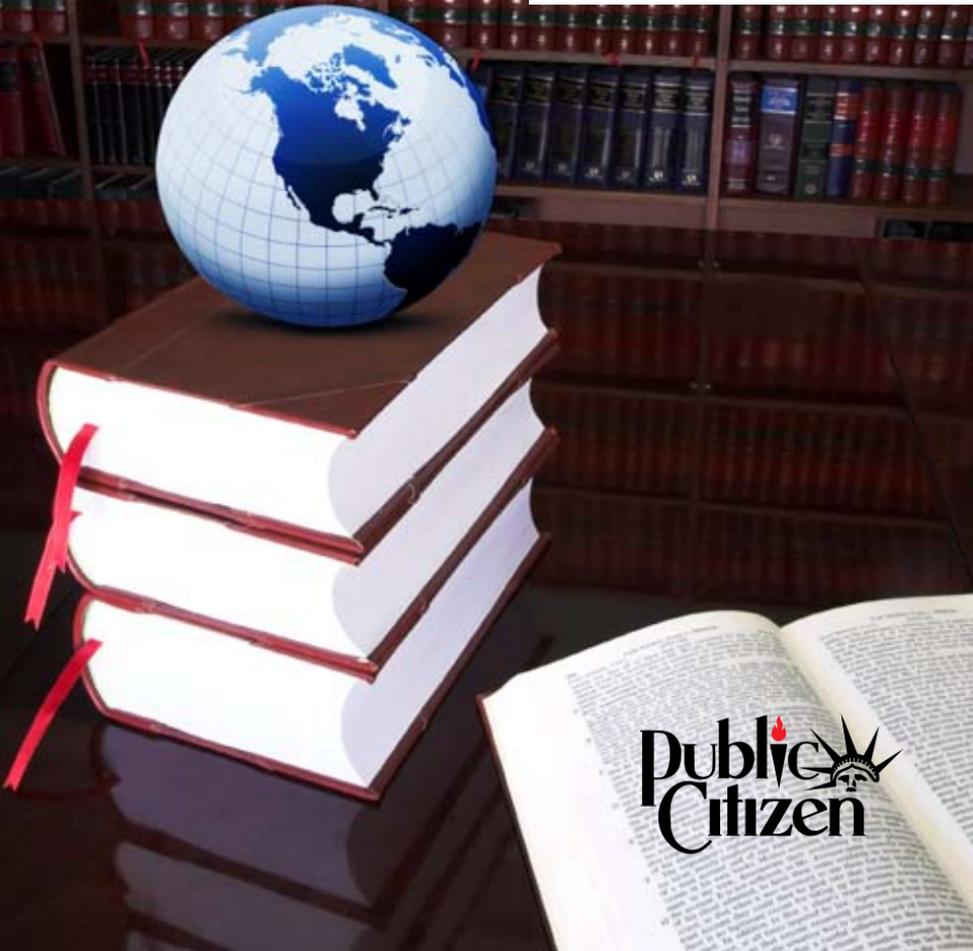


Federalism and Global Governance

Comparative Analysis of Trade Agreement Negotiation and Approval
Mechanisms Used in U.S. and Other Federalist Governance Systems

Mary Bottari and Lori Wallach



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EXECUTIVE SUMMARY

“[I]t is clear that world trade is evolving into new areas that touch not only the sovereign heart of nation-states, but also areas within the constitutional prerogative of subnational governmental units.”

— *University of Chicago law review article*¹

This book compares negotