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ABSTRACT

The division of powers that has evolved under Canadian federalism regarding the negotiation and implementation of international treaties divides these responsibilities between the federal and provincial governments respectively. This division of powers, however, does not accurately reflect the changing nature of international trade agreements, which are increasingly addressing areas of provincial responsibility. The result will likely be increased resistance from the provinces to implementation should they not play a more substantial role in the negotiation of future agreements. This thesis examines the Canadian trade policy formulation process and evaluates three mechanisms by which provinces have been or could be involved in it: consultation, ratification, and provincial participation in Canadian negotiating delegations. The appropriateness of each of these options is evaluated based upon criteria of constitutionality, representativeness, efficiency and acceptability to international actors. The conclusion discusses situations in which each option might be pursued and the challenges to greater provincial involvement.

Keywords: Canada; Federal Government; Provinces; Sub-national Governments; Federalism; International; Trade; Policy Formulation; Implementation; Policy Options

Subject Terms: Federal-Provincial Relations; Federal Government; Provinces Free Trade Canada; Foreign Economic Relations; Economic Policy; Free Trade
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CHAPTER 1: PROBLEM AND BACKGROUND

Introduction

As a federal state, Canada has two separate but equal spheres of government, whose relative roles and responsibilities are enshrined in a written constitution. As in most federal states, the judiciary has also played a significant role in shaping the division of powers between the federal and provincial governments. Regarding the negotiation and implementation of international trade agreements, there have been three major court cases that have clearly delineated the federal government’s responsibility to negotiate international trade agreements and the provincial governments’ responsibility for implementation where such agreements affect areas of provincial jurisdiction. As international trade agreements have evolved over time, tariffs and other border measures of discrimination have largely been eliminated, shifting the focus towards non-tariff barriers, services, government procurement and environmental controls.¹ This shift has meant that areas of provincial jurisdiction are increasingly affected by and implicated in international trade agreements; however, provinces are still largely removed from the negotiations which shape these agreements as per the division of powers. While consultative mechanisms through which provincial input has been sought to varying degrees have evolved over time, the extent to which these mechanisms are appropriate for conveying provincial policy preferences during negotiations is uncertain. Should

provincial policy preferences not be accounted for as international trade agreements increasingly penetrate areas of provincial jurisdiction, certainty of implementation will diminish. This has significant implications for Canada, given that international actors have been reluctant to accept domestic conflict and jurisdictional issues as justifications for failures to follow through on international commitments. Thus, the federal government increasingly depends on the power of implementation held by the provincial governments to avoid international trade disputes being brought against Canada, making the provincial role more significant.

As the federal government continues to ratify agreements that increasingly encompass areas of provincial jurisdiction, which require provincial support to implement, the potential for federal-provincial conflict is heightened. Conflict has largely been avoided in the past because, although international trade agreements have increasingly incorporated areas of provincial jurisdiction, they have not been as penetrating as originally thought, and certain exclusions for areas of provincial jurisdiction have been secured. However, many of these areas are being targeted for further liberalization in the near future, as are new areas that had not previously been included. As this occurs and the provisions affecting provincial jurisdiction become increasingly penetrating, the potential for conflict will increase. In order to avoid unproductive federal-provincial conflict and reduce Canada's vulnerability to international trade disputes, there is a need to evaluate the existing policy of consultation as well as consider new policy options that the federal government can pursue to ensure that the provinces will implement the agreements Canada negotiates. This thesis will evaluate three policy options including consultation, ratification, and provincial
participation on federal negotiating delegations that better recognize the federal-provincial balance of power over the negotiation and implementation of international trade agreements. The problem will be outlined subsequently in this chapter by discussing the legal and political, domestic and international factors that illustrate the need for greater coordination between the provincial and federal governments over the negotiation and implementation of international trade agreements. The nature of past and present consultative mechanisms pursued by the federal government will be discussed at the end of the chapter, preceding an overview of the thesis structure.

The Division of Powers

Judicial Review

At the time of Confederation, Canada had no rights to negotiate international agreements independently. Since Canada was created as a British colony, all rights to international treaty-making rested initially with the British Crown. Section 132 of the Constitution Act of 1867 vested the Government of Canada with the powers necessary for “performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.”\(^2\) As Canada acquired the ability to make international treaties on its own as a sovereign nation, this responsibility continued to be exercised by the federal government. Federal dominance in treaty-making and implementation has not gone unchallenged, however. There have been three major court cases that have explored and

delineated federal and provincial jurisdiction relevant to international treaty-making and implementation.

The first court case to define respective federal and provincial responsibilities for international treaty-making was the 1937 *Labour Conventions* case, which stands as the leading precedent in this area. This case determined that the federal Parliament’s legislative power could not be extended beyond the subjects enumerated in Section 91 by virtue of any international obligations incurred by the national government. Ultimately the federal government’s right to negotiate and ratify international agreements was confirmed, but its powers to ensure that the obligations accompanying the treaty would be fulfilled were curbed, as the provinces were given jurisdiction over the implementation of international treaties where provincial jurisdiction was affected. This case effectively divided responsibility for international treaty-making and implementation between the federal and provincial governments; where provincial jurisdiction is implicated, this decision makes the federal government dependent on the provinces to fulfil international commitments. This has led some to argue that the federal government should seek to have the *Labour Conventions* case overturned or pursue an extension of federal jurisdiction under two other areas that would justifiably allow a greater federal

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role regarding international agreements, specifically those that are economic in nature:
the peace, order and good government clause, and the trade and commerce power.⁴

The 1988 *R. v. Crown Zellerbach* decision addressed the peace, order and good
government clause, which is commonly cited as having significant implications for the
federal role in international treaty-making and implementation. In this case, the Supreme
Court determined that the federal responsibility to ensure peace, order and good
government⁵ could be used to justify federal intrusion into areas of provincial jurisdiction
for matters of national concern, where the issue has “a singleness, distinctiveness and
indivisibility that clearly distinguishes it from matters of provincial concern and a scale
of impact on provincial jurisdiction that is reconcilable with the fundamental distribution
of legislative power under the Constitution.”⁶ Justices Dickson C.J. and McIntyre, Wilson
and Le Dain JJ. espouse the majority opinion in this case and explain:

> In determining whether a matter has the requisite singleness, distinctiveness and indivisibility, it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.⁷

Furthermore, there must be “ascertainable and reasonable limits in so far as its impact on
provincial jurisdiction is concerned” in order for an issue to fall under the federal power

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⁵ See Appendix A.


⁷ Ibid, 3-4.
of peace, order and good government. Although the majority opinion supported an extension of this clause to allow federal intrusion into provincial jurisdiction in this case, this extension was not granted without consideration of the extent to which this would affect provincial jurisdiction. This gives an indication of the viability of using this clause to extend federal power in international treaty-making and implementation.

Furthermore, there was a significant dissenting opinion in this case. The dissenting opinion explained that to extend the ability of the federal government to intrude into provincial jurisdiction under the peace, order and good government clause in areas of broad, overlapping jurisdiction would "effectively gut provincial legislative jurisdiction and sacrifice the principles of federalism enshrined in the Constitution." This case specifically addressed environmental controls and the dissenting view argued that environmental issues such as ocean pollution are not marked by a singleness, distinctiveness and indivisibility that would clearly distinguish it from a matter of provincial concern; as such, expanding the peace, order and good government clause would "have an impact on provincial jurisdiction irreconcilable with the division of legislative power under the Constitution." Thus, given that three out of seven Justices, despite acknowledging the trans-border nature of environmental issues, did not agree to federal intrusion in this area seems to signify the Supreme Court has been very cautious about sanctioning the expansion of the peace, order and good government clause. If faced with sanctioning federal intrusion into areas that are not as clearly intra-provincial and trans-border, the extension of this clause in the future seems suspect.

8 Ibid, 4.
10 Ibid, 6.
11 Ibid, 5-6.
The trade and commerce power, a second avenue through which the federal government may be able to expand its role in international economic treaty-making and implementation beyond pursuing the overturn of the Labour Conventions case, was most recently and relevantly explored in the 1989 *General Motors of Canada Ltd. v. City National Leasing* decision. Under section 91(2), the federal responsibility for the regulation of commerce and trade, this decision laid out five criteria for the valid exercise of the general power to regulate trade affecting the whole country. The federal government could overrule provincial legislation and overstep provincial jurisdiction if the following criteria were met:

1) the impugned legislation must be part of a general regulatory scheme;
2) the scheme must be monitored by the continuing oversight of a regulatory agency;
3) the legislation must be concerned with trade as a whole rather than with a particular industry;
4) the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and
5) the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country.

The Court has also said, though, that these five criteria “do not represent an exhaustive list of traits that will tend to characterize general trade and commerce legislation...[nor is] the presence or absence of any of them...necessarily determinative.” As such, the

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12 See Appendix A.
15 Ibid, 4.
Court has reserved considerable scope for itself to change the stringency with which this power could be extended to the federal government.\textsuperscript{16}

However, given the structure of the decision in this case, it seems likely this power will be extended cautiously. The Court stated that any case in which the extension of this power would be contemplated would require “consider[ation] of the seriousness of the encroachment on provincial powers,”\textsuperscript{17} and in this case considerable attention was given to explaining why the extension of this power was granted and represents an insignificant intrusion on provincial powers. At issue was the civil right of action, an area that is typically provincial jurisdiction, and which was provided by the federal government only as a remedial provision in the Combines Investigation Act. The Supreme Court argues remedial provisions are typically less intrusive and the cause of action clause is significantly constrained by the Act, which regulates competition policy and is of a clearly national nature.\textsuperscript{18} The Court’s decision also reflects the fact that the federal government is not constitutionally precluded from rights of civil action.\textsuperscript{19} Finally, although the decision in this case unanimously legitimized federal intrusion under the trade and commerce power, it was cautioned by the Supreme Court that “on any occasion

\textsuperscript{16} Regarding federal intrusion into provincial jurisdiction to ensure compliance with international trade commitments, Mark. A. Luz has also considered the federal government’s ability to utilize the inter-provincial and international branch of the trade and commerce power to justify such intrusion. He argued that the courts would be much less likely to permit federal intrusion under this power than under the general trade and commerce power, the definition of which has been most significantly developed in the CN Leasing decision. As such, an extension of the inter-provincial and international trade and commerce power to justify greater federal intrusion has not been considered here. Mark A. Luz, “NAFTA, Investment and the Constitution of Canada: Will the Water Tight Compartments Spring a Leak?” Ottawa Law Review, Vol. 32, No. 1 (2000-2001), 56-62.


\textsuperscript{18} Ibid. 5.

\textsuperscript{19} Ibid. 5.
where the general trade and commerce power is advanced as a ground of constitutional validity, a careful case by case analysis remains appropriate.\textsuperscript{20}

With both of these more recent Supreme Court cases, the circumstances under which the Supreme Court was willing to extend the federal government’s ability to intrude into areas of provincial jurisdiction under the peace, order and good government clause and the federal trade and commerce power were specific. In these decisions, the Supreme Court limited federal intrusion to issues that could be demonstrated to be significantly national in scope, requiring a federal regulatory scheme, that had significant extra-provincial effects, but that also only incidentally compromised provincial jurisdiction. As such, it can reasonably be argued that the federal government’s ability to intrude into areas of provincial jurisdiction to secure compliance is limited. Accordingly, where federal and provincial policy goals diverge with respect to the implementation of international treaties, given the provincial government’s constitutionally sanctioned responsibility for implementation, it seems the potential for federal-provincial conflict would exist. Although the federal government could attempt to solidify its ability to intrude into areas of provincial jurisdiction by pursuing an extension of either of the two most recent aforementioned court cases, closer examination of these decisions indicates that such an extension might be difficult to secure.

**Federal-Provincial Transfers**

Should the federal government fail to extend its ability to intrude upon areas of provincial jurisdiction through legal mechanisms in order to secure provincial compliance and implementation, there are other policy instruments at its disposal. Ian Robinson

\textsuperscript{20} Ibid, 4.
discusses providing ‘carrots’ like financial incentives to implement international commitments, or using a ‘stick’ strategy, including reducing federal transfers to provinces that do not comply with international trade commitments. Since the Supreme Court has ruled that the federal government can unilaterally alter funding arrangements with the provinces, it is completely possible that the federal government would use its spending power to influence provincial initiatives.

However, attempts at persuasion or coercion by the federal government through transfer payments upon which the provinces depend, will likely have a negative effect on federal-provincial relations. Undoubtedly, ‘stick’ strategies will be interpreted negatively and be accompanied by provincial complaints of federal bullying. ‘Carrot’ strategies such as financial incentives seem likely to be perceived more favourably by provincial governments; however, they may also face considerable negativity. Despite the benefits of obtaining financial incentives from the federal government to implement policies, ‘carrot’ strategies could also be perceived as co-optation, particularly by governments that had resisted implementation before the inception of the incentive. It is possible ‘carrot’ approaches would be seen as an attempt by the federal government to buy provinces off and could possibly bring forth arguments reminiscent of those made by the provinces against conditions on transfer payments; just as conditions on transfer payments were seen by some provincial rights proponents as a mechanism through which the federal government could use its spending power to extend its influence into

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provincial jurisdiction, ‘carrot’ approaches could be seen as an attempt to compromise provincial autonomy and could serve to further sour federal-provincial relations.

On balance, ‘carrot’ strategies would likely be perceived more favourably than stick strategies. For the federal government, however, ‘carrot’ strategies could be costly and might create a precedent of federal pay-offs that could serve to encourage provincial resistance in hopes of obtaining a financial reward. Not only could this strategy be very costly for the federal government, it might also be ineffective, as wealthier provinces may be in a position to forgo federal financial incentives. Conversely, ‘stick’ strategies may have the potential for greater effectiveness; however, this would almost certainly have a negative effect on federal-provincial relations. Both strategies represent sub-optimal solutions for securing provincial compliance. Skepticism over the effectiveness of ‘carrot’ and ‘stick’ strategies has been echoed by Grace Skogstad, who argues that the “Government of Canada has limited ‘carrots’ or ‘sticks’ to chivvy the provinces along.”\(^\text{23}\) Although she does not elaborate on her reasons for this conclusion, she likely makes this observation because of the lack of cost-effectiveness or political viability of such strategies. Murray G. Smith echoes this sentiment, stating that making federal fiscal transfers conditional upon compliance would appear “Draconian relative to current federal-provincial relations in Canada.”\(^\text{24}\)

Ultimately, it seems as though both legal and political mechanisms through which the federal government could attempt to secure provincial compliance have the potential to create or exacerbate tensions and discourage cooperative federalism in favour of


conflictual federalism. While a situation of conflictual federalism in this context would seemingly have negative implications for provinces involved and Canada more generally, ramifications for the federal government, should they have to resort to coercion to secure compliance from the provinces would also be significant. Firstly, even if provincial compliance were forthcoming where it had not been before, after the pursuit of an extension of previous court cases or the use of financial incentives or disincentives by the federal government to secure compliance, it would not necessarily be cost-effective or timely. Secondly, and perhaps more significantly, if legal and political strategies for securing provincial compliance fail, the federal government is ultimately unable to guarantee provincial implementation of international trade provisions. As the signatory to international treaties on behalf of Canada, the federal government will be the party held responsible for failure to comply with international commitments. This has become more significant in recent years as a result of changes in the international trade regime that have served to heighten federal dependence on provincial compliance.

The Evolution of International Trade Agreements

The evolution of the international trade regime, including enhanced institutional governance mechanisms and increasingly penetrating agreements since the inception of the General Agreement on Trade and Tariffs (GATT) in 1947, suggests an increased dependency by the federal government on the provinces to implement agreements, and as

[25] Mark A. Luz and Marc C. Miller, “Globalization and Canadian Federalism: Implications of the NAFTA’s Investment Rules,” McGill Law Journal, Vol. 47 (2002), 982. Mark A. Luz argues that it may be possible for the federal government to hold provinces legally accountable for arbitral awards against Canada that result from non-compliant provincial legislation. However, the effectiveness of this strategy depends on whether the federal government could legitimately enact legislation requiring the province to pay, which would likely only result if the federal government could secure an extension of its jurisdiction. Luz, “NAFTA, Investment and the Constitution of Canada,” 79.
such, a heightened potential for federal-provincial conflict over international trade agreements. While the federal government could pursue legal and political strategies to secure provincial compliance with implementation necessary to satisfy international commitments, which could range from persuasion to coercion and likely foster a climate of federal-provincial conflict, there is no guarantee that such strategies would result in provincial compliance. Jennifer Smith and Richard Simeon have discussed the relative balance of power between the federal and provincial governments where there is exclusive jurisdiction. Smith states, “the existence of exclusive jurisdiction under the Constitution spells leverage;”26 Simeon notes that autonomy is especially constrained where significant interdependence exists.27 The division of powers has created a situation of significant interdependence regarding the negotiation and implementation of international trade agreements. It will be shown subsequently that with the evolution of international trade agreements, which have increasingly targeted areas within provincial jurisdiction and have developed stronger dispute settlement mechanisms, the federal government has become less able to act autonomously in the area of international trade and has become increasingly dependent on provincial compliance.

International Dispute Resolution

Ensuring implementation in a timely fashion is significant given the establishment of binding dispute settlement mechanisms in the World Trade Organization (WTO) and

the North American Free Trade Agreement (NAFTA). The federal government negotiates and signs international treaties and as such, is responsible for ensuring that the commitments of each agreement are met and the measures necessary to comply are implemented. If they are not, it is the federal government that must account to international actors. Historically under the GATT system, disputes between parties arising from failure to comply with, implement or follow through on international trade commitments could be brought before a GATT panel. Trade experts would hear disputes and make recommendations for their resolution. However, GATT panel recommendations were only binding if both parties to the dispute agreed to the adoption of the GATT panel report. In the late 1980s and early 1990s, “a growing number of fractious trade disputes...could not be resolved.” This created concerns about the effectiveness of the dispute settlement mechanism and the extent to which it could actually be considered binding. With the creation of the World Trade Organization in 1995, within which the GATT was encompassed, a binding dispute settlement mechanism was instituted. Under the WTO dispute settlement mechanism, decisions of WTO panels became binding on both parties unless the appellate body decision was

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28 The dispute settlement bodies that are part of the WTO and the NAFTA are considered binding because it is much more difficult to reject the findings of the dispute settlement body than it was under the GATT and international actors have abided by rulings to a greater extent than they had previously under the GATT system. While there is no international authority above the state that can force it to comply, the ability of the dispute settlement body to order retaliation against the offending party to compensate recipients of unfair trade practices has contributed to greater legitimacy, and acceptance of this system of dispute settlement by international actors. This has encouraged compliance and the perception of the system as binding.

29 This is because the federal government is the only legitimate signatory to international agreements, as prescribed by the Canadian division of powers. Skogstad, “International Trade Policy and Canadian Federalism,” 162.


rejected by the dispute settlement body (negative consensus). Given that the dispute settlement body includes one representative per WTO member, a negative consensus finding would be unlikely. Should the losing party chose not to implement the WTO dispute settlement body’s decision, retaliation by the winning party could be sanctioned by the dispute settlement body in the form of tariff and non-tariff barriers.\textsuperscript{32}

Under the NAFTA, binding dispute settlement mechanisms were also instituted. The signatories to the agreement, Canada, the United States, and Mexico, can be held responsible for failure to implement or policies that violate the provisions of the agreement. The NAFTA is unique, however, in that not only government agents are able to initiate arbitration against governments for breach of agreement. Under Chapter 11, investors who feel that a host government has breached its obligations may pursue arbitration against that government using the World Bank’s International Centre for the Settlement of Investment Disputes (ICSID), ICSID’s Additional Facility Rules, the rules of the United Nations Commission for International Trade Law, or through the host country’s domestic court system.\textsuperscript{33} Under Chapter 19, independent binational panels can review government anti-dumping and countervailing duty determinations upon request of any signatory to the NAFTA.\textsuperscript{34} Previously, governments had to challenge these determinations through the domestic courts of the determining country.

Under Chapter 20, if consultations between parties regarding a dispute over any interpretation or application of the NAFTA fail, a five-member arbitral panel may be

\textsuperscript{32} Ibid, 76, 78.
established from panel lists provided by each country.\textsuperscript{35} Beyond the administrative process reviews permitted under Chapter 19, Chapter 20 panels can declare domestic legislation void.\textsuperscript{36} Chapter 20 panels also provide for scientific review boards, which make determinations on factual issues involving the environment, health, safety and/or other scientific matters to assist the panel in determining whether an interpretation or application of the agreement is discriminatory.\textsuperscript{37} The authoritative nature of these scientific review boards on issues of 'fact' could prove problematic for the federal government in Canada, particularly since many of the matters upon which these boards rule are issue areas within provincial jurisdiction. Provincial governments may make decisions or interpretations based on scientific evidence that are not consistent with the findings of the review board. Even if a provincial government were sympathetic to liberalization, they might have compelling scientific evidence to enact policies that protect public health and welfare which may be deemed discriminatory and unnecessary given the scientific findings of the review boards.

Should the federal government’s ability to demonstrate implementation of international trade agreements be delayed or absent as a result of federal-provincial conflict or an inability to secure provincial compliance, it could have significant consequences for the federal government internationally. Not only is Canada seen by other international actors and partners as having a \textit{de facto} responsibility to ‘play by the


\textsuperscript{36} Christopher J. Kukucha, \textit{The Provinces and Canadian Foreign Trade Policy: Evaluating International and Domestic Pressures}, (Unpublished manuscript, University of Lethbridge, March 2007), 42.

rules’ internationally, but it also has a *de jure* responsibility to accept the consequences for failure to do so. This is because Canada has adopted several pieces of legislation on the recognition and enforcement of foreign arbitral awards, including the 1985 United Nations Foreign Arbitral Awards Convention Act, the 1996 International Commercial Arbitration Act, and the 1996 Foreign Arbitral Awards Act.\(^3\) The institution of increasingly strong dispute settlement mechanisms at the WTO and the NAFTA, and legislation binding Canada to respect the arbitral awards of these mechanisms, suggests a degree of dependency by the federal government on the provinces, given federal responsibility for representing and accepting arbitral decisions on behalf of Canada in a trade dispute. Utilizing Simeon and Smith’s assertion, the courts’ confirmation of the provincial responsibility for implementation, which is necessary in order to achieve compliance with international obligations, and limitations on the extent to which the federal government may infringe upon this responsibility, signals provincial leverage.

In order to avoid international disputes that could result from failure to comply, the associated legal costs, as well as potential costs of retaliation if the federal government continues to be unable to secure compliance, it is in the interest of the federal government to seek a policy options that will maximize provincial cooperation in the implementation of international trade agreements. During the softwood lumber dispute, for example, the federal government did not have all provinces on side with its position on how to proceed around the 1986 Memorandum of Understanding with the United States, and the Government of British Columbia threatened to negotiate its own deal with U.S. lumber interests. Brown states “these threats went a long way to undermining any

\(^3\) See Luz and Miller, “Globalization and Canadian Federalism,” 954, for complete listing of legislation.
Canadian position based on fighting the good fight before the [U.S.] Department of Commerce." If the federal government does not account for provincial interests in developing its policy position, Canada's position at dispute settlement could be undermined. This would be costly to the federal government, as they would be responsible for dealing with any monetary penalties and could be seen as responsible by affected constituents should retaliation against Canadian industries be sanctioned.

While it could be foreseen that if the federal government lost at dispute settlement, it could simply pass along the costs associated with an international trade dispute to the province which precipitated it, this would be an undesirable outcome, as it would likely cause significant federal-provincial tensions, particularly if there was more than one province involved. Furthermore, requiring international actors to sue the federal government to ensure that Canada follows through on its international commitments bodes ill for Canada's international credibility. Pursuing policy options that recognize the significance of the provincial role could serve to promote cooperative federalism, and would reduce the likelihood of provinces having to leverage their responsibility, minimizing the likelihood of international disputes for which the federal government will have to assume responsibility.

Federal responsibility for international trade disputes brought against Canada has been affirmed and entrenched by international dispute settlement panels. During the implementation of the Tokyo Round GATT provisions, certain provinces, most notably Ontario, did not implement provisions related to liquor and wine distribution and marketing to the satisfaction of the European Community. As a result, the European

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Community brought Canada before a GATT Panel. The Government of Canada attempted to argue that the division of powers prevented it from implementing GATT provisions with respect to provincial liquor board practices. However, this argument was rejected by the GATT Panel on the grounds that, in signing the legislation on behalf of Canada, it was obligated to take "‘all reasonable measures’ to ensure that regional and local governments adhered to the Agreement." This is significant given that provincial governments themselves signed a Statement of Intent under the GATT concerning the practices of their provincial liquor boards with the United States and the European Community. This Statement of Intent was not legally binding, however, and as such, it has been argued the provinces did little to follow through on the commitments made in it because they did not feel directly responsible to a “continuing institutional framework.”

As the entity with primary jurisdictional responsibility for negotiating international treaties with broad national effect such as those under the WTO, it is the federal government that most significantly faces the wrath of the international community if international trade obligations are not met.

Under the Canada-United States Free Trade Agreement (CUSFTA) and subsequently the NAFTA, a similar but stronger provision making the federal government responsible for compliance with international obligations was included: as the signatory, the federal government must employ “all necessary measures” to ensure sub-national government compliance. Although this phrase was intended to apply to areas that go beyond what is covered by the GATT/WTO, where there is overlap between the

41 Ibid, 162.
42 Ibid, 162.
CUSFTA, NAFTA and GATT/WTO provisions, this phrase de facto binds the federal government to the more stringent requirement that all necessary measures are taken to secure compliance. As a result of the more stringent “all necessary measures” requirement, a greater onus is placed on the federal government to secure compliance at any cost and makes it increasingly vulnerable to provinces that refuse implementation. As such, it stands to reason that where provincial and federal policy goals diverge, there will be a heightened potential for inter-governmental conflict. In light of the “all necessary measures” requirement of NAFTA, the need to employ strategies that will secure provincial compliance is acute.

Additionally, international actors have shown reluctance to accept constitutional justifications for failures to follow through on international commitments. Article 27 of the Vienna Convention on the Law of Treaties states, “A party may not invoke the provisions of its internal law for its failure to perform a treaty.” As such, the federal government must be able to follow through on the international commitments it negotiates or must accept liability for failure to do so. Foremost, international actors want to be certain that when an agreement is concluded, other parties to the agreement can reliably bring domestic policies and programs into compliance. For example, during the negotiation of the CUSFTA in the 1980s, the US insisted on addressing federal ability to secure implementation by requiring as part of the agreement that the federal government be able to override provincial liquor boards. This was perhaps in response to the

concurrent GATT provincial liquor board case (1985-87) between Canada and the European Community discussed above, where the federal government had tried to argue jurisdictional issues prevented it from implementing GATT provisions; in this case, the federal government was only able to achieve provincial implementation to the satisfaction of international actors after extensive federal-provincial negotiation following the GATT Panel's ruling against Canada, a significant amount of time after the provisions were supposed to have been implemented. 47 Dispute settlement exists as recourse for failure to implement. However, the cost and time associated with dispute settlement makes it a second-best option for ensuring that commitments are implemented.

The evolution of international trade agreements has significantly affected the extent to which the federal government can afford to dismiss provincial demands in the negotiation of international trade agreements. Through the imposition of binding dispute settlement mechanisms, rulings prohibiting federal justifications for failure to implement based upon the division of powers, the requirement of the federal government to move beyond 'reasonable measures' to 'necessary measures,' and the insistence of international actors in the creation of international trade agreements that the federal government be able to guarantee compliance irrespective of provincial resistance up front, it becomes clear that international actors expect the federal government to be able to secure compliance from the provinces. This expectation becomes increasingly significant as it is recognized that international trade agreements are increasingly incorporating areas of provincial jurisdiction.

Issue Areas Included in International Trade Agreements

Before the 1970s, areas of provincial jurisdiction were not significantly implicated in international trade agreements. Trade agreements before this time dealt primarily with the “reduction of tariffs and quotas on imported goods, [which] fall unambiguously under exclusive federal jurisdiction.” With the Tokyo Round, however, tariffs were largely eliminated and the focus shifted towards non-tariff barriers, services, government procurement and environmental controls, which directly implicated the provinces. Although it was expected at the time that areas of provincial jurisdiction would be significantly affected, sub-national governments were in fact exempted from some of these areas such as government procurement, and other areas were not as penetrating as had been expected.

Robinson has comprehensively chronicled the increasing inclusion of areas of Canadian provincial jurisdiction into international trade agreements from the pre-Tokyo Round of GATT through the Uruguay Round of the WTO and the NAFTA. Some of his key findings show that during the Uruguay Round, non-tariff barriers such as subsidies and technical standards were targeted much more comprehensively than had previously occurred, which was significant for provinces, as these ‘inside-the-border’ measures affect public policy at all levels of government. Furthermore, the Uruguay Round Agreements specifically addressed issue areas in which provinces have significant jurisdictional claim such as agriculture, financial services, education and health

51 Ibid, 201.
52 Ibid, 201.
services. At the conclusion of the Uruguay Round, however, none of these areas had been fully liberalized, and the latter two areas had not been ‘opted-in’ to by Canada. Grace Skogstad claims that in fact, “Canadian negotiators succeeded in having all provincial subsidies removed from the final text of the Uruguay Round Agreement on Agriculture.” While the lack of penetration into areas of provincial jurisdiction by these agreements could explain why there has not been significant federal-provincial conflict over the negotiation and implementation of international trade agreements yet, it should not be concluded that areas of primarily provincial jurisdiction have been excluded or spared from future liberalization.

Because they have already been included in even a limited way in the Uruguay Round Agreements, these represent areas in which some agreement already exists about the need or desire to negotiate on liberalizing them. Furthermore, commitments to progressive liberalization that are a hallmark of the GATT/WTO regime and enshrined in agreements such as the GATS ensure that “Members shall enter into successive rounds of negotiations...with a view to achieving a progressively higher level of liberalization.” Areas for which exemptions have been secured often serve as the starting point for future negotiations, in attempts to liberalize areas that had previously been protected. Exemptions signal areas around which governments have sensitivities; they can be used as leverage by other parties to shape negotiations and may become areas around which

concessions are sought should a country hope to achieve its negotiating goals. Thus, while intrusion into provincial jurisdiction has so far been limited, the likelihood of the federal government negotiating in areas of provincial jurisdiction in the future is significant, as will be discussed below. Should provincial policy interests and goals not be communicated effectively with the federal government or represented in the federal government’s negotiating position, the likelihood of securing provincial compliance with implementation will be reduced.

In the CUSFTA, while Robinson finds that provincial jurisdiction is touched by a number of provisions including natural resources, financial services, and investor property rights, others have argued that these areas affected provincial jurisdiction only incidentally. Brown notes that Chapter 8 on wine and spirits, over which the U.S. required the federal government to guarantee it would take action to ensure provincial compliance, was the only chapter that significantly impinged on provincial jurisdiction directly. The NAFTA, however, built on many of the CUSFTA provisions and added restrictions on the activities of public corporations, many of which are provincially incorporated, and the extent to which technical standards could be applied where they restricted trade. Because technical standards were not addressed as mechanisms for trade distortion before the NAFTA and GATT Uruguay Round, the extent to which governments can employ technical standards to justifiably restrict trade according to international trade dispute panels is unknown. As discussed previously regarding

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58 Robinson, “Neo-Liberal Trade Policy and Canadian Federalism Revisited,” 201. See Appendix A.
61 See Appendix A.
NAFTA’s dispute settlement mechanism, the application of technical standards is continuously evolving and narrowing with each investor or state challenge. Technical standards include environmental, agricultural and public health regulations, all of which significantly involve provincial jurisdiction.\(^{63}\) Provincial governments may not recognize the extent to which their jurisdiction and abilities to regulate will be impeded by restrictions on the application of technical standards, which may result in increasing resistance from provinces to these provisions of the NAFTA and the WTO. The inclusion and conditioning of public corporations and technical standards signifies the increasing importance of areas of provincial jurisdiction, particularly as the restrictiveness and intrusiveness of these provisions continues to evolve.

Workers rights and environmental regulations, which very significantly affect provincial jurisdiction, were also addressed by the NAFTA in two side agreements. However, provincial governments were permitted to ratify these side agreements before being bound by them,\(^{64}\) a policy option whose broader applicability will be considered subsequently in this thesis. While it has been argued that these side agreements are insignificant and have weak dispute and enforcement mechanisms,\(^{65}\) permitting the provinces to ratify the agreements in order for the provisions to apply to provincial governments represents a recognition by the federal government of the provincial government’s role to play in the negotiation and implementation of international trade agreements where provincial jurisdiction is implicated. This is also likely a reflection of the increasing inclusion of provincial areas of jurisdiction into international trade agreements.

\(^{63}\) Ibid, 203.

\(^{64}\) Skogstad, “International Trade Policy and Canadian Federalism,” 165.

\(^{65}\) Kukucha, The Provinces and Canadian Foreign Trade Policy, chapter 12.
The evolution of international trade agreements as described above suggests international trade agreements have begun to encroach into areas of provincial jurisdiction and will continue to do so more significantly in the future as the commitment to progressive liberalization proceeds into areas of provincial jurisdiction and the extent to which agreement provisions are penetrating is defined by dispute settlement. At the WTO fourth Ministerial Conference in 2001, which began the current Doha round of WTO negotiations, governments put forth proposals to address previously exempted government procurement provisions, agricultural subsidies and services, all of which will have ramifications for areas of provincial jurisdiction.

Brown has argued that if liberalization of government procurement practices go “beyond the entities listed in the 1979 [GATT] Code, provincial government procurement, in particular certain crown agencies such as hydro corporations, will be a prime target of [Canada’s] major trading partners.” The liberalization of agricultural trade, particularly Canada’s supply management, including marketing boards which are provincially regulated, is one of the top priorities for developing countries at the Doha Round. It is doubtful that multilateral trade negotiations will go forward without some further commitments by developed countries to liberalization. Regarding services, Australia and the U.S. have stated they would like to see countries such as Canada liberalize trade in provincially regulated services such as education.

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governments are the principal providers of many government services and the main regulators of many private services. The Free Trade Area of the Americas (FTAA) embodied similar negotiating proposals and agenda items: these included liberalizing services such as education, health care, financial, environmental and water services, as well as strengthening the NAFTA’s language regarding technical, sanitary and phytosanitary standards and investor property rights. Although the Doha Round negotiations have been suspended and the FTAA is currently defunct, the proposals accompanying these negotiations could be revived in the future if these negotiations are continued or begun under the conceptualization of another agreement. This possibility is worth considering, as negotiations in these areas would implicate provincial jurisdiction, if not completely, at least partially.

As areas of trade which would be considered exclusively federal jurisdiction are now highly liberalized, attention will increasingly turn towards areas of provincial jurisdiction. While there is considerable debate in the literature over whether the liberalization of provincial areas of jurisdiction empowers the provinces or contribute to greater centralization within the federation, which will be discussed in chapter 2, a trend towards encompassing areas of provincial jurisdiction into international trade agreements can be seen. Furthermore, some have argued that education and labour market policies “will be among the most important policy instruments” for ensuring the ability of societies and economies to engage in successful international competition, and are areas

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71 Ibid, 205.
72 Ibid, 201.
in which proposals to engage in liberalization have been put forth. As these are provincial responsibilities, it is crucial that the significance of the provincial role is recognized. The rising power imbalance in the division of power over the negotiation and implementation of international trade agreements is underscored by changes in dispute settlement mechanisms, the focus of international trade agreements, and the recognition that areas of provincial jurisdiction play a significant role in ensuring Canada’s ability to be internationally competitive. This power imbalance must be addressed through policy options that recognize provincial international trade policy preferences in the negotiation and implementation of international trade agreements.

**Past and Present Federal-Provincial Coordination**

As areas of provincial jurisdiction have been increasingly addressed at international trade negotiations, the federal government has sought to obtain provincial input to varying degrees. At the beginning of the Tokyo Round, the only mechanism through which provinces could give input was the Canadian Trade and Tariffs Committee (CTTC). In this committee, the provinces were regarded as little more than an interest group, on par with business, unions, consumer groups and other interested parties in terms of input into the federal government’s negotiating position. Although provincial mechanisms for representation were expanded in 1975 to include an ad hoc federal-provincial committee of deputy ministers and in 1977 through the Canadian Coordinator for Trade Negotiations (CCTN), the provinces still had to compete with other groups for

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Dissatisfied with the extent of the provincial role, British Columbia, Alberta, Ontario and Quebec in fact sent delegates to Geneva for the negotiations, but were not permitted by Ottawa to join the Canadian negotiating delegation. While the provinces continued to push for a stronger role, the federal government argued that “any increased role for the provinces would prevent Canada from presenting a unified position at the international bargaining table.”

In 1985, at the onset of the CUSFTA negotiations, British Columbia, Alberta, Saskatchewan, Manitoba and Quebec stated they would support the free trade agreement but “requested ‘full participation’ in the upcoming negotiations.” Ontario was cautious about the free trade agreement but supported the principle of full participation. The federal compromise in 1986 fell far short of full participation, however. Provincial participation was limited to periodic meetings to review progress in the negotiations, and provinces were not given additional access to the chief negotiator, although it was promised that “the federal government would formally seek the views of all provinces prior to endorsing any agreement.” However, provincial participation in the final stages of the CUSFTA negotiation was extremely limited. As a result there were aspects of the final agreement of which the provinces were unaware. Although no province significantly resisted the implementation of the agreement, several provincial governments introduced legislation or passed decrees regarding the CUSFTA to indicate

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75 Ibid, 140.
76 Ibid, 141.
77 Ibid, 142.
to the federal government that they would control the implementation of the agreement where it affected provincial jurisdiction.  

During the NAFTA, provincial participation expanded slightly to include one official representative per province on the Committee for the Free Trade Agreement, which replaced the CCTN. The federal government and the provinces also agreed to establish the Committee for North American Free Trade Negotiations (CNAFTN) through which draft proposals presented during the negotiations and information on specific sectoral issues could be shared. With the conclusion of the NAFTA, the CNAFTN has evolved into the CTrade process. The CTrade process involves four meetings per year between the federal government and the provinces, during which federal officials can update and brief the provinces on current international trade issues. These consultative mechanisms will be discussed in detail in chapter three.

While some have argued that the evolution of these consultative mechanisms constitutes an increasingly formalized and effective means through which provinces are involved in the negotiation of international trade agreements, others have emphasized that these consultative mechanisms have provided the provinces with information, but not a formalized role in the formulation of Canadian trade policy. During the CUSFTA, the provinces largely had access to the same consultative forums as interest groups. It has been noted that "the degree of input from the provinces exceeded 'that of most other domestic actors, including the private sector, other federal departments and

82 Ibid, 149-150.
However, this would be expected given that provinces constitute separate legitimate governing entities, with legal authority and legitimacy to legislate and make policy in particular areas, particularly, areas of jurisdiction which were significantly implicated in the CUSFTA. Comparisons of provinces with other domestic actors insinuate that provincial policy preferences matter little more than other actors in the Canadian state and indicate that the significance of the provincial role and the importance of provincial implementation powers have been under-estimated.

Commenting on the CNAFTN, charges of attempts at provincial co-optation have been made against the federal government. Others add that “Ottawa’s commitment to information sharing [through CNAFTN] was really nothing more than another effort to limit the ability of provincial governments to influence the Canadian negotiating team.” This was done by overwhelming provincial officials with information for which they were ill-prepared, thus limiting their ability to challenge the federal government’s policy agenda. While other informal mechanisms of communication between federal and provincial trade officials also supplement these consultative mechanisms, the extent to which provincial interests have been incorporated where they have not been consistent with federal policy preferences in the area of international trade through these mechanisms is questionable. It is also worth questioning the extent to which the provincial power of implementation has truly been recognized through a consultative mechanism that engages in information sharing to a greater extent than it does in genuine

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87 Ibid, 150.
collaboration. As areas of provincial jurisdiction are increasingly encompassed and affected by international trade agreements, it is worth considering the mechanisms through which provincial policy preferences are communicated and incorporated into federal trade policy. If the current mechanisms do not recognize the provincial power of implementation and do not account for provincial policy preferences adequately, there exists a great propensity for unproductive federal-provincial conflict, which has the potential to draw in international actors through international dispute settlement mechanisms and affect Canada’s international reputation.

**Thesis Overview**

This thesis will explore and evaluate three policy options that could be pursued by the federal government to represent provincial policy preferences. Options that appropriately represent provincial policy preferences may increase the likelihood that the provinces will implement Canada’s international commitments, which are increasingly incorporating areas of provincial jurisdiction. The three options to be evaluated are: 1) consultation, ranging from the less formal consultation practiced during the Tokyo Round, to the more formalized consultative mechanisms developed during the CUSFTA and utilized since; 2) bestowing upon provinces the right to ratify international trade agreements negotiated by the federal government, as was done with the NAFTA labour and environmental cooperation side agreements; and 3) permitting provincial governments to have a seat at the negotiating table, as suggested by Quebec’s Minister of Industry and Commerce and the House of Commons Standing Committee.

The first chapter has introduced the issue and illustrated the heightened significance of the provincial role in implementing international trade agreements, as
such trade agreements increasingly address areas of provincial jurisdiction and the federal
government has been held responsible for ensuring that compliance is forthcoming.

Chapter two will proceed to outline the existing literature on this topic and show the
limitations of this literature, specifically that recent literature on this evolution has been
sparse, and none of these policy options have been thoroughly evaluated on specific
criteria. The criteria by which each of these options will be evaluated will also be
outlined in this chapter: constitutionality, representativeness, efficiency and acceptability
to international actors. Chapters three, four, and five will discuss each of the three policy
options being evaluated respectively, and apply to them the evaluation criteria outlined in
chapter two. The final chapter will consider the completed evaluations of each policy
option relative to one another, make some recommendations regarding in which
situations each option would be most appropriately used, and address some limitations
challenges to greater provincial participation in negotiations in the future.
CHAPTER 2: LITERATURE REVIEW AND CRITERIA

The challenges posed by Canada’s division of powers around the negotiation and implementation of international economic treaties have been chronicled by academics, including legal and political scholars, as well as politicians. Academic interest in this topic largely began with the Tokyo Round of the GATT, when international trade negotiations began to discuss areas beyond federal jurisdiction. Early works cover international economic and social activities of the provinces, and identify the need for study of federal-provincial relations as international trade agreements covering areas of provincial jurisdiction are signed and have to be incorporated into domestic legislation. More recent works have observed the events which have followed the signing and implementation of these treaties and made predictions about the future of federal-provincial relations in accordance, should trade agreements continue to penetrate into spheres of public policy that were once solely domestic. Debates in the academic literature on this topic falls roughly along two dimensions: firstly, that globalization and international trade agreements are leading to decentralization or centralization within the federation; secondly, that changes associated with this are likely to lead to conflict or cooperation within the federation. Stemming from these positions, much of this literature has commented on the appropriateness of current mechanisms for involving sub-national governments in international economic policy formulation, including negotiating strategies for trade agreements. Statements from provincial politicians and senior
bureaucrats have exclusively highlighted the significance of the provincial role and the need for better recognition of it.

Both the academic literature and statements by politicians and senior bureaucrats regarding the negotiation and implementation of international trade agreements will be discussed in this chapter. Upon review of this literature, it becomes clear that none of the academic or political literature has systematically evaluated the various mechanisms by which provincial input could be conveyed or the provinces involved during the negotiation of international trade agreements. This is despite the fact that almost all of the literature which discusses it recognizes that areas of provincial jurisdiction are increasingly being incorporated into international trade agreements, with some arguing this may lead to significant conflict. Criteria by which three of these mechanisms will be evaluated including constitutionality, representativeness, efficiency, and acceptability to international actors, are presented at the end of the chapter.

**Decentralization versus Centralization**

A central debate in scholarship on the influence of globalization on the Canadian federation, particularly economic globalization and the international trade agreements which are a manifestation of it, has examined whether the balance of power in the federation has shifted towards the provinces (decentralization) or towards the federal government (centralization) in this area. Legal and constitutional literature has examined the court cases that have delineated the respective federal and provincial roles in the negotiation and implementation of international trade agreements. Greg Craven states that in the tradition of British constitutional theory, even if the federal government has unlimited power to make treaties, “such treaties will not affect rights and obligations
within Canada until they are enacted into...law by the appropriate legislature." This is according to the ruling of the 1937 Labour Conventions case, which was the formative case in allocating the federal government the responsibility for negotiating international treaties, and maintaining provincial responsibility for implementation in areas of provincial jurisdiction. Craven states that this decision has been criticized for safeguarding provincial power, "as the capacity to enter into treaties logically must be regarded as concurrent with the power to implement those treaties," despite the effect this may have on foreign relations.

Robert G. Richards discusses how the more recent Crown Zellerbach and CN Leasing decisions of the 1980s have further shaped the division of powers established in 1937. Richards states that while the Supreme Court has contemplated re-opening the Labour Conventions case, it is unlikely they would extend federal authority to the implementation of international agreements. Richards argues that the Labour Conventions decision to give provinces the ability to implement international agreements within their jurisdiction has maintained a healthy balance of powers between the federal and provincial governments that the Supreme Court would be likely to continue to support. Thus Craven, and Richards view the current balance of powers and the likely outcome of any future re-definition as maintaining the significant power of implementation within provincial jurisdiction for the provinces.

Provincial capacity has been a key factor that has shaped perceptions of whether the balance of power has shifted towards or away from provincial governments as a result

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89 Ibid., 14.
of changes associated with globalization. A significant portion of the literature on globalization and Canadian federalism stems from research in the late 1980s and early 1990s chronicling the increased international activities of provincial governments. According to Earl H. Fry, “leaders of regional and local governments in federal states [have become] keenly aware that in an increasingly interdependent world, international trade, investment, and tourism linkages are crucial for maintaining and enhancing the economic well-being of their constituencies.” As such, provinces have asserted themselves in important and independent ways into the international economy.

Feldman and Feldman chronicle the increased international activity of Canadian provinces throughout the 1970s and 1980s. They argue that Quebec has historically maintained the strongest commitment to and undertaken the greatest amount of international activity, but show how provinces such as Ontario, Alberta, and British Columbia began to rival Quebec’s commitment in the 1980s through dedicated international relations bureaucracies, monetary commitment and foreign offices. Garth Stevenson notes that this role was visible, as provinces “attend[ed] international conferences, and establish[ed] permanent foreign missions abroad.” This activity was encouraged by other countries, notably France in Quebec’s case. Furthermore, although concluding international treaties is the exclusive responsibility of the federal government, the provincial governments have signed numerous international arrangements without

93 Stevenson, Unfulfilled Union, 269.
obstruction from the federal government.\textsuperscript{94} Between 1964 and 1984, Quebec had concluded ninety-seven agreements with thirty-three countries.\textsuperscript{95}

The increasing global interdependence of which provincial international activity is a symptom, Luc Bernier argues has permitted the provinces to develop advanced bureaucratic structures and advanced economic policies which rival those of the federal government. While de Boer remains skeptical that provinces are able to rival the federal government's capabilities for engaging in international trade negotiations, he notes that provincial trade officials tend to stay in their positions for longer and develop better institutional memories.\textsuperscript{96} He concedes that lack of capacity can be offset by a higher level of sophistication in provincial officials, "who may have a narrower set of trade issues upon which to concentrate, and know these issues well."\textsuperscript{97} Provincial bureaucratic structures and sophistication have enabled the activity of which Fry, Feldman and Feldman, and Stevenson speak.\textsuperscript{98} Through this international activity, provinces have become increasingly legitimate international actors. As provincial interests and areas of jurisdiction were increasingly implicated in international relations, provinces successfully inserted themselves into the international arena, no longer relying solely on the federal government to represent their interests abroad. This literature implies a momentum shift

\textsuperscript{94} Fry, "Trans-Sovereign Relations of the American States," 56; Feldman and Feldman, "Canada," in Federalism and International Relations: The Role of Subnational Units, eds. Hans Michelman and Panayotis Soldatos (Oxford: Clarendon Press, 1990), 176-7, 179. According to Craven, "Federal Constitutions and External Relations," 14, the constitution is particularly unclear on the ability of provincial governments to enter into international agreements.

\textsuperscript{95} Feldman and Feldman, "Quebec's Internationalization of North American Federalism," 77.

\textsuperscript{96} Stephen de Boer, "Canadian Provinces, US States, and North American Integration: Bench Warmers or Key Players?" Choices: Canada's Options in North America, Vol. 8, No. 4 (November 2004), 12.

\textsuperscript{97} Ibid. 6.

in the federation regarding the conduct of international relations; an area that was previously the exclusive domain of the federal government has become shared between both levels of government.

A significant portion of the more recent literature on globalization and Canadian federalism argues that the increasingly penetrating nature of international trade agreements has heightened this trend. As border measures such as tariffs have largely been liberalized, and production has become increasingly globalized, “what had hitherto been considered to be largely domestic issues, including the actions of non-central governments, are being seen as ever more important determinants of international competitiveness and trade.”99 Douglas Brown’s seminal work on this topic argues explicitly that the balance of power in the federation related to international economic relations has shifted towards the provinces. He identifies internal factors, such as constitutional framework, regional political economy and executive federalism, as well as external factors like the changing nature of international relations to explain this evolution.100 Brown’s work argues constitutional powers of property and civil rights as well as control over resources and industrial policy have played a key role in augmenting the provincial governments’ importance in international economic policy-making.101

Stevenson agrees, arguing that jurisdiction over land, labour, and capital are significant for the development of a modern economy, and in Canada, these areas are to a large extent controlled by the provinces.102 Examples discussed include resource policies, preferential procurement policies for provincial entities, monopolies and near monopolies

101 Ibid, 86.
102 Stevenson, Unfulfilled Union, 178-9.
over the retail sale of alcoholic beverages, the marketing of agricultural products, and limitations on labour mobility established by professional regulatory bodies. As the federal government has negotiated international trade agreements, it has liberalized areas within its jurisdiction before those within provincial jurisdiction. International actors are now looking to address provincial policies through international economic agreements, which have heightened the significance of the provincial role in determining economic policy within Canada, shifting the balance of power in the federation.

Thomas Courchene agrees with Stevenson’s reasoning for this, but explains it more fully: as the federal government increasingly delegates its powers to supranational institutions and regimes, its ability to transfer funds to the provinces for social programs is inhibited. This in turn decreases the federal government’s legitimacy and increases the demand on provinces to provide services, underscoring the significance of the provincial role in the federation. Individuals and firms are empowered by this decentralization, and provincial governments are pressured to respond to regional and local issues as well as the demands of corporations, sometimes at the expense of the development of the national economy. As such, provinces have increasingly become the focal point for non-state and international actors as globalization has proceeded.

Richard Simeon agrees with Brown and Courchene that the biggest loser in globalization is the federal government, which transfers power up to supranational organizations, and down to local institutions. Regional economies are linked across

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103 Ibid, 204-6.
104 Ibid, 272.
106 Ibid, 44.
international boundaries, increasingly north-south as opposed to east-west in the case of
Canada.\(^{107}\) As international trade issues are “projected more and more into provincial
areas of jurisdiction, the federal dominance in trade policy is more likely to decline than
to grow.”\(^{108}\) Simeon sees this trend continuing, even if the federal government is able to
facilitate a move towards centralization by securing an expansion of the POGG and Trade
and Commerce powers.\(^{109}\) Simeon’s work considers the importance of the provincial role
if globalization does facilitate greater decentralization. Building upon Courchene’s
assertions, Simeon questions whether Canada will continue to have a national economy,
and if in fact it should attempt to pursue national policies, given that global forces are
appearing to heighten regional differences.\(^{110}\) Chris Kukucha, although he feels
decentralization of Canadian political economy “pre-date[s] the increasing intrusiveness
of international trade commitments,” acknowledges that this trend is continuing, and
argues that such decentralization puts pressure on the federal government to represent
provincial economic priorities in international trade negotiations.\(^{111}\)

Thus, it is clear that a significant portion of the literature contends the provinces
have shown themselves to be capable, legitimate and significant actors as globalization
and international trade liberalization has both encouraged and thrust them onto the
international stage. These developments make the constitutionally defined provincial
power of implementation all the more significant, but not necessarily more likely to be
altered by the courts. However, not all of the literature agrees with this interpretation.

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\(^{108}\) Ibid, 289.

\(^{109}\) Ibid, 287.

\(^{110}\) Ibid, 286.

\(^{111}\) Kukucha, The Provinces and Canadian Foreign Trade Policy, 121.
legal interpretation by Mark A. Luz suggests that the federal trade and commerce power could be expanded by the courts, particularly as Chapter 11 of the NAFTA is likely to qualify as a regulatory scheme under the definition set out by the courts in the *CN Leasing* decision.\(^{112}\) If the NAFTA or other international trade agreements operating within a similar institutional framework were found to satisfy the conditions of a regulatory scheme, which would allow the federal government to introduce implementing legislation to bring the agreement into force, Luz argues there would be considerable scope to hold provinces accountable to international trade commitments and the financial burdens accompanying failures to comply.\(^{113}\) This would not only extend the federal government’s legislative reach, but would also reduce the federal government’s dependency on provincial compliance, as provinces could be forced to account for these failures themselves.

Mark A. Luz and Marc C. Miller have argued there is scope for the federal government to extend not only through an extension of the trade and commerce power, but also through an extension of the peace, order and good government clause.\(^{114}\) Given the increasingly penetrating nature of international trade agreements and the accompanying legalization of dispute settlement mechanisms, Luz and Miller feel the courts will allow the federal government to implement international treaty commitments because they feel provinces will no longer possess the capacity. They emphasize that “because provincial powers are territorially limited, the unterritorial nature of global interactions...will increasingly be put beyond provincial legislative competence.”\(^{115}\)

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\(^{113}\) Ibid, 79.

\(^{114}\) Luz and Miller, “Globalization and Canadian Federalism,” 991-996.

\(^{115}\) Ibid, 976, 980, 985.
Specifically, Luz and Miller predict the courts will put greater emphasis on achieving comity between provinces, which they argue is most suitably achieved by a stronger federal role.\textsuperscript{116}

Ian Robinson similarly predicts the federal government will be able to secure an extension of the peace, order and good government clause and the trade and commerce power, as provincial capacity to act is increasing compromised. He identifies both legal and market constraints facing the provinces. Legal constraints, which are the conditions and limitations placed on governments through international trade agreements, Robinson acknowledges have affected the federal government to a greater extent than provincial governments.\textsuperscript{117} However, legal constraints have facilitated market constraints, such as increased capital mobility, which has put governments in competition with one another for investment, and increased investor rights. This has made it more difficult for governments to enact regulations governing the activities of trans-national corporations operating within their jurisdiction.\textsuperscript{118} While Robinson states that this affects both governments, he argues it is more difficult for provinces to withstand pressure from capital than it is for the federal government.\textsuperscript{119} Stephen McBride argues that the pressure exerted on provincial governments by international capital, and the desire to be seen as a stable location for investment may account for why provincial governments have not typically refused to comply with international trade commitments, even where provincial governments have been opposed to the agreements within which they are contained.\textsuperscript{120}

\textsuperscript{116} Ibid, 987.
\textsuperscript{118} Ibid, 245-6.
\textsuperscript{119} Ibid, 248.
This has reduced the threat of provincial resistance facing the federal government, in turn promoting greater centralization in the federation regarding the negotiation and implementation of neo-liberal economic agreements.

The strength of the federal role is also maintained by its ability to secure compliance with international trade agreements. Robinson argues the federal government could use its spending power to compel provincial compliance with international trade commitments, and/or financially penalize provincial failures that resulted in an international dispute through federal transfer payments to the provinces. The federal government’s power is further enhanced in this area as a result of previous international trade agreements. Given that previous agreements primarily affected areas within federal jurisdiction, the federal government’s ability to redistribute funds to the provinces through transfer payments has been limited. 121 As such, Robinson argues that the federal government could also secure compliance with the international treaty commitments it makes by reducing transfers, perhaps to repay fines accrued from disputes over breach of international obligation, or threatening to introduce implementing legislation. 122 As such, he suggests the federal government has continued to retain the power within the federation to compel provincial international activities if need be. George MacLean and Kim Richard Nossal have also argued that provincial international activity has been compelled or permitted by the federal government. Although provinces may have interests abroad, provincial international activity has largely occurred because it has met

121 Robinson, “Neo-Liberal Trade Policy and Canadian Federalism Revisited,” 208-9
broader strategic interests of the federal government and been allowed to continue by the federal government.\textsuperscript{123}

Regarding the effect of globalization on Canada's legal and constitutional balance of power with respect to the negotiation and implementation of international trade agreements, the literature is split. As discussed in chapter one, this thesis agrees with Craven and Richards in emphasizing the significance of the provincial role in implementation and supporting the likelihood that the courts will safeguard this power to maintain the federal-provincial balance in the division of powers. While Canada has enacted legislation that binds it to follow through on supranational arbitral awards, it seems likely that the courts will require the federal government to avoid disputes and the corresponding consequences by securing satisfactory implementation of international trade through appropriate involvement of the provinces, rather than by usurping their constitutionally guaranteed jurisdiction. As outlined in chapter one, the \textit{CN Leasing} decision set out a test to balance federal and provincial rights that severely limited the situations in which the federal government could infringe on provincial powers.\textsuperscript{124} Even if such an intrusion could be legally justified, as Luz argues with respect to the NAFTA, the implications of such an intrusion may encourage the courts to search for reasons to deny such an intrusion. In such a situation, the spirit of the division of powers, which respects a balance between federal and provincial jurisdiction and powers is likely to prevail, which Luz himself acknowledges.\textsuperscript{125} It is debatable the extent to which the interprovincial nature of economic globalization and the desire by international investors for


\textsuperscript{124} Also discussed in Luz and Miller, "Globalization and Canadian Federalism," 992.

\textsuperscript{125} Luz, "NAFTA, Investment and the Constitution of Canada," 61, 68.
provincial comity will be accepted by the courts as justification for upsetting the federal provincial balance which has been maintained in this area since the Labour Conventions case.

International trade agreements are increasingly addressing areas that were previously exclusively within the domestic public policy sphere and governments' ability to act has been constrained. As this has primarily addressed areas of federal jurisdiction, the attention of international actors has increasingly turned towards areas of provincial jurisdiction. Constitutional jurisdiction over property and civil rights, resources and industrial policy heightens the significance of the provincial role should Canada desire to continue to conclude international trade agreements. While Robinson has argued that market constraints deserve equal if not more significant consideration than legal constraints imposed through international trade agreements, he does little to show how the effects of these would shift the balance of power towards the federal government. The provinces may be disinclined to resist neo-liberal agreements for fear of lost investment, but they are not bound by legal constraints in the same way the federal government has been, as a signatory to these agreements which have significantly implicated federal jurisdiction. Furthermore, given that legal constraints have disproportionately affected the federal government which Robinson claims has contributed in part to declining federal transfers to the provinces, the threat of reduced federal transfers is less poignant.

While there are factors such an increasing market constraints, and mechanisms such as pursuing an extension of federal jurisdiction or the possibility of financial penalties, at present the provincial governments are the only legitimate entities able to implement international trade provisions in areas of provincial jurisdiction. As
international actors are increasingly interested in incorporating areas of provincial jurisdiction into international trade agreements, the federal government will be pressured to obtain commitments from provinces in order to gain concessions in areas of interest to Canada. The balance of power is likely to continue to shift towards provinces in the future regarding the negotiation and implementation of international trade agreements.

**Conflict versus Cooperation**

Predictions of federal-provincial cooperation or conflict are also common in the literature on the impact of globalization on Canadian federalism. Conflict refers to tension between the federal and provincial governments over international positions or actions undertaken by either actor; such tensions could manifest themselves in domestic difficulties in the federal-provincial relationship, through difficult relations with other international actors for one level of government as a result of an action taken by another level of government, or through opposing or contradictory actions taken by both levels of government that have ramifications in the international arena. For the purposes of this thesis, cooperation is signified by support for common foreign policy objectives by both levels of government, a concurrency of foreign policy position, or attempts to consider the positions of both levels of government when engaging in international relations, perhaps through consultative mechanisms.

In constitutional and legal literature on the subject of Canadian federalism and international economic relations, predictions of increased or decreased use of the court system correlate to predictions of conflict or cooperation. This is because choosing to address the division of powers over the negotiation and implementation of international treaties through the court system in itself signals a conflictual federal-provincial
relationship on this issue, as governments have not been able to agree on a common understanding of which level should possess which powers and responsibilities. Luz and Miller argue that there will likely be an increase in court cases dealing with the federal-provincial division of powers over the negotiation and implementation of international trade agreements. As international economic commitments increasingly require provincial comity and require regulatory changes that have extra-provincial effects, which provinces will not be able to sufficiently address through their legislatures, the federal government will seek an extension of its powers into areas of provincial jurisdiction through the courts. This will require new interpretations of constitutional provisions, such as the peace, order and good government clause, and the trade and commerce power, which provinces will not be likely to agree to on their own.

Luz and Miller also see the courts playing a significant role because provinces are not directly liable for violations of international treaties to which they are not signatories, as this power belongs to the federal government. They foresee the courts being called upon “if the federal government wants [a] province to back down from [a] policy decision...or wishes to be compensated by the provinces for...[an] arbitral award.” Robinson agrees that pursuing an extension of the peace, order and good government clause, and the trade and commerce power would be a viable option for the federal government should it hope to secure provincial compliance with federal policy preferences, or thwart potential provincial resistance to the neo-liberal economic commitments the federal government negotiates. Should this fail however, Robinson argues the federal government could pursue other political mechanisms such as transfer

127 Ibid, 996.
payment reductions or introducing implementing legislation to coerce provincial compliance.128 Much like utilizing the court system to obtain permission to legally intrude into areas of provincial jurisdiction, these options would clearly promote conflictual federal-provincial relations.

One source of the conflict Luz and Miller, and Robinson see potentially being resolved in the courts was identified by early literature chronicling the international activity of the provinces. As provinces began to realize the effects of international trade and commerce on their constituency, many perceived the need to assert their identity or authority, and began to engage in increasingly assertive and independent international activity. This resulted in conflict in some cases, as the federal government increasingly felt an area of sole federal jurisdiction was being intruded upon by the provinces. Louis Balthazar points to federal government’s actions in the wake of two Quebec-France treaties on education, and cultural and artistic exchange in 1965. According to Balthazar, “Ottawa felt threatened enough in its jurisdiction over foreign affairs to conclude immediately two umbrella-treaties with France to cover the French-Quebec agreements which were labeled ‘ententes.’”129 This was a statement to Quebec that the federal government viewed itself as the only actor able to legitimately conclude treaties and would take action to prevent the international community from thinking otherwise.

Further federal frustration and resistance to provinces undertaking formal international activity occurred when Quebec was invited alone to an international conference on education in Gabon. The federal government “took offence, broke off diplomatic ties with Gabon and did not resume them” until after the country fully

recognized Ottawa as the exclusive and legitimate Canadian international actor (in exchange for a generous aid package). \(^{130}\) During the softwood lumber dispute of the mid-1980s, the federal government's ability to carry out its responsibilities in terms of representing the provinces in international disputes was undermined by the province of British Columbia, which threatened to cut an independent deal with the U.S. and effectively undermined the Canadian negotiating position, to the irritation of the federal government. \(^{131}\) Thus, as provincial activities in the international arena have increased, there have been several instances of tension and retaliatory diplomatic actions by both levels of government in response.

Some have argued the potential for future conflict in these areas depends on provincial ability to act in the international arena and/or develop collaborative foreign economic policy. Feldman and Feldman feel that provincial assertiveness depends upon bureaucratic competence and the presence of fiscal means. \(^{132}\) Bernier agrees, arguing many provinces have developed this as increased international interdependence has necessitated the development of advanced institutional structures at the provincial level. In turn, provincial capacity to act autonomously in areas of provincial jurisdiction has been strengthened. The fragmentation of authority that characterizes federalism, though, constrains both levels of government to incremental policy-making, particularly where both levels are able to act relatively autonomously, and as such, limits the possibility for agreement. \(^{133}\) Brian Hocking supports this notion, stating that challenges to coordination in developing international economic policy between both levels of government include

\(^{130}\) Ibid, 142.

\(^{131}\) Brown, "The Evolving Role of the Provinces in Canadian Trade Policy," 104.


bureaucratic specialization, regionalization and sectoralism, which impair the necessary vertical, inter-jurisdictional, and horizontal integration of the bureaucracy. Simeon states more broadly, the chief process difficulties in developing a collaborative model for trade policy development result from: the greater number of actors involved in the process, and the inevitable presence of a “lowest common denominator that are not really in the interest of anyone.” These difficulties may frustrate Canada’s trading partners and may raise the potential for the regional divisiveness.

Robinson has also identified the potential for regional divisiveness, arguing that the presence of a lowest common denominator encourages a “race to the bottom” between provinces. Robinson states this is because “it is easier...to play 10 provinces...off against one another than ‘whip-saw’ [a] large national government.” Fry too identifies the existence and future potential inter-provincial competition for trade and investment as a result of increased international involvement of provincial economies. Fry states that such competition has resulted in very distinct economic policies within each province. Accordingly, it has been argued that the potential for conflict is both inter-provincial as well as inter-jurisdictional. Fry notes the ability of national governments to make and harmonize national and regional economic policies and priorities has been complicated by heightened exposure of the provinces to

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137 Fry, “Trans-Sovereign Relations of the American States,” 58.
international economic activity.\textsuperscript{139} Brown states the federal government's inability to bind provinces to accept commitments is problematic, given the absence of an institutional framework for follow-up on provincial commitments and the potential for provinces to undermine a unified Canadian policy position through independent international action.\textsuperscript{140} As the nature and frequency of provincial involvement in international economic relations increasingly coincides with provincial perceptions of threats to areas of jurisdictional responsibility,\textsuperscript{141} it can be expected that the provinces are increasingly likely to demand that their interests are represented in international economic affairs. As the provinces do not bind themselves to abide by the commitments made in international trade agreements, there is arguably less of a deterrent for the provinces to refuse to implement such commitments, and chance intergovernmental conflict to ensure provincial policy preferences are maintained.

Brown and Simeon were two of the first to note this conundrum: "Ottawa cannot deliver on its promises without provincial cooperation."\textsuperscript{142} For Simeon, in addition to the procedural problems of collaboration identified earlier, conflict is likely to result from limited shared jurisdictional responsibilities between the federal and provincial governments under the Constitution, significant provincial fiscal autonomy, and executive federalism.\textsuperscript{143} Stevenson argues, in fact, conflict over economic policy has been common. Such conflict is attributable to the regionalized nature of the Canadian economy, which tends to support the concentration of a particular sector within a

\textsuperscript{139} Fry, "Trans-Sovereign Relations of the American States," 60.
\textsuperscript{140} Brown, "The Evolving Role of the Provinces in Canadian Trade Policy," 107.
\textsuperscript{141} Feldman and Feldman, "Canada," 181.
\textsuperscript{142} Simeon, "Important? Yes. Transformative? No." 157.
\textsuperscript{143} Ibid, 136-7.
particular province, as well as ideological differences.\textsuperscript{144} Thus divergent provincial perspectives on international trade policy are to be expected. Derrick G. Wilkinson discusses the consultative mechanism for obtaining stakeholder input on international trade policy during the CUSFTA negotiations. According to Wilkinson, provincial input was not regarded much differently than private sector input, requests for information were sometimes refused because the information was not publicly available yet, and provincial requests for greater involvement in negotiations were largely ignored; that “both the institutional and the procedural aspects [were] entirely at the behest of the federal government...in the view of the provinces [was] unsatisfactory.”\textsuperscript{145} Even with the CUSFTA, which infringed upon provincial jurisdiction less significantly than subsequent trade agreements have and future ones intend to, provinces argued that at a minimum, meaningful involvement of the provinces would involve a joint ministerial-level body to provide trade policy direction.\textsuperscript{146} Without a mechanism for representing provincial concerns and policy preferences in the conduct of international trade relations or the development of Canadian foreign economic policy that recognizes the significance of the provincial role, federal-provincial relations in this area will likely be rocky.

Conversely, however, several scholars have identified instances of cooperation between both levels of government and do not conclude that the federal-provincial relationship over international economic foreign policy has been or will become conflictual in the future. In the constitutional and legal literature, Richards has argued that conflict manifested through the courts is unlikely because neither federal nor provincial governments will choose to resolve future jurisdictional controversies in the

\textsuperscript{144} Stevenson, Unfulfilled Union, 213, 271.
\textsuperscript{146} Ibid, 206.
Grace Skogstad agrees; she rejects the notion that the federal government would seek an extension of the *Crown Zellerbach* or *CN Leasing* court decisions, as the federal government has preferred to work in partnership with the provinces through political mechanisms.\(^{148}\)

Skogstad and Hocking chronicle some of these political mechanisms, but not in as much detail as Kukucha. Kukucha’s recent work chronicles the full evolution of the federal-provincial consultative system on international economic issues. Kukucha lists the Canadian Trade and Tariffs Committee, the Canadian Coordinator for Trade Negotiations (CCTN), the Committee for the Free Trade Agreement, the Committee for North American Free Trade Negotiations (CNAFTN), and the Ctrade process as examples of consultative mechanisms that involved the provinces in international trade policy-making.\(^{149}\) Requests for full provincial participation in negotiations have been denied, however.\(^{150}\) Kukucha believes enhanced consultative mechanisms are appropriate and indicate positive steps taken by the federal government to promote cooperative inter-governmental relations.\(^{151}\)

Hocking agrees with Kukucha that some such mechanisms have promoted cooperative federal-provincial relations and that cooperation has been positive. For Hocking, this stems from the fact that these mechanisms evolved out of necessity for both levels of government. Hocking argues the federal government needs the provinces because of their bureaucratic expertise, to communicate developments, and for crucial linkages to domestic and non-governmental actors during negotiations. Correspondingly,


\(^{150}\) Ibid, 142.

\(^{151}\) Ibid, Chapters 2, 4.
the provinces need the federal government because they lack the resources that international policy-making requires, and because the federal government has better access to international networks which are crucial as provincial international activity is relatively ad hoc.\textsuperscript{152} Because of this recognition by both levels of government, cooperative relations have prevailed. Skogstad, writing more recently than Hocking, shares the notion that the cooperative mechanisms which have developed have done so out of need by both levels of government.

In the future, some have predicted cooperation will continue. Kukucha argues that beyond consultative mechanisms which encourage cooperative relations, provinces have developed and maintained distinct trade profiles that pre-date more recent, accelerated changes associated with increasing global interdependence. As such, competition resulting from a ‘race to the bottom’ in investment and taxation policies is unlikely according to Kukucha.\textsuperscript{153} Furthermore, provinces have cooperated in recent Team Canada trade promotion activities, which suggests to Kukucha that competition has been and will continue to be avoided.\textsuperscript{154} Skogstad also predicts that cooperation will continue in the future, based on the rationally-based calculations of necessity she argues have driven federal-provincial relations in the past.\textsuperscript{155} Skogstad, however, does not limit her consideration of mechanisms by which cooperation will be promoted to consultative mechanisms.

Conflict seems more likely than cooperation in the future if appropriate mechanisms for dealing with the changing federal-provincial balance of power in the

\textsuperscript{152} Hocking, "Managing Foreign Relations in Federal States," 69-70.
\textsuperscript{153} Ibid, 105.
\textsuperscript{154} Ibid, 104.
\textsuperscript{155} Skogstad, "International Trade Policy and Canadian Federalism," 164.
negotiation and implementation of international trade agreements are not developed. As international trade agreements address issues outside of federal jurisdiction, the federal government will be increasingly interested in securing provincial implementation of these commitments. This may include pursuing an expansion of the peace, order and good government clause, and the trade and commerce power, to allow intrusion into provincial jurisdiction, which will be conflictual. Given indications from recent court decisions, the courts are likely to maintain a balance of federal-provincial powers, which will force the federal government to utilize political mechanisms such as threatening to withhold transfer payments, or threatening to introduce implementing legislation themselves to achieve its policy preferences. For the provinces, conflict may arise as a result of refusing to implement international trade agreements in areas of provincial jurisdiction if the commitments conflict with provincial policy preferences or if provinces are inadequately involved in the trade policy formulation process. While Richards and Skogstad argue that the option of settling conflict through the courts is unlikely, it is clear that some of the other political mechanisms for settling conflict would have outcomes that would be little more cooperative.

Skogstad, Hocking, and Kukucha argue that current mechanisms for preventing federal-provincial conflict by promoting provincial involvement have been successful and will likely continue to be so. However, as was discussed in chapter one and will be seen subsequently, these mechanisms have been criticized by provincial political officials as inadequate and have not displaced calls for more formal provincial involvement during negotiations where provincial jurisdiction is significantly implicated. While Kukucha does not believe that provinces will come into direct conflict with one another to attract
trade and investment because of their diverse trade profiles, this will not necessarily preclude pressure from international actors on the federal government to secure predictable and increasingly less restrictive government regulations from provinces. If the federal government continues to be the primary actor concluding international trade agreements, it is unlikely that international actors will not demand some comity or consistency across provinces, irrespective of nuances in provincial trade portfolios, or whether equal interest by international actors in each province exists. Thus, significant potential for conflict is suggested by both international pressures for commitments in areas of provincial jurisdiction, and questions of the continuing appropriateness of current mechanisms for involving provinces in international trade policy formulation.

**Appropriate versus Inappropriate Policy Formulation**

Of the scholars who have written about Canadian federalism and international economic relations, some have discussed the appropriateness of how policy is currently formulated in this area. Those who believe that the balance of power in this area leans towards the federal government have tended to suggest that the federal government is the most appropriate actor in the international arena and have not advocated greater provincial involvement. Luz and Miller believe the federal government is the only actor with the ability and justification for concluding and implementing international trade commitments. Robinson, although he does not believe a stronger federal presence is positive, agrees. Those who argue federal-provincial relations in this area have been cooperative have pointed to existing mechanisms for federal-provincial consultation over the conduct of international trade relations and the conclusion of treaties. This group of scholars has argued that the current mechanisms governing federal-provincial relations in
international economic policy formulation are appropriate and have not speculated upon how these relations should be evaluated or could be improved. In support of the status quo, Hocking stated that full provincial participation would result in bureaucratic turf-wars, policy incoherence, and the exploitation of domestic grievances by international actors during negotiation.\textsuperscript{156}

One notable exception is Skogstad, who believes that cooperation is likely because she suggests a range of options that could be pursued by the federal government in order to mitigate tensions beyond just consultation. These include: the federal government concluding only agreements within its jurisdiction, binding itself to enforce only agreements within its jurisdiction, or attempting to override the provinces by securing compliance through an extension of the \textit{Crown Zellerbach} and \textit{CN Leasing} decision at the Supreme Court.\textsuperscript{157} Skogstad does not go so far as to systematically evaluate these options however; she simply argues that there are several options at the federal government’s disposal that could be used to promote and maintain cooperative relations.

Suggestions of alternative mechanisms to the consultative processes pursued more commonly by the federal government in the past, such as those suggested by Skogstad, are more characteristic of scholars who have argued there has been decentralization in the federation in this area, or who have argued inter-governmental relations have been conflictual. Those scholars that have argued the balance of power in the federation in this area has shifted towards the province through enhanced international activism, retained provincial autonomy and capability, and the shifting focus of international trade.

\textsuperscript{156} Hocking, “Managing Foreign Relations in Federal States,” 79-80.
\textsuperscript{157} Ibid, 163-5.
agreements towards areas of provincial jurisdiction have tended to argue that an enhanced provincial role in the formulation of international economic policy would be appropriate. Simeon, Wilkinson, and Courchene have argued that given the interdependent environment of global trade relations and the strength of the provincial position, mechanisms for obtaining binding commitments which recognize the significance of the provincial role must be examined. However, these scholars fall short on suggestions for how this could be addressed. Although Courchene suggests decision-making should be devolved, he does not examine how exactly this should occur. While Wilkinson suggests that provinces should only be committed to implement international trade agreements if they bind themselves by signing an annex to the agreement, he does not evaluate how plausible this would be. Simeon, who calls for a “strengthened, more rule-driven and more transparent intergovernmental process,” as many policy areas now both require a federal and provincial response, also does not explore further. Brown, and de Boer suggest several options such as improved consultation, provincial ratification, and giving the provinces a seat at the negotiating table, but like Skogstad, neither scholar conducts any systematic evaluation of the various policy options they identify.

Stevenson, who believes conflict is endemic to federal-provincial relations in the area of international economic policy, identifies several mechanisms for resolving such conflict within the federation. These include the constitutional powers of disallowance

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159 Courchene, Rearrangement, 133.
164 Stevenson, Unfulfilled Union, 211.
and reservation which have fallen into disuse, connections through political parties if both levels of government have the same governing party, the judiciary, bureaucratic networks, and executive federalism.\textsuperscript{165} While the identification of such mechanisms for resolving conflict is important, these mechanisms are not evaluated by Stevenson. This is crucial since some mechanisms have large caveats that would surround their usefulness, nor would they necessarily be useful for precluding conflict and promoting cooperative relations in the future.

Beyond academic literature, a crucial contribution to this field comes from statements made and documents produced by government and political officials on this topic. At a 1990 conference on Canadian federalism’s ability to meet global economic challenges, Stuart Culbertson of the Ministry of International Business and Immigration in British Columbia spoke about the increasing importance of international linkages for provinces. Much of his presentation focused on the need for B.C. to address barriers to trade with the Asia-Pacific Region. He stated that B.C. was seeking “an increasingly active involvement in Canada’s strategy towards... Asia-Pacific economic cooperation.” Culbertson emphasized that given the significance of this region to B.C., the province would be looking to develop and expand cooperative relationships with colleagues beyond the federal government, such as the Pacific Northwest Economic Partnership with Washington state.\textsuperscript{166} In Alberta, the provincial government recommended in 1978 that the constitution should “include provisions that confirm the established legitimate role of the provinces in certain areas of international relations,” a suggestion that understandably

\textsuperscript{165} Ibid, 214-229.
received no sympathy from the federal government." Speaking as an Alberta civil servant, Wayne Clifford of Federal and Intergovernmental Affairs spoke about the need to formalize structures for provincial involvement in international trade relations with the federal government. He argued that predictability was essential to actors both within and outside Canada, and that this could be best achieved by involving provinces in developing a uniform international trade policy.

Barrows and Jansen of the Ontario Ministry of Industry, Trade and Technology argued there should be a systematic way of determining when and how provinces are involved in international economic policy-making. They define the scope of what should constitute legitimate provincial interest as issues that are "economic in nature and mainly direct in their implication; involve exports from, or imports to, the province of both goods and services; and are, in the view of the province concerned, important to the economy as a whole or to key participants in the economy." They also argue that decision-making around such issues in international economic relations should allow provincial involvement in "problem identification; conceptualization of key issues; analysis of options; preparation of positions; and participation in the negotiation process (as observers, delegates and/or technical experts)." Barrows and Jansen argued more specifically that beyond preparatory work, the provinces should be allowed approval of negotiating mandates; negotiations and preparation of draft agreements; and ratification

167 Stevenson, Unfulfilled Union, 269.
170 Ibid, 150.
and implementation.” For these two, extensive provincial involvement did not represent a
desire for greater power than was justified; it merely reflected the mutual interests and
respective importance of both parties in the conduct and administration of international
trade agreements.\textsuperscript{171}

Following the most recent round of international trade negotiations which
concluded the Uruguay Round and the NAFTA, provincial demands for involvement in
international trade negotiation and policy-making increased, despite greater consultation.
In 1998, Alberta’s Minister of Intergovernmental and Aboriginal Affairs proposed
generally that provinces have ‘full involvement’ in international negotiations;\textsuperscript{172}
Alberta’s proposal, however, stopped short of endorsing the need for formal ratification
implied by a proposal from a British Columbia Special Legislative Committee of the
same year. It argued that the federal government should be required to “secure the
express consent of the Legislative Assembly of BC before making international
commitments as part of a trade or investment treaty” involving provincial measures.\textsuperscript{173}

Advocating more direct involvement, Quebec’s Minister of Industry and
Commerce argued in 1999, based upon representation of sub-units in the EU, that
provinces should be part of the Canadian negotiating team; it was argued that provinces
should be at the negotiating table, able to intervene on issues of importance to local
industry.\textsuperscript{174} In the same year, the House of Commons Standing Committee on Foreign
Affairs and International Trade echoed Quebec’s demands, recommending provinces be

\textsuperscript{171} Ibid, 150.
\textsuperscript{172} (Honourable) David Hancock: Minister of Intergovernmental and Aboriginal Affairs, “Going Global:
An Agri-Food Industry Trade Conference,” 13 November 1998
<http://www.iir.gov.ab.ca/trade_policy/pdfs/5.4.4.10.13-
\textsuperscript{174} Ibid, 171.
involved in the entire process of negotiating international agreements. At the Council of the Federation meeting in 2001, the premiers called for an agreement to ensure full federal/provincial/territorial participation in Canada's international energy discussions and negotiations. Another press release called for Ottawa to ensure provincial representation at future ministerial meetings in the context of the WTO, FTAA and other trade negotiation forums. This primary evidence suggests that the federal-provincial division of powers regarding international treaty-making is contested, and consideration of the range of options suggested and available would be useful. Barrows and Jansen's suggestions for greater and more specific provincial involvement are the most detailed of these; however, even their suggestions are not examined in enough detail to give a measured analysis of how meaningful provincial involvement would occur.

This thesis argues that because power and importance has been shifting towards the provinces in this area, conflictual relations are more likely than cooperative relations should the significance of the provincial role not be appropriately recognized in international economic policy formulation. A detailed evaluation of three policy options that could be pursued by the federal government to more appropriately involve the provinces in international economic policy formulation, and more specifically, in international trade agreement negotiation will be conducted. The evaluation criteria by which these options will be evaluated will be discussed subsequently.

175 Department of Foreign Affairs and International Trade, “Backgrounder: Highlights of the Government Response to the Sub-Committee on International Trade, Trade Disputes and Investment of the Standing Committee on Foreign Affairs and International Trade (SCFAIT),” 23 April 1998 <http://w01.international.gc.ca/minpub/Publication.asp?publication_id=375369&Language=E>
Evaluation Criteria

Each option will be evaluated according to four criteria. These are: constitutionality, representativeness, efficiency, and acceptability to international actors. This section will define each criterion, explain the rationale behind choosing each criterion, and describe what the ideal option would be according to the criteria as applied to the negotiation, conclusion, and implementation of international trade agreement.

Constitutionality

Constitutionality refers to the extent to which each option differs from the currently understood federal-provincial constitutional division of powers over the negotiation and implementation of international treaties. Constitutionality is a significant criterion because it considers the extent to which each option would require a re-interpretation of existing precedents by the courts, should either level of government choose to challenge it. As has been previously conveyed in this thesis, the courts have played a crucial role in shaping the way international trade policy is formulated in Canada. The division of powers contributes dramatically to the problem this thesis has identified: the potential for non-compliance from provincial governments and corresponding federal responsibility for that failure to comply internationally. Any policy option considered by the federal government for better recognizing the provincial role and involving the provinces to a greater extent would have to be relatively consistent with the division of powers that bestows upon the federal government responsibility for negotiating international treaties, and bestows upon the provinces responsibility for implementing them. As has been shown in chapter one, the courts have recognized the delicate federal-provincial balance that exists in this area and have shown reluctance to
alter it, as some have suggested might happen. The best policy option would be one that differed least from the rules and spirit of the federal-provincial relationship as substantiated by past court rulings, as it would be less likely to result in a court challenge, which would signify conflictual federal-provincial relations.

**Representativeness**

For the purposes of this thesis, representativeness is defined as the degree to which governments are permitted the opportunity to convey their policy preferences where areas of their jurisdiction are affected. This criterion requires that the mechanism for such input meaningfully recognizes it and incorporates it into decision-making. This criterion is crucial because it recognizes the increased capacity of provincial governments to formulate international economic policy or participate in the international arena, as identified by the literature. It also addresses the increasing significance of areas of provincial jurisdiction to international actors, identified as the fundamental problem driving this thesis. As international actors become increasingly interested in liberalizing areas of provincial jurisdiction and the federal government faces increasing pressure to make commitments in areas of provincial jurisdiction in order to obtain concessions from other international actors in areas of interest to Canada, provincial policy preferences and interests must be represented. If they are not, the likelihood of provincial implementation and compliance is diminished, particularly where federal and provincial policy preferences diverge.

This is further reason why representation is a crucial criterion by which to evaluate any mechanism for formulating international economic policy or trade negotiating positions. As the division of powers allows the federal government to
negotiate international treaties, they are typically the sole signatory to those agreements. Thus, as the sole signatory, the federal government has the legal responsibility for ensuring Canada's implementation and compliance with international agreements. Any mechanism which does not adequately represent the policy preferences of a government whose jurisdiction is affected will increase the likelihood that Canada will face an international dispute and/or a tarnished reputation for failing to uphold its international commitments. The best policy option would be one that maximizes representativeness of any level government in areas where constitutionally guaranteed jurisdiction is affected.

Efficiency

Efficiency refers to the speed and ease with which Canada can negotiate and conclude international trade agreements. As there are many factors that affect how quickly and easily international trade agreements are concluded, this criterion refers specifically to the effect of domestic governmental actors on the negotiation and conclusion process.¹⁷⁷ How quickly and easily international trade agreements are implemented is not part of this criterion. This criteria is important because any mechanism that increases representativeness during the negotiation and conclusion of international trade agreements will arguably decrease the ease with which trade-offs can be made and all or a majority of actors satisfied. Greater representativeness may also increase the amount of time it takes to hear all perspectives during negotiations. How quickly and easily international actors can reach agreement with Canada during negotiations will likely have an effect on whether they want to enter into future

¹⁷⁷ 'Conclusion' refers to completing and signing the final text. Ratification may also be part of the conclusion process where ratification occurs, as in the NAFTA side agreements. The introduction of implementing legislation is not part of the conclusion process.
negotiations. The seemingly inverse relationship between representation and efficiency is a crucial part of the problem this thesis has identified; it likely represents one of the drawbacks that discouraged the federal government from utilizing greater provincial participation in the negotiation of international trade agreements in the past. The best policy option would be one that maximizes efficiency during the negotiation and conclusion of international trade agreements.

Acceptability to International Actors

This criterion refers to how favourably international actors with which Canada might and does engage in international trade agreement negotiations would view each policy option. The option must not deter potential international partners from entering into negotiations or desiring an international trade agreement with Canada. How reliably Canada implements its international commitments is a crucial consideration for this criterion. As Canada has always relied heavily on international trade, and the international trade regime has strengthened and expanded steadily since the end of World War II, in which Canada has been an important participant, Canada must be seen as reliable and dependable in its negotiation and implementation of international trade commitments. Failure to implement international commitments or difficulties in the negotiation and conclusion of international trade agreements would likely compromise Canada’s international reputation. The best option would be one that would allow Canada to reliably negotiate, ratify and implement international trade agreements. Uncertainty must be minimized. Too much process complexity or autonomy for either level of government would likely contribute to uncertainty.
Overall, the best policy option, one that would adequately recognize the increasingly significant role played by the provinces as areas of provincial jurisdiction increasingly come within the purview of international actors, would be one that balances each of these criterion. In particular, it is crucial that constitutionality, efficiency, and acceptability to international actors are balanced against representativeness. These criteria will be applied to each of the three policy options outlined in chapter one in the subsequent three chapters. The conclusion will suggest, based on these evaluations, which option is best on balance.
CHAPTER 3: CONSULTATION

The first policy option for enhancing provincial involvement during the negotiation of international trade agreements this thesis will consider is mechanisms for consultation. Consultative mechanisms have been the principal way in which provinces have been involved in trade policy in the past; however, some have criticized these mechanisms as ad hoc and insincere. This chapter will discuss two types of consultative mechanisms Canada has pursued: the first, developed during the Tokyo Round, is characterized as informal, ad hoc, and heavily controlled by the federal government with little significance afforded to the provincial role; the second, developed during the CUSFTA and since, is more formalized, regularized, and involves the provinces more significantly in policy formulation. Both types of consultative mechanisms will be evaluated according to their constitutionality, representativeness, efficiency, and acceptability to international actors.

Past Consultative Mechanisms

As outlined in chapter one, there have been several consultative mechanisms through which the federal government has sought to include the provinces in trade policy formulation, which has arguably been achieved with varying degrees of success. Earlier consultative mechanisms were less formalized, did not involve the provinces collaboratively in policy formulation, and did not recognize the significance of the provincial role in the implementation of international trade agreements. The earliest notable mechanism for provincial consultation was the Canadian Trade and Tariffs
Committee (CTTC) established during the Tokyo Round. This committee was established by the federal government to "[gather] briefs from business, unions, consumer groups, the provinces, and all other interested parties," on trade policy positions as international trade negotiations began to deal more significantly with behind the border measures such as non-tariff barriers, which had serious implications for groups other than the federal government. The committee was chaired by a federal deputy minister and provincial briefs were collected alongside those from other non-governmental stakeholders.\textsuperscript{178}

While it was a formal mechanism through which provincial governments could register briefs on international trade, this process was not collaborative and did not seem to confer significant legitimacy on a provincial role in trade policy formulation, as provincial input was collected together with other non-government groups.

The lack of regional and jurisdictional representation in this process was addressed in 1975 with the creation of an ad hoc federal-provincial committee of deputy ministers. While this committee was more collaborative and regarded the provincial role with greater significance than the CTTC had, the committee meetings were not regularized.\textsuperscript{179} During the Tokyo Round, a third mechanism for consultation was developed in 1977. A Canadian Coordinator for Trade Negotiations (CCTN) was appointed by the federal government through which provincial and other stakeholder input was to be coordinated in preparation for negotiations. According to Kukucha, provincial bureaucracies were involved in providing information to assist the CCTN in negotiations.\textsuperscript{180} Provincial input into the negotiations was still heavily guided and narrowly focused by the federal government however, indicating that the provinces

\textsuperscript{178} Kukucha, The Provinces and Canadian Foreign Trade Policy, 139.
\textsuperscript{179} Ibid. 140.
\textsuperscript{180} Ibid. 140.
played a supporting role during the negotiations with the agenda firmly controlled by the federal government.

More formalized consultative mechanisms which involved the provinces more significantly in policy formulation began with the Canada-US Free Trade Agreement (CUSFTA). The federal government realized provincial cooperation was going to be important for this agreement to succeed and provincial governments were loudly demanding “full...participation” in the negotiating process. As such, the federal government put forth this compromise:

1) The first ministers would meet once every three months for the duration of the negotiations, to review their progress. The first such meeting was set for 17 September 1986.
2) Designated ministers would meet as required, chaired by the new federal Minister for International Trade, Pat Carney.
3) There would only be one Chief Negotiator for Canada, Simon Reisman, who would be fully responsible to the federal cabinet for the conduct of the negotiations. The Trade Negotiations Office would be completely under the Chief Negotiator’s supervision. There would be no provincial representatives in the TNO or in negotiating sessions with the United States.
4) The Chief Negotiator’s mandate would be established by the federal government, in consultation with the first ministers and the designated ministers.
5) There would be close ongoing consultation through the CCTN with Simon Reisman as Chairman. The CCTN, which had met once a month since January 1986, would continue to meet as often as required. Its function would be to provide liaison and advice.
6) The federal government would formally seek the views of all provinces prior to endorsing any agreement. There was no agreement on the issue of the role of provinces in the ratification or implementation of the agreement.

This consultative mechanism established regular meetings, indicated that provincial input may be considered in the development of the negotiating mandate, and stated that provincial views would be sought prior to the endorsement of any agreement.

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182 Ibid, 95.
Furthermore, this mechanism did establish a more formal and clearly spelled out role for the provinces that arguably gave provinces a greater degree of certainty in their role and permitted for participation preparation.

Information sharing between the federal government and the provinces continued during the NAFTA negotiations. Provinces “received copies of every draft proposal tabled by the United States and Mexico and information on a number of specific sectoral issues. On several occasions, the provinces even had access to material not yet reviewed by cabinet.”183 Furthermore, the number of venues through which provinces had input was maintained. The CCTN was transformed into the CFTA, to address issues arising from the CUSFTA, and under the newly established CNAFTN, many provinces had groups of provincial officials from different government departments to address sector-specific issues.184 To address both regional and global trade issues, the CNAFTN process evolved to become the CTrade committee system for international trade. Much of the same structure was maintained with two enhancements: firstly, the frequency of meetings was increased to four regular meetings per year; and secondly, the location of one of the meetings was to be outside of Ottawa, arguably to emphasize a more collaborative relationship with the provinces.185 This meeting showcases trade concerns of the region within which it takes place and allows the provinces to feel as though they can have some control over the agenda.

Although the more formalized consultative mechanisms enhanced provincial involvement in international trade negotiations, there have still be several challenges and criticisms. Firstly, these consultative mechanisms did not bestow “full provincial

183 Kukucha, The Provinces and Canadian Foreign Trade Policy, 147.
184 Ibid, 146-7.
185 Ibid, 149-150.
participation" and the extent to which they significantly improved access to trade policy formulation is debatable. The establishment of the Trade Negotiations Office, in addition to the office of the Canadian Coordinator for Trade Negotiations during the CUSFTA negotiations indicates the federal government desired to maintain firm control over the negotiations of the CUSFTA. The TNO, which was largely removed from provincial influence, added a second layer to the policy formulation process that did not necessarily bring the provinces any closer to decision-making. Furthermore, establishing that the TNO would be solely accountable to the federal government, would have no provincial representatives and the Chief Negotiator would receive its mandate from the federal government suggests that the federal government may have viewed the provincial influence over and presence in the CCTN as too strong and desired to limit it. Finally, the federal compromise for involving the provinces during the CUSFTA negotiations committed the federal government to seeking provincial positions prior to the acceptance of any agreement. However, provincial participation in the final stages of the CUSFTA was limited, partly because of the short deadline imposed on negotiators to accept the deal. Nonetheless, there were no formal meetings between provinces and the federal government between the release of the preliminary agreement and the release of the final legal text.186

The utility of information sharing during the CNAFTN and CTrade have also been challenged. Some critics have charged that the extensive amount of information provided to the provinces by the federal government during the CNAFTN process was intended to distract provinces from contributing strategically to the Canadian negotiating

position by focusing their attention on specifics and overwhelming provincial bureaucratic capacity with information. Kukucha’s research indicates that the CTrade process has received similar criticism. He recounts that some officials feel that CTrade meetings are primarily opportunities for the federal government to brief the provinces on trade issues rather than arenas for formal consultation. Some have also complained of documents arriving late, inhibiting policy planning.

These criticisms illustrate the continued limitations of federal provincial consultative mechanisms. Despite these challenges, however, the more recent formalized consultative mechanisms pursued during the CUSFTA and afterwards reflect a realistic approach to the type of consultation in which the federal government is willing to engage. These mechanisms are more regularized, do bring the provinces closer to policy formulation, and as such, recognize the legitimacy of provincial involvement in trade policy formulation, given the provincial power of implementation where provincial jurisdiction is implicated. Suggestions of making provincial positions conveyed through these mechanisms binding on the federal government are not appropriate for this policy option, as they would move such mechanisms beyond consultative by definition. Such suggestions are more appropriate for other policy options that will be considered in subsequent chapters. The following section will apply the evaluation criteria outlined in chapter two to the more formalized consultative mechanisms that emerged during and after the CUSFTA to determine how consistent this policy option is with the changing nature of international trade agreements, the significance of provincial jurisdiction, and the problems inherent in underestimating this, as outlined in chapter one.

188 Ibid, 150.
Constitutionality

The consultative mechanisms described in this chapter do not challenge or threaten the constitutional division of powers as delineated by the courts over the negotiation and implementation of international trade agreements. The division of powers mandates that negotiating international treaties is the exclusive responsibility of the federal government. According to the ruling in the 1937 *Labour Conventions* case, provinces have the responsibility for implementing international commitments where they fall within provincial jurisdiction.189 The domestic consultative mechanisms outlined above do not challenge either level of government's responsibilities. Although the federal government would involve the provinces in developing the negotiating position according to the preferred consultative mechanism outlined above, the federal government would still retain the exclusive right to negotiate international agreements on behalf of Canada. Furthermore, although the provinces had been involved through the consultative mechanism in developing the negotiating position, they would still retain the ability to implement, or perhaps more significantly, not implement international agreements that affected their jurisdiction.

The consistency of the above outlined consultative mechanisms with the division of powers is further substantiated by the Supreme Court of Canada's recent direction as outlined in the *Crown Zellerbach* and *CN Leasing* decisions. These decisions, as described in chapter one, show the Supreme Court's concern for protecting the federal-provincial balance of power. The Supreme Court was divided over the *Crown Zellerbach* decision to allow the extension of the federal peace, order and good government clause,

and cautioned that there must be “ascertainable and reasonable limits in...impact on provincial jurisdiction” should the court extend federal power.  

190 In the *CN Leasing* case, which laid out the conditions for extending the federal trade and commerce power, the court also said that “consideration of the seriousness of the encroachment on provincial powers,” would have to be undertaken.  

Consultative mechanisms allow for the balance that has been determined appropriate by the courts in giving the federal government the ability to negotiate international agreements and provinces the responsibility for implementing in areas of provincial jurisdiction in the past to be maintained. They allow for provincial policy preferences to be conveyed during the policy formulation phase, so as to encourage provincial compliance with international commitments that the federal government negotiates, and reduce the likelihood that the federal government would be able, or would have to argue for an extension of its power into provincial jurisdiction.  

192 While facilitating this, consultative mechanisms do not suggest a re-definition of the roles and responsibilities of each level of government as defined by the division of powers. Thus, consultative mechanisms score highly on the constitutionality criteria established in chapter two. This is particularly the case for more binding mechanisms developed during the CUSFTA and afterwards, as they provide a greater recognition of the provincial power of implementation in areas of provincial jurisdiction than earlier mechanisms, which thus makes them more consistent with the balance of powers in this area, as issue areas within provincial jurisdiction are increasingly addressed by international trade.

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191 Ibid, 4.  
agreements. Consultative mechanisms would also be less likely to legitimate an extension of federal powers into provincial jurisdiction, which would disrupt the balance of powers that the courts have seen fit to maintain.

**Representativeness**

According to the representativeness criterion defined in chapter two, the representativeness of a policy option has two components: firstly, it must allow government policy preferences to be conveyed; and secondly, such conveyance must be meaningful, referring to the likelihood that such input would be incorporated into policy formulation and/or decision-making. As the federal government has maintained itself as the sole entity which develops the final negotiating position through the consultative mechanisms it has pursued, and negotiates the agreements itself, it can be assumed that the federal government allows its policy preferences to be conveyed. On the provincial side, the consultative mechanisms that have been pursued give the provinces the opportunity to convey their policy preferences to the federal government.\(^{193}\) Thus, the consultative mechanisms that have been pursued satisfy the first component of the representativeness criterion. This is particularly true of the mechanisms utilized during the CUSFTA and since, as these mechanisms have allowed for more regular and scheduled conveyance of provincial policy preferences.

In terms of the second component of the representativeness criterion, all of the consultative mechanisms outlined in this chapter illustrate that the federal government has been able to maintain firm control over the policy formulation process and ensured that its preferences are meaningfully translated into the Canadian negotiating position.

\(^{193}\) Skogstad, "International Trade Policy and Canadian Federalism," 162.
With the more formalized consultative mechanisms developed during the CUSFTA and onwards, the opportunities for meaningful provincial involvement have increased, without decreasing the level of federal control over the process significantly. On the provincial side, as meetings have become more regularized, provinces have had a greater opportunity to prepare for meetings which has likely permitted provinces to improve the calibre of their contributions as opposed to when meetings were ad hoc. Furthermore, with some meetings taking place outside of Ottawa, the provinces have had greater opportunities to shape the agenda of discussions, which has perhaps allowed them to highlight issues that may not have previously received much attention. Despite this, however, ultimate negotiating position formulation and decision-making has remained with the federal government. While opportunities for provincial input have increased with such consultative mechanisms, there is no guarantee that provincial interests will be reflected in the final policy, which was a crucial part of the definition of the criterion identified for optimal representativeness.

This issue is particularly acute if one considers that there may be regional differences in policy preferences. Because the consultative mechanisms outlined here do not provide a thorough or guaranteed system by which to account for and address differences in policy preference between provinces, the degree to which provincial policy preferences can be meaningfully conveyed can be skewed.194 For example, Kukucha explains that during the CUSFTA negotiations, the west worried Ontario and Quebec

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194 De Boer, "Canadian Provinces, US States, and North American Integration," 6. De Boer discusses differences in provincial capacity to be involved in consultations; however, this is an issue that cuts across all policy options being evaluated in this thesis and as such will be discussed in the concluding chapter.
would dominate discussions. Because consultation provides a considerable amount of
leeway to the federal government in determining the extent to which provincial policy
preferences will be incorporated into the Canadian negotiating position and decision-
making regarding international trade agreements, the consultative mechanisms described
above score poorly on the representativeness criterion.

Efficiency

The consultative mechanisms outlined above allow the federal government to
fairly quickly and easily negotiate international trade agreements. Firstly, because
consultative mechanisms as they have been described in this chapter do not bind the
federal government to consider provincial perspectives, the federal government can
quickly negotiate international trade agreements with international actors. While the more
formalized mechanisms suggest regular meetings and seeking provincial views prior to
the endorsement of any agreement, they do not bind the federal government to these
process norms in any way. One example would be the final stages of CUSFTA outlined
above, where provincial acceptance was not sought, nor were any federal-provincial
meetings convened because the federal government deemed the deadlines too tight. In
practice however, consultation with the provinces would likely occur during negotiations.
This would be because the federal government would be accountable to international
actors for provincial compliance and implementation. They would likely want to ensure
the agreement they were negotiating would be accepted and implemented by the
provinces. This could slow the negotiating process.

195 Kukucha, The Provinces and Canadian Foreign Trade Policy, 142.
197 Ibid, 96.
Another consideration affecting efficiency would be the extent to which provinces desired to play a supporting role in the negotiations. More formalized consultative mechanisms such as those pursued during and after the CUSFTA involve the provinces as collaborators in Canadian trade policy development behind the scenes, and as such, discourage unilateral international provincial efforts that may undermine a coherent national negotiating position or pose challenges for negotiators during negotiations.\textsuperscript{198} As consultation maintains the federal government as the sole international treaty negotiator for Canada and legitimates it as the sole representative of the Canadian position in the international arena, the federal government can maintain control over the Canadian negotiating position during international trade negotiations. Furthermore, through consultative mechanisms, provinces remain dependent on the federal government to represent them internationally, and as such, will likely mobilize quickly if the federal government requires them to during negotiations. Maintaining final control over the Canadian negotiating position and remaining the sole international representative for Canada during the negotiation of international trade agreements will enhance the speed and ease with which the federal government would be able to negotiate international trade agreements. On balance, the consultative mechanisms outlined in this chapter provide a relatively high degree of efficiency in the negotiation of international trade agreements.

\textbf{Acceptability to International Actors}

The extent to which consultative mechanisms, such as those outlined above, would be acceptable to international actors is closely linked to how reliably Canada is

\textsuperscript{198} Skogstad, "International Trade Policy and Canadian Federalism," 161.
able to negotiate and follow through on the commitments it makes. Consultative mechanisms have arguably been relatively acceptable to international actors as a mechanism by which to involve provincial perspectives in the formulation of trade policy, negotiation and securing implementation, as Canada has not been visibly ostracized from international trade negotiations, and countries appear willing to continue to enter into trade agreements with Canada. Consultative mechanisms seem not to have deterred trading partners from entering into agreements with Canada to this point.

However, according to Brown’s discussion of consultative mechanisms, “the lack of means of reaching binding decisions [on] the domestic side of the equation in Canada has raised questions about Canada’s ability to conduct effective trade relations.” There are two examples of situations in which consultative mechanisms have not been acceptable to international actors, and actions to address the inadequacy of this policy option have been taken. In 1987, Canada was involved in a dispute with the European Community over liquor and wine distribution and marketing, brought about because Ontario refused to comply with the regulations the federal government had negotiated under the GATT in this area. The consultative mechanism employed by the federal government did not bind the provinces to the commitments made during negotiations in any way and allowed Ontario to not follow through on implementation because its policy preference diverged from what had been committed to by the federal government.

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As the signatory to the agreement, the federal government was the only entity which international actors could hold accountable. However, the federal government argued unsuccessfully that it should not be held accountable, as the area in which the commitment had been made was under provincial jurisdiction. Thus, in this case, a consultative mechanism which did not guarantee provincial policy preferences were included in the Canadian negotiating position and did not bind the provinces to accept the final outcome of negotiations was unacceptable to international actors and resulted in a dispute being brought against Canada. Furthermore, during the negotiations of the CUSFTA, the United States insisted on a provision that would prohibit discriminatory pricing policies of provincial liquor boards. Likely in response to the provincial failure to stem discriminatory liquor and wine distribution and marketing policies despite international commitments the federal government had made, this insistence illustrates that consultative mechanisms may not achieve the degree of reliability international actors require when negotiating on international commitments with Canada.

Although the consultative mechanisms pursued during and after the CUSFTA are more formalized and have arguably made a greater attempt to regularly involve the provinces in trade policy formulation, dissatisfaction amongst international actors with this policy option may arise again in the future, particularly as international trade negotiations focus on areas of provincial jurisdiction. As areas of provincial jurisdiction are addressed, the requirement by international actors for stronger guarantees of provincial implementation and compliance will likely increase, and international actors may desire to deal with provinces more directly. Thus, this thesis argues that consultative

204 Stevenson, Unfulfilled Union, 272.
mechanisms have been somewhat acceptable to international actors, but that this assessment has the potential to become less favourable should this policy option not continue to substantially secure provincial implementation of and compliance with international trade commitments.

Consultative mechanisms have been the most commonly pursued policy option for involving the provinces in policy formulation around international trade agreements. During the Tokyo Round, such consultation was largely informal, ad hoc, and lumped provincial policy preferences in with those of other stakeholder groups. More formalized, regularized, and significant consultative mechanisms were developed during the CUSFTA and have been pursued since. In all types of consultation, however, the federal government has maintained final control over the formulation of policy preferences and positions during negotiations, and remains the sole actor at the negotiating table. As such, the constitutionality of the consultative mechanisms that have been pursued is high. No redefinition of the traditional division of powers is required, and the relative federal-provincial balance of power in this area of divided jurisdiction is maintained. While the more recent type of consultative mechanisms that have been pursued allow for greater representation, this mechanism does little to guarantee that provincial perspectives will be meaningfully reflected in the negotiating strategy or decision-making. As such, this policy option scores poorly according to the representation criterion.

The fact that the federal government is not bound to consider provincial perspectives during negotiations makes this policy option highly efficient for the negotiation and conclusion of international trade agreements; however, that representation of the provincial perspective during the negotiation is not guaranteed poses
potential difficulties to do with the acceptability of consultative mechanisms for international actors. If provincial perspectives are not represented, which the flexibility of consultative mechanisms does little to induce, there is a heightened likelihood of provincial non-compliance with negotiated commitments. This has been unacceptable to international actors on two occasions, and as such consultative mechanisms do not score highly on this criterion. Overall, consultative mechanisms provide much flexibility for the federal government but do not necessarily appropriately recognize the significance of the provincial role. As trade agreements increasingly move into areas of provincial jurisdiction and areas of particular significance to the provinces are increasingly targeted, the extent to which consultative mechanisms can continue to secure provincial compliance may be limited.
CHAPTER 4: RATIFICATION

The second policy option this thesis will consider is permitting the provinces to ratify international trade agreements that address areas of provincial jurisdiction. This option removes the responsibility for ensuring provinces comply with international trade commitments from the federal government, and would make the provinces accountable to international actors. A variant of this option was pursued with the North American Agreement on Labour Cooperation (NAALC) and the North American Agreement on Environmental Cooperation (NAAEC). As such, there is a degree of plausibility to this being employed as a viable policy option. However, full ratification has never been extended to the provinces, and consequently analysis of this option has been limited.

While this option vastly improves representativeness over the option of consultation, there are trade-offs in acceptability to international actors. This option will be evaluated in detail below, according to the evaluation criteria presented in chapter two.

Background

The notion of binding provinces to international trade commitments can be found in literature from the mid-1980s. The first high-profile mention of this option comes from the MacDonald Commission in 1985. The Commission argued that “where a proposed treaty contains provisions that require implementation by provincial legislatures or affect rights within areas of provincial jurisdiction, the relevant sections should be ratified by provincial legislatures;” obligations of the treaty would come into effect where two-thirds of provincial legislatures representing fifty percent of Canada’s population agreed to bind
themselves to it. According to Barrows and Jansen, the province of Ontario also proposed a framework for joint decision-making prior to the commencement of the CUSFTA that envisaged provincial participation throughout the negotiations and conclusion of the agreement, including provincial ratification of the agreement. Brown’s work in 1991 discusses three ways in which ratification could be employed as a viable policy option: firstly, by requiring treaties receive majority support in provincial legislatures; secondly, by reforming the Senate according to regional representation and requiring ratification of any treaty through that body; and finally, by establishing a “Federal-Provincial High Commission on Treaties and International Agreements” that would conclude all international treaties on behalf of Canada. Brown argues that the changing nature of international trade agreements increasingly requires the federal government to explore options for obtaining binding commitments to international trade agreements, which ratification can secure most reliably. Brown’s first suggestion has since been supported provincially, with a proposal from a British Columbia Special Legislative Committee in 1998, which stated that the federal government should be required to “secure the express consent of the Legislative Assembly of BC before making international commitments as part of a trade or investment treaty” involving provincial measures.

A less formal version of ratification has also been suggested to ensure provincial commitment. Regarding the Canada/U.S. Alaska Pipeline Treaty of the 1970s, Clifford

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208 Ibid, 120-121.
recounts the implicated provinces signed an annex to the agreement committing to permit activities associated with the treaty that affected them to occur. Clifford suggested such a model be employed in the future to both recognize the significance of provincial jurisdiction and ensure that Canada can adequately follow through on the commitments it makes.\textsuperscript{210} Furthermore, provincial governments signed a Statement of Intent under the GATT in the 1980s regarding provincial liquor board practices.\textsuperscript{211} A similar ‘signatory’ approach was pursued during the negotiation and conclusion of the NAALC and the NAAEC. According to Kukucha, provinces were involved in the drafting of the Canadian proposals and had access to all Mexican and American position papers on the NAALC and NAAEC.\textsuperscript{212} As these agreements addressed areas largely within provincial jurisdiction,\textsuperscript{213} and measures associated with them largely have to be implemented by the provinces to bring the treaty into force, the federal government involved the provinces throughout the negotiation process. The provinces were permitted to identify in an annex to the agreements whether or not they would be bound by the NAFTA side agreements.\textsuperscript{214}

For the purposes of this chapter, the policy option of ratification is defined as permitting provinces to bind themselves to international trade agreements the federal government negotiates in areas of provincial jurisdiction through a majority vote in the

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\textsuperscript{210} Clifford, “An Albertan Perspective,” 132.
\textsuperscript{211} Although this Statement was not binding, it still recognized the need for provincial commitments in areas of provincial jurisdiction such as this. Brown, “The Evolving Role of the Provinces in Canadian Trade Policy.” 107.
\textsuperscript{212} Kukucha, \textit{The Provinces and Canadian Foreign Trade Policy}, 522.
\textsuperscript{213} Personal interview, 27 January, 1994, as quoted in Kukucha, \textit{The Provinces and Canadian Foreign Trade Policy}, 522.
\end{flushright}
provincial legislative assembly. This would involve provinces binding themselves to parts of an agreement that address provincial jurisdiction or binding themselves to an entire agreement if the agreement addresses areas solely or primarily within provincial jurisdiction. Upon signing, provinces would be bound to implement and comply with the provisions of the agreement to which they had bound themselves, and would be subject to relevant dispute settlement mechanisms. Should any province fail to uphold commitments to which they bound themselves, international actors would be able to bring dispute settlement proceedings directly against the offending province instead of against the federal government, as is currently the case.

Constitutionality

While permitting provinces to ratify international trade agreements in areas of provincial jurisdiction represents a departure from current Canadian constitutional practice, permitting the provinces to ratify international trade agreements is not significantly inconsistent with the spirit of the division of powers. De jure, bestowing the power of ratification upon the provinces would likely be seen as inconsistent with the present division of powers if challenged in court, as the provincial role has been limited to implementation. The Labour Conventions case states that the federal government has the authority to negotiate and sign an international treaty on any matter.215 However, outside of its legislative competence, it may not introduce implementing legislation. As “treaties do not have a direct effect in domestic law without implementing legislation,” provinces are the only entities that may legitimately bring international agreements into

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force in areas of provincial jurisdiction. Given this, the federal government’s ability to negotiate and bring international treaties into force means little in practice if the issue area covered by the treaty is not within federal jurisdiction; despite being negotiated and signed, the treaty is not in force until implementing legislation has been introduced, which only the provinces may do in areas of provincial jurisdiction. Permitting provinces to ratify international trade agreements in areas of provincial jurisdiction would make ratification meaningful and compliment the role and responsibility of implementation bestowed upon the provinces by the courts in the Labour Conventions case. Because it is only in concert with the power of implementation that ratification has significance, it can be argued the courts would see allowing provinces to ratify international trade agreements in areas of provincial jurisdiction as de facto constitutional.

Permitting provinces to ratify international trade agreements may also be considered constitutional on the grounds that it maintains an appropriate balance of power. As outlined in chapter three, the courts have been wary of altering the federal-provincial balance in this area. If it can be argued that ratification more relevantly and appropriately lies with the entity that has the power to introduce implementing legislation and bring the treaty being ratified into effect in domestic law, permitting provinces to ratify international trade agreements will not be seen as drastically altering the balance that exists with the present division of powers and as such may be seen as constitutional. Thus, while a literal reading of the division of powers could find permitting the provinces to ratify international agreements in areas of provincial jurisdiction to be unconstitutional,

217 Federally, treaties may be brought into force by Royal Prerogative exercised by the federal cabinet. However, if a treaty requires actions that exceed what is possible under the Royal Prerogative, implementing legislation must be introduced through Parliament.
a more nuanced interpretation that considers the spirit of the division of powers in this area could find bestowing the responsibility for ratification upon provinces constitutional. As such, this policy option should be considered moderately constitutional.

**Representativeness**

The policy option of ratification is extremely representative for both levels of government, as both have mechanisms by which they can convey their policy preferences and have them meaningfully incorporated into decision-making. By allowing the federal government to continue to be the sole negotiator of international trade agreements, ratification permits the federal government to convey its policy preferences during the negotiation of the agreement. Federal policy preferences are meaningfully conveyed in decision-making because they would likely be directly reflected in the final text. Furthermore, as the federal government would still be charged with the responsibility of introducing implementing legislation to bring the provisions of the agreement into force in areas of federal jurisdiction, federal policy preferences have another way in which they can be meaningfully conveyed. Should the federal government choose to introduce implementing legislation, they are clearly conveying a preference for the agreement.

As ratification permits the provinces to determine whether or not to bind themselves to international trade commitments that address areas within their jurisdiction, provinces are able to convey their policy preferences through the act of binding themselves or not to the agreement.\(^{218}\) Provincial options are somewhat constrained in making this decision, however. Because the provinces are not involved in the

negotiations of the trade agreement, the final text to which they may or may not bind themselves may not contain provisions with which they are entirely satisfied. Provinces will perhaps have to weigh the benefits and drawbacks of binding themselves to the agreement or the portions that affect provincial jurisdiction. They would not have the option of conveying preferences related to particular clauses or provisions in the agreement because the agreement would already have been concluded by the time the provinces had the opportunity to give binding and meaningful reaction. However, it is likely that if the option of ratification were employed, the federal government would consult and involve the provinces during the negotiation phase, as was done during the NAALC and NAAEC. Such consultation would make decision-making during the negotiations, and for the provinces during ratification, more meaningful, as there would be opportunities for provincial policy preferences to be conveyed during both the negotiation and implementation of the agreement. Thus, ratification scores highly according to the representativeness criterion established in chapter two.

Efficiency

According to the definition presented in chapter two, efficiency refers to the speed and ease with which international trade agreements are negotiated and concluded. Ratification largely fulfills this definition because it permits the federal government to solely negotiate international trade agreements. This would permit the federal government to negotiate any agreement the way they saw fit and would not require the federal government to involve the provinces directly. As such, the negotiation phase could be conducted quite quickly and easily by the federal government. In practice, however, as in the NAALC and NAAEC, the federal government may want to consult the
provinces during negotiations. The federal government may want the provinces to sign on to agreements that facilitate liberalization in certain provincial areas, and as such would likely consult the provinces to ensure that the provinces were on-side with what was being negotiated and would be likely to support it. For example, although the NAALC and NAAEC were regarded as “just not that significant,” the federal government entered into compliance agreements with selected provinces for both of these agreements. However, the incentive for such consultation might not be as significant as it would be if the policy option of consultation were being employed. As the federal government would not be accountable for provincial implementation to international actors, the desire for consultation by the federal government may not be as strong.

While the incentive for the federal government to pursue consultation may not be as strong, the desire for consultation by international actors may increase the certainty that it would occur, slowing negotiations. International actors may want provincial perspectives during the negotiation of an agreement on the likelihood of provincial commitment once the agreement was negotiated. Together, however, neither of these activities, including entering into separate negotiations with the provinces to ensure compliance (which may be done concurrently or after the agreement is concluded), or confirming a position with the provinces, would significantly detract from the efficiency of the negotiations with an international actor.

A final consideration worth noting, although speed and ease of implementation is not part of the definition for the efficiency criterion, is that it is likely that implementation would be secured more quickly and easily by allowing provinces to ratify international

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trade agreements that affect areas of provincial jurisdiction. This is because, once provinces have bound themselves to an agreement, provinces would be accountable to international actors for following through on the commitments they had made. Thus, provinces have a direct incentive to follow through on the commitments they have made so as to avoid an international dispute. Overall, in terms of negotiation, conclusion, and implementation, permitting provinces to ratify international trade agreements that affect areas of provincial jurisdiction would have a relatively high degree of efficiency.

**Acceptability to International Actors**

While the process for negotiating the agreements would be relatively efficient, the number of international actors wanting to negotiate international trade agreements with Canada would likely be reduced if provinces were permitted to ratify international trade agreements in areas of provincial jurisdiction. While implementation would likely be more reliably secured in provinces that signed on to the agreement, as they would be held directly accountable, there would be the distinct possibility of one or more provinces not agreeing to sign on to the agreement. This would negate the negotiating process in essence, because commitments contained in the agreement may not be committed to by all or certain provinces, at which the commitments may have been primarily targeted. This was a factor in the NAALC, which only Alberta, Quebec, Manitoba, and Prince Edward Island have signed, and the NAAEC, which only Alberta, Quebec, and Manitoba have signed. Differential commitments to international trade agreements may also be problematic for international actors and have a deterrent effect on their desire to enter into negotiations with Canada, because inconsistency in domestic regulations is perceived

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negatively by international actors. Inconsistency in domestic regulation makes it difficult for international actors and firms to project profitability, and plan investment and marketing strategies. This may affect the desire of governments to spend time and resources negotiating an agreement that may not make it any easier for their businesses to operate in and trade with Canada. 221

Furthermore, permitting individual provinces to bind themselves or not to international agreements may require an additional level of negotiation that international actors may not be prepared to take on. 222 It is likely that international actors would not want to have to try to convince individual provinces to bind themselves to an international trade agreement that they had just spent months or years negotiating. Presenting at a Canadian conference on Canadian federalism and globalization, U.S. lawyer Robert Herzstein argues that it is important to international actors that there is one authority that is able to decisively deal with issues of international trade and commerce to avoid wrangling with sub-national governments over compliance and implementation issues. 223

Having to deal with individual states or not being able to count on their commitment to the negotiated agreement would frustrate international actors and may deter them from engaging in international trade negotiations with Canada, or result in international actors insisting on the inclusion of undesirable rules to compensate for this. In the case of the NAALC, Canada cannot challenge labour violations in the United

States or Mexico unless the issue would fall under federal jurisdiction in Canada. If it falls under provincial jurisdiction, the matter cannot be brought forward unless provinces included in the declaration account for 35 per cent of Canada's labour force,224 provincial ability to challenge practices in the United States or Mexico is de facto nullified if not enough provinces to make up 35 per cent of Canada’s labour force sign the agreement, as the provisions of the agreement, including dispute settlement, will not be applicable to them. In the NAAEC, Canada can only request panel proceedings be brought against the United States or Mexico for a suspected violation of the agreement if “the provinces included in the declaration account for at least 55 per cent of Canada’s Gross Domestic Product,” or if for a specific sector, the provinces included in the declaration account for at least 55 per cent of total Canadian production in that sector, or unless Ottawa can show the violation is regarding a matter that is solely under federal jurisdiction.225 As such, permitting provinces to ratify international trade agreements in areas of provincial jurisdiction would likely be quite undesirable to international actors. Thus, ratification scores very poorly according to this criterion.

On balance, permitting provinces to ratify international trade agreements where they affect provincial jurisdiction would pose some challenges. The constitutionality of this issue could be contested, as it currently stretches the literal interpretation of the division of powers. While it is highly representative, allowing provinces to formally convey policy preferences by determining whether or not they will be bound to the agreement, how this option would affect efficiency depends on the level of consultation the federal government sees fit to engage in and the level demanded by international

224 Kukucha, The Provinces and Canadian Foreign Trade Policy, 521.
actors. Not having the provinces involved in the negotiation and not requiring the federal government to be accountable for provincial compliance with the agreement in a dispute certainly provides the conditions under which the federal government would be able to negotiate as autonomously and easily as they desired. However, ratification would likely be highly undesirable to international actors. International actors would not likely want to conclude an agreement without certainty that it would be implemented, nor would they likely want to engage in further negotiations with individual provinces to secure compliance. This negotiating strategy may reduce the number of international actors interested in concluding international agreements with Canada or may result in undesirable agreements that contain unfavourable stipulations and safeguards in response to concerns about domestic compliance. Ratification would provide mixed results: while it may be a more desirable strategy for negotiations on issues that are clearly provincial and about which the federal government does not have a strong preference, it would not be desirable for agreements in which Canada has a strong stake and interest, and is concerned about obtaining strong commitments and concessions from other international actors.
CHAPTER 5: PROVINCES AT THE NEGOTIATING TABLE

Most commonly, provincial demands for participation in the negotiation of international trade agreements have called for ‘full participation,’ including a place for provincial representatives on international trade agreement negotiating teams. This policy option, permitting provincial participation on Canadian negotiating delegations and allowing provinces to be ‘in the room’ during international trade negotiations, is the final option to be evaluated in this thesis according to the criteria discussed in chapter two. This option would enlarge the Canadian negotiating team, and permit provinces to speak to policy preferences and issues affecting provincial jurisdiction during the negotiations of international trade agreements. While this option would be the most representative of the three options discussed in this thesis, it would significantly challenge the division of powers regarding the negotiation of international treaties, and would pose challenges for the efficiency with which international trade agreements could be negotiated.

Background

At the Annual First Ministers’ Conference in 1985, the provinces agreed on the “principle of full provincial participation.” In 1986, this term was operationalized by Alberta and Ontario, which argued provincial participation should include, amongst other things:

the establishment by all first ministers of a joint mandate and 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 [during the CUSFTA negotiations]; full participation
in the negotiating strategy; full information sharing in confidence with the federal negotiators.\textsuperscript{226}

While most aspects of this definition of full provincial participation could be accomplished by enhanced consultation, the desire for provincial representatives to be in the room during negotiations could not be. This participation would be highly visible. John Kincaid states that constituent diplomacy such as that exercised by sub-national governments representing provincial and local issues, “contributes to the democratization of national political processes by adding new voice to foreign-policy-making.”\textsuperscript{227} The assessments of Herzstein,\textsuperscript{228} Craven,\textsuperscript{229} and Simeon,\textsuperscript{230} however, suggest that provincial voices in the international arena, particularly where they dissent from the position of other provinces or the federal government can have negative implications for the country as a whole. Providing provinces with a voice and visibility to international actors is likely part of the reason provincial proposals for full participation, such as the 1986 proposal, have been rejected by the federal government.

In fact, this strategy has never been fully utilized by the federal government in the negotiation of a major international trade agreement. According to Douglas Brown, provinces were invited to the launch of the Uruguay Round in 1986, the mid-term meeting in Montreal in 1988, Cairns group meetings, and provinces have made missions to Geneva to meet with other delegations to gain “first-hand information about negotiating issues;” however, all of this occurred by invitation from the federal

\textsuperscript{227} Kincaid, “Constituent Diplomacy in Federal Polities and the Nation-State,” 73.
\textsuperscript{228} Herzstein, “The U.S. Perspective,” 139-140.
\textsuperscript{229} Craven, “Federal Constitutions and External Relations,” 10.
government and did not constitute participation in the Canadian delegation, nor participation in the negotiations themselves. More recently, however, some provincial participation during negotiations has occurred. During the final stages of the North American agreements on labour and environmental cooperation, provinces were invited to Washington: “six provinces attended various stages of the talks and Alberta and Quebec were present for the entire period.” While it is unknown how valuable this participation was given the late stage at which they were brought into the negotiations and the extensive behind the scenes consultation between federal and provincial officials that occurred before provinces were present at the negotiating table, this nonetheless represents an example of federal support for provincial participation in negotiations when areas of provincial jurisdiction are significantly affected.

Furthermore, provincial officials continue to advocate for direct provincial participation in negotiations. Regarding possible movement towards continental energy integration, provincial premiers at their 2001 conference called for full provincial and territorial participation in international energy discussions and negotiations. Simeon states that as owners, regulators, and financial beneficiaries of all forms of energy, “producing provinces have made it clear that they are to be at the table in any discussions, and [former] Alberta Premier Ralph Klein has independently touted his province’s willingness to proceed in Washington [with continental energy integration discussions].”

For the purposes of analysis in this chapter, permitting a provincial place at the negotiating table would entail the federal government inviting one provincial

231 Brown, “The Evolving Role of the Provinces in Canadian Trade Policy,” 100.
representative for each province to be on the Canadian negotiating delegation and present at the negotiating table during the negotiation of an international trade agreement. While provincial and federal representatives would be equal parties in the negotiations, the federal government would retain responsibility for signing the treaty into law for all of Canada and the provincial governments would retain responsibility for implementation in areas of provincial jurisdiction. Disputes and accountability to international actors for compliance would continue to be the primary responsibility of the federal government, as it would sign on to the agreement on behalf of Canada.

**Constitutionality**

Permitting the provinces to have a seat at the negotiating table during the negotiation of international trade agreements would challenge the division of powers regarding federal and provincial responsibilities in this area. According to Richard G. Richards, it is well-established that the federal government has the exclusive right to negotiate and conclude treaties; "the provinces do not enjoy such power."\(^{234}\) Sitting at the negotiating table as equal participants in negotiations, the federal government would no longer enjoy this exclusive right. Thus, *de jure*, this policy option would violate the division of powers established by the constitution and subsequent legal interpretations.

In practice, however, this strategy may encourage provincial implementation and compliance with international trade agreements which legal scholars Mark A. Luz and Marc C. Miller have suggested might be a rationale for altering the present division of powers. Luz and Miller argue that the courts may extend the federal role in the negotiation and implementation of international trade agreements into provincial

jurisdiction if provinces fail to comply with international commitments.\textsuperscript{235} They suggest that the courts have committed to interpret legislative activities with a view to international law and international legal commitments.\textsuperscript{236} Should provincial participation at the negotiating table be sanctioned by the federal government and result in greater likelihood of securing compliance with international trade obligations and international law, the courts may be inclined to consider supporting this interpretation. This may also be likely since a political solution that resulted in greater compliance, such as permitting the provinces to have a seat at the negotiating table, would prevent the courts from having to rule in favour of extending the federal trade and commerce power, and the federal peace, order, and good government clause into provincial jurisdiction to secure compliance, as Luz and Miller suggest the courts will become increasingly inclined to do.\textsuperscript{237} This interpretation would stretch the judiciary's powers of interpretation, however. On balance, it seems likely the courts would view this policy option as unconstitutional if they were asked to rule on it. Thus, permitting the provinces to have a seat at the negotiating table during international trade negotiations scores poorly according to the constitutionality criterion outlined in chapter two.

**Representativeness**

Having both the federal and provincial governments at the negotiating table allows both entities an opportunity to convey policy preferences. The extent to which this conveyance is meaningful for the federal government, however, is diminished by provincial participation. Without provincial participation, the federal government could

\textsuperscript{235} Luz and Miller, “Globalization and Canadian Federalism,” 992-3.
\textsuperscript{236} Ibid, 978-80.
\textsuperscript{237} Ibid, 997.
ensure that its preferences were dominantly reflected at the table. Should provincial perspectives be represented, they would be represented as the federal government saw fit to represent them, and only if the federal government thought such representation was to its benefit. With provincial participation and the addition of other actors, the federal voice would be diluted. While the federal government would still be able to convey its policy preferences, these would have to compete with potentially opposing perspectives and federal perspectives may not be reflected in the final agreement to the extent that they would have been had the federal government remained the sole participant in the negotiations for Canada. Given that the federal government would still have to be the signatory to the agreement, however, it is likely that the federal perspective would be significantly incorporated in the decision-making over the final text of the agreement. Thus, although federal policy preferences may be diluted, they would still be meaningfully conveyed through this policy option.

Allowing provinces to be visibly involved in the negotiation of international trade agreements would permit the provinces to also meaningfully convey their policy preferences. By having a seat at the table, provinces would be permitted an avenue through which their preferences and concerns could be conveyed directly, without being filtered through the federal government, as would be the case with the other policy options discussed in this thesis. The absence of filtering increases the likelihood that provincial preferences will be meaningfully conveyed and incorporated into decision-making, as the federal government would not have the opportunity to shape provincial perspectives to fit its preferences. Furthermore, it would allow provinces to answer specific questions about particular provincial positions, information about which the
federal government might not have been able to provide, and which might influence the perspective of international actors. Given that the federal government would be the signatory to the final negotiated agreement, provincial perspectives might be tempered by stronger federal policy preferences. However, the ability to directly convey positions and provide information to international actors during negotiations would enhance and make more meaningful the conveyance of provincial perspectives and their role in decision-making. Thus, permitting provinces to have a seat at the negotiating table is highly representative according to the criterion established in chapter two.

**Efficiency**

Permitting provinces to have a seat at the negotiating table would pose significant challenges for efficiency, which has been defined for the purposes of this thesis as the quickness and ease with which international trade agreements could be negotiated and concluded. This policy option would reduce the speed with which negotiations could proceed and conclude. As this option would significantly increase the number of participants at the negotiating table, the number of individual perspectives to be heard would presumably increase as well. To hear all of these perspectives, and challenges to them if there are competing perspectives, would increase the amount of time spent sharing information and opinions dramatically, before the exchange and deal-making between Canada and the other international actor(s) with which Canada would be negotiating could even occur. Furthermore, if there were a number of competing perspectives, it would take a significant amount of time to reconcile them during the exchange and deal-making of negotiations. With an increase in actors at the negotiating table, an increase in divergent perspectives can reasonably be expected, and as such, the
time required to deal with them and come to agreement should be expected to increase as well.

Competing perspectives, which would likely increase with an increase in the number of actors at the negotiating table, would also affect the ease with which international trade agreements could be negotiated and completed. Not only would reconciling competing perspectives increase the amount of time it would take to conclude negotiations, but it would also make the task for reconciling these perspectives incredibly difficult. Developing agreement amongst Canadian actors, let alone agreement amongst Canadian and international actors to conclude an agreement may require some considerable compromises that actors may not initially be willing to make. For example, provinces with more specialized and narrow positions on a few issues may have less ability or desire to make the trade-offs or concessions that frequently move negotiations along. An increase in the number of actors at the negotiating table would increase the constraints and considerations that would have to be worked through to come to agreement, making concluding negotiations difficult. This would be further exacerbated by the need to achieve a balance between federal and provincial policy preferences. This balance might be difficult to achieve to the satisfaction of all actors, which would make the negotiations increasingly difficult and time-consuming. As the federal government would be the actor that would sign the agreement on behalf of Canada and be accountable to international actors, they would likely demand a greater number of federal policy preferences be recognized. However, the provinces would still be in the room during the negotiations and may make statements about their interest in complying with the

agreement should their policy preferences not be reflected in the final agreement as well. Overall, this policy option would rank very poorly according to the efficiency criteria established in chapter two.

**Acceptability to International Actors**

The inefficiency of this policy option would likely be unacceptable to international actors. International actors would likely not want to increase the time it would take to negotiate and conclude an international agreement, nor would they likely desire to deal with internal squabbling during the conclusion of an international treaty. This would detract from the purpose of the negotiations and not be a valuable use of the international actors' time. More likely than not, having the provinces at the negotiating table would be viewed negatively by international actors.

However, it is possible that international actors would support this policy option given that it would permit them to glimpse internal divisions that they may be able to exploit during negotiations to obtain enhanced concessions. For example, Robert Herzstein explains that the U.S. was able to capitalize on dissenting opinion made public by British Columbia during the softwood lumber dispute of the early 1990s. Policy makers and negotiators could see there was potential support in B.C. for the U.S. argument that stumpage programs constituted a subsidy, which opposed the Canadian position, and thus could gauge to what extent they would have to compromise, given the domestic inconsistencies in the Canadian position. Furthermore, as Ian Robinson points out, it is significantly easier to cajole 10 individual provinces than one federal

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government. While Robinson is referring to the influence of multi-national corporations on provincial economic policy-making, his statement holds true for provincial involvement in international trade negotiations. Having the provinces at the negotiating table may allow international actors to promise specific concessions in areas of particular interest to certain provincial governments in return for concessions that the federal government or other provincial governments may not desire to make. This 'divide and conquer' strategy may not only pit Canadian governments against one another in negotiations, but may also allow international actors to apply pressure to the federal government to concede on certain issues 'from the inside' by securing support from provincial governments. The potential to obtain leverage or play domestic interests against one another to enhance the international actor's negotiating position may tempt international actors to lend support to this policy option.

Finally, international actors might be inclined to accept a provincial presence at the negotiating table because it may provide greater certainty around compliance with the negotiated agreement. De Boer argues that having provinces at the negotiating table would permit them to develop a clearer understanding of international trade obligations and expectations, which they sometimes have difficulty ascertaining where they have not been involved in the negotiating process. Provincial positions and conduct during the negotiation phase may provide the international actor with insights into the likelihood that implementation and compliance would be forthcoming from the provinces. This information would allow international actors to plan for potential dispute settlement proceedings, or perhaps even demand greater concessions during the negotiation of the

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agreement if this indication was noted early in the negotiating phase. Such concessions were demanded during the CUSFTA negotiations regarding provincial liquor boards. The U.S. insisted that the federal government be able to guarantee it could override provincial liquor boards likely in response to provincial failure to comply that had been the subject of a previous GATT dispute.\textsuperscript{243} Weighing the benefits and drawbacks of this option for international actors suggests that permitting the provinces to have a seat at the negotiating table would be marginally acceptable to international actors; however, even marginal acceptability would be to the detriment of Canada in international trade negotiations.

Permitting provinces to be at the negotiating table has not been significantly attempted as a policy for recognizing the significance of the provincial role, outside of provincial involvement in the final phases of the NAALC and NAAEC negotiations. Despite this, provincial leaders continue to advocate for provincial participation in the Canadian negotiating delegation and a seat at the negotiating table when they refer to ‘full participation’ in negotiations. Constitutionally, this policy option is problematic, as it explicitly challenges the federal government’s ability to negotiate and sign international treaties as defined by the division of powers. While this option is highly representative, as it permits an opportunity for provincial policy preferences to be directly conveyed during the negotiations, this policy option is highly inefficient. Giving provinces a seat at the negotiating table would likely increase the amount of time and decrease the ease with which international trade agreements could be negotiated and concluded. This inefficiency would likely make this option undesirable to international actors wishing to negotiate international trade agreement with Canada, despite the potential to exploit regional and domestic grievances to obtain more favourable concessions and to gain

\textsuperscript{243} Stevenson, \textit{Unfulfilled Union}, 272.
greater certainty around implementation. Overall, this policy option would not best serve Canada’s international trade goals.
CHAPTER 6: CONCLUSION

Chapter Summary

As international trade agreements become increasingly penetrating, given Canada’s division of powers, they have increasingly begun to address areas within provincial jurisdiction. This began with the Tokyo Round of the GATT, when governments started to address non-tariff barriers such as subsidies, government procurement and technical barriers, as well as issue areas such as agriculture, fisheries, and resource products, which had the potential to affect provincial jurisdiction. However, the agreements resulting from the Tokyo Round, contained commitments that would minimally affect provincial jurisdiction or provincial practices were largely exempted. With the Uruguay Round, although some of these commitments were expanded and new areas came under the purview of the WTO such as financial services, education, and health services, significant exemptions and minimal commitments in areas of provincial jurisdiction resulted. While the CUSFTA and the NAFTA addressed more areas falling within provincial jurisdiction than the GATT/WTO agreements have, the effect on provincial jurisdiction has been incidental to date.

The potential for these commitments to be interpreted with greater effect for provincial governments remains, particularly with the stronger dispute settlement.

244 Brown, “The Evolving Role of the Provinces in Canadian Trade Policy,” 91.
245 Ibid, 92.
procedures contained in the WTO and the NAFTA. Also, commitments to progressive liberalization, which target issue areas identified in WTO agreements where no or few commitments have been made, could serve to involve areas of provincial jurisdiction much more significantly than has previously been the case. Doha round negotiating proposals, should the round proceed, suggest that provincial jurisdiction will be significantly affected. Areas such as agriculture and procurement for which provincial governments have previously received significant exemptions will likely be targeted in this next round.

Should provinces not have an appropriate outlet for conveying their policy preferences during future negotiations, it seems likely that the potential for provincial non-compliance and failure to implement provisions they did not have a role in negotiating will be heightened. This may, in turn, increase the potential for federal-provincial conflict in this area. While the federal government may pursue legal means of attempting to secure provincial compliance, the analysis presented in chapter one of this thesis suggests that the courts would be reluctant to extend the federal role. Political means such as providing financial incentives, fining, or reducing transfer payments to provinces are also an option for securing provincial compliance; however, these means would be financially undesirable, politically unsavoury, and may further contribute to conflictual federal-provincial relations in this area.

The interpretation of the evolution of international trade agreements upon which the arguments in this thesis rest is largely supported in the literature. In particular, literature following the CUSFTA identifies the increasing significance of the provincial role and the need to engage provinces in the negotiation of international trade
agreements. This literature highlights increased provincial capacity and desire to have an international presence, particularly around economic issues. It suggests that these changes are contributing to decentralization in the federation and the likelihood of conflict in the federation should the significance of the provincial role not be recognized. Literature following the Uruguay Round and the NAFTA tends to be more modest in its assertions. It points to the consultative mechanisms the federal government has employed to obtain provincial input into negotiations, and suggests that these have been successful at mitigating conflict. Those who continue to predict conflict as areas within provincial jurisdiction are increasingly, more significantly and directly implicated in international trade agreements tend to see this conflict as contributing to centralization in the federation. This would occur as the federal government intruded into provincial jurisdiction and/or lobbied the courts for the ability to do so justifiably to ensure provincial compliance with international trade commitments. This thesis contributes to the literature in two ways: firstly, by building the post-Uruguay Round, post-NAFTA literature on this issue, which is by far more limited than the literature produced after the CUSFTA; and secondly, by providing a systematic evaluation of policy options for greater provincial involvement.

This thesis does not support the argument of several post-Uruguay, post-NAFTA works that the courts will extend the peace, order and good government clause, or the federal trade and commerce power to allow the federal government to intrude into provincial jurisdiction to ensure implementation of international trade commitments. Rather, it is more likely the Supreme Court will seek to maintain balance in federal-provincial jurisdiction in this area. As such, alternative political mechanisms for
encouraging provincial compliance should be pursued such as consultation, ratification, or giving provinces a seat at the negotiating table. These mechanisms have been suggested notably by Brown, Skogstad, and various provincial representatives, but have not been thoroughly evaluated. This thesis endeavoured to conduct a systematic evaluation of these options and developed evaluation criteria in accordance with the analysis of the problem presented in chapter one.

As the division of powers and the extent to which provincial perspectives have been represented largely contributed to the potential for conflict given divided jurisdiction over this issue, the extent to which each of these options is consistent with the division of powers and enhanced provincial representativeness became two of the criteria for measuring the utility of each option. Efficiency was chosen as a criterion by which to evaluate the utility of each option because the current process for negotiating international trade agreements is efficient, which is likely one of the things that has not discouraged international actors from entering into international trade agreements with Canada. Furthermore, there appears to be an inverse relationship between representativeness and efficiency, which makes this criterion an important counterbalance to the representativeness criterion. The final criterion, acceptability to international actors, was chosen, firstly, because this issue concerns international relations. Secondly, it was chosen because, as international trade agreements increasingly address areas of provincial jurisdiction, the probability that provincial governments will fail to implement and comply with international trade commitments if such commitments are not made with consideration of provincial perspectives is likely to increase. In turn, this will affect the desire of international actors to enter into international trade
negotiations with Canada. Thus, the options and criteria by which each policy option was evaluated were based on the analysis of the problem put forward in this thesis.

Upon evaluation of each of the options it becomes clear that each option has different strengths that lend to its use in specific situations. Table 1 compares the evaluation of each of the policy options by criteria.

Table 1: Summary of Policy Options by Evaluation Criteria

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<thead>
<tr>
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<th>Constitutionality</th>
<th>Representativeness</th>
<th>Efficiency</th>
<th>Acceptability to International Actors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consultation</td>
<td>High</td>
<td>Somewhat Low</td>
<td>Somewhat High</td>
<td>Moderate</td>
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<tr>
<td>Ratification</td>
<td>Moderate</td>
<td>High</td>
<td>Somewhat High</td>
<td>Low</td>
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<tr>
<td>Provinces at the Negotiating Table</td>
<td>Somewhat Low</td>
<td>High</td>
<td>Low</td>
<td>Somewhat Low</td>
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</table>

Range of Values: High, Somewhat High, Moderate, Somewhat Low, Low

As Table 1 shows, consultation is highly constitutional and relatively efficient because it does not suggest a departure from the division of powers, nor does it suggest that any other domestic actors besides the federal government be at the table during international trade negotiations. It is moderately acceptable to international actors, limited only by the fact that this option does little to guarantee implementation will occur in areas of provincial jurisdiction; however, it is the least representative of the options evaluated in this thesis. As such, the use of more formalized consultative mechanisms that developed during the CUSFTA would be adequate in the negotiation of international trade agreements that significantly address areas within federal jurisdiction. To be
suitable for negotiating agreements that significantly encompass areas of provincial jurisdiction, outstanding criticisms of the more formalized post-CUSFTA consultative mechanisms must be addressed. These include incomplete or inappropriate information sharing, distance from the development of the federal negotiating position, and process inconsistencies that have challenged meaningful provincial policy planning; if not addressed, these challenges will render even the more formalized consultative mechanisms increasingly ineffective should international trade agreements continue to focus attention on areas within provincial jurisdiction.

As can be seen in Table 1, ratification is less constitutional than consultation. While it would not be consistent with a literal interpretation of the division of powers, ratification means little without implementing legislation, which would be the responsibility of the provinces if provincial jurisdiction continues to be increasingly incorporated into international trade agreements. However, it should be considered at least as efficient as consultation. Consultations with provinces during the negotiating phase, which could slow the process, would be equally likely with the policy option of ratification as with consultation, although for different reasons. Ratification would be highly representative in contrast to consultation, but would likely be unacceptable to international actors, given that real commitment to the negotiated agreement would rest with the provinces, who would not be involved in negotiations. Despite some of the limitations of this strategy, it may be useful in the future, however. Given that this option would likely include consultation between the federal and provincial governments to ensure the final negotiated agreement reflected provincial concerns so as to increase the likelihood of implementation, it would be the best policy option of those considered for
facilitating federal-provincial dialogue. It would also build upon the representativeness of the consultative mechanisms that currently exist by allowing provinces to agree whether or not to bind themselves to the agreement. This policy option may be useful to the federal government around agreements to which the federal government does not have a strong interest in Canada being bound, agreements the federal government thinks are controversial, or those for which the federal government does not want to be held accountable.

As Table 1 shows, giving the provinces a seat at the negotiating table is the least constitutional of the options evaluated in this thesis because it most directly challenges the current division of powers. While this option can be considered relatively as representative as ratification, this option is highly inefficient according to the efficiency criterion outlined in chapter two. Having federal and provincial representatives at the negotiating table would increase the number of participants at the negotiating table, making compromise more difficult to achieve, and may bring to light regional differences and grievances, the exposure of which could weaken the Canadian negotiating position. As such, the acceptability of this option to international actors would be somewhat low. This option could be useful in negotiating agreements that involved significantly provincial jurisdiction, required provincial expertise to negotiate, and the federal government was not committed to negotiating quickly. It could also be useful if the federal government did not have a strong preference regarding the direction the negotiations, or perhaps had a legitimate interest in allowing provinces to shape the agreement.
Overall, consultation received the most favourable evaluations according to the criteria established in chapter two; however, there are challenges to this option that must be addressed for it to continue to be effective. While the options of ratification and provincial participation on the Canadian negotiating delegation present some challenges that resulted in less favourable evaluations, these options may still be useful in particular situations, particularly where the federal government wants to increase opportunities for provinces to convey their policy preferences, and may not be as concerned about the preferences or protests of international actors.

**Formalization**

Arguably, potential federal-provincial tensions could be partially mitigated if the federal government were to formalize its relationship with the provinces over the negotiation of international trade agreements. According to Skogstad, since 1995, “the premiers at their Annual Premiers’ Conference have called for the existing ad hoc consultative and collaborative partnership to be confirmed in a signed federal-provincial co-operation agreement.”248 Given that consultation appears most favourable and has been used most significantly, it is likely that any future formalization of the federal-provincial relationship would occur around consultation. This has not been forthcoming, however. Furthermore, criticisms of the consultative mechanisms that are currently in place, which have become more formalized and regularized, have centred around some outstanding inconsistencies in the process; these inconsistencies, listed above and presented in chapter three, have done little to build confidence and certainty between the federal government and the provinces regarding the provincial role in the negotiation of international trade.

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agreements. The federal government breaking its promise to seek the views of all provinces before endorsing the CUSFTA is perhaps the most striking example of the unreliable nature of federal-provincial relations in this issue area. Formalizing the federal-provincial relationship is this area would provide the provinces with certainty around their role and permit them to plan allocations of their resources to participate to the extent they desired. This would enhance the perception that provinces have a crucial role to play in international trade relations, particularly where areas of provincial jurisdiction are implicated, and would likely contribute to the provincial desire to comply with commitments the federal government had made.

While formalization of the provincial role would seemingly decrease the likelihood of the federal government acting inconsistently in its relations with the provinces, as has happened with consultation, formalization would complicate the use of policy options that may be more appropriate given the nature of the agreement being negotiated. Flexibility would most likely be in the federal government’s best interest, as it would allow the federal government to limit or enhance the provincial role as it saw fit. Flexibility might also be in the interest of provinces, however. While it would complicate planning and capacity issues if the option being employed was not outlined clearly and well in advance of the start of the negotiations, it may provide an opportunity for greater representation in the negotiations of international trade agreements. As in the case of the NAALC and NAAEC, the provinces could be involved to a greater extent where areas of provincial jurisdiction are more significantly affected. The existence of an agreement regarding formalization, however, might make moving between policy options for provincial involvement in the negotiation of international trade agreements problematic.
Provinces with less capacity or lack of interest in a particular issue may not want a policy option that would require greater provincial involvement. Given that they would also not likely want to be left out of a major federal-provincial international effort, any attempts to act beyond the federal-provincial relationship circumscribed in the agreement may be protested.

As international trade agreements are likely to affect provincial jurisdiction more significantly and potentially in new ways than they have previously, flexibility in policy options for involving the provinces in the negotiation and conclusion of these agreements would be advisable. While it may not provide the provinces with greater certainty around their role, it may present the opportunity for them to be involved more significantly and meaningfully in decision-making, where the federal government deems it to be appropriate. Given that provinces hold the power of implementation in provincial jurisdiction, which is required for compliance with international trade commitments, it seems unlikely the federal government would reduce provincial involvement below the largely regularized and formalized consultative mechanisms that developed during the CUSFTA and since. In fact, it would be prudent for them to move beyond these where areas of provincial jurisdiction are significantly affected and employ options that are more representative, such as ratification or giving the provinces a seat at the negotiating table, should they hope to avoid dealing with international trade disputes.

Limitations and Challenges

This thesis operates on the assumption that there will be some divergence in policy preference between the federal and provincial governments during the negotiation of international trade agreements. If there is concert between federal and provincial
policy preferences with respect to international trade policy, then the power of implementation held by the provinces and the potential for non-compliance with commitments is insignificant. Given that international trade agreements almost exclusively pursue the liberalization of trade and investment and that Canadian provinces maintain and defend many protectionist policies, however, it is fair to assume that there will not be convergence in federal and provincial policy preferences on every issue that international trade agreements may cover. As such, representation of provincial perspectives during the negotiation of international trade agreements is essential.

One of the most notable challenges to provincial participation in international trade negotiations is bureaucratic capacity. This includes resource constraints, both human and financial, as well as time constraints. A significant portion of the literature on this subject, particularly the literature which argues there is centralization in the federation as a result of globalization, has stated provinces lack the capacity to participate in international trade negotiations. However, much of the literature also argues that provinces have an increasing capacity to act internationally and engage in trade promotion. While provincial expertise in negotiating international trade agreements may be limited, provincial interest in trade issues, familiarity with provincial policies and knowledge of the implications of international economic developments for provincial industries is high. Provinces have not been immune from the reality that with globalization, international regimes, processes and actors have an effect on provincial economies. Accordingly, provinces have actively increased their interest and knowledge of international economic issues such as trade and investment. Furthermore, as international trade agreements increasingly constrain provincial ability to make public
policy, particularly in areas that have significance to the provinces such as in natural resources, labour, investment and procurement procedures, education, and health, the extent to which it can be convincingly argued provinces will not want or need to develop and maintain the capacity to understand and be involved in international trade issues diminishes.

This thesis has made little attempt to distinguish between provinces or regions in addressing the desirability of each policy option. This was done to allow evaluation of each option on a broad, theoretical level to enable comparison between options without consideration of the context within which each option might be desirable. In reality, however, the context is significant and it is important to note that not all provinces desire the same degree of involvement in the negotiation of international trade agreements. While this may change as government priorities change, there are some consistent patterns in provincial desires for involvement. The literature indicates Quebec, Ontario, Alberta, and British Columbia have historically wanted the greatest involvement in international issues. All of these provinces, as discussed in chapter two and chapter five, have advocated for a larger provincial role in the negotiation of international trade agreements. It is arguably because these provinces have greater capacity and larger bureaucracies devoted to international trade issues than other provinces that they have taken a leadership role in advocating for greater provincial involvement.

The size and breadth of provincial bureaucratic capability in this area is not the sole precondition for effectiveness and interest in participating in international trade issues and agreements. For example, Prince Edward Island was one of the four provinces that bound themselves to the NAALC. Provinces with more limited bureaucratic capacity
to engage in international trade issues may still be effective and desire the opportunity to be involved. De Boer states “the lack of capacity in some of the smaller provinces is offset by the high level of sophistication of their officials, who may have a narrower set of trade interests upon which to concentrate and know these issues well.” 249 This can make provinces with more limited bureaucratic capacity important actors to the federal government during negotiations as they can supply valuable detailed information. Provinces that have developed specialized knowledge in fewer areas because of bureaucratic resource constraints may have a strong desire to participate to see specific commitments made in a few key areas that may be of particular significance to the provincial economy. This may be significant as well for Canadian territories, which have been deliberately excluded from this analysis. The capacity and desire to be involved, as well as the extent to which the territories have a legitimate jurisdictional role in the negotiation and implementation of international trade agreements is uncertain and would be worth investigating in future research. Although it has been outside the scope of this analysis given differences between provinces and territories in jurisdictional responsibilities and relationship to the federal government, increasingly penetrating international trade agreements will undoubtedly pique the interest of territories if they have not already, even if only in a specific or narrow way, as with smaller provinces.

While there are challenges to provincial involvement in international trade policy formulation and the negotiation of international trade agreements, these are not significant enough to justify limiting the provincial role in international trade issues. As international trade agreements move beyond areas in which significant liberalization has

been achieved, areas which have primarily been within federal jurisdiction to this point, provinces will be required to increase bureaucratic capacity and interest in international trade issues, should they desire to not be passive recipients of economic globalization. As international trade agreements continue to encroach upon provincial jurisdiction, disparities in provincial capacity and ability to be involved in international economic issues may diminish out of necessity.

If provinces are not given appropriate domestic political mechanisms through which they can actively participate in shaping Canada’s international economic commitments, irrespective of challenges to participation such as capacity, provinces may take action to regain control over areas within provincial jurisdiction by limiting the extent to which international commitments they were not involved in negotiating apply to them. Should the federal government not involve the provinces in the negotiation of international trade agreements, provinces may be forced to withhold implementation of such commitments. Maintaining several options for involving provinces in the negotiation and conclusion of international trade agreements, such as consultation, ratification, and giving them a seat at the negotiating table, would be an effective way of involving the provinces where areas of provincial jurisdiction are affected. While the federal government may maintain control over when each option is utilized, the federal government would be well served if they recognized the significance of the provincial power of implementation and remembered that negotiating commitments means little without the ability to follow through on them, which is and will be increasingly beyond federal competence.
BIBLIOGRAPHY


APPENDIX

Relevant Excerpts from the Constitution Act, 1867:

Powers of the Parliament: Section 91

It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. Repealed.
2A. The Public Debt and Property.
2A. Unemployment Insurance.
3. The Regulation of Trade and Commerce.
4. The raising of Money by any Mode or System of Taxation.
5. The borrowing of Money of the Public Credit.
6. Postal Service.
7. The Census and Statistics.
12. Quarantine and the Establishment and Maintenance of Marine Hospitals.
13. Sea Coast and Inland Fisheries.
14. Ferries between a Province and any British or Foreign Country or between Two Provinces.
17. Savings Banks.
18. Weights and Measures.
20. Interest.
20. Legal Tender.
22. Patents of Invention and Discovery.
23. Copyrights.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Justice, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

**Exclusive Powers of Provincial Legislatures: Section 92**

In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. Repealed.
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.
9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
10. Local Works and Undertakings other than such as are of the following Classes:
   a. Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
   b. Lines of Steam Ships between the Province and any British or Foreign Country:
c. Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

11. The Incorporation of Companies with Provincial Objects.

12. The Solemnization of Marriage in the Province.

13. Property and Civil Rights in the Province.

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

16. Generally all Matters of a merely local or private Nature in the Province.

**General: Section 132**

The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.

Other relevant sections of the Constitution Act may be:

- Non-Renewable Natural Resources, Forestry Resources, and Electrical Energy: Section 92A
- Education: Section 93
- Agriculture and Immigration: Section 95
- Revenues; Debts; Assets; Taxation: Section 109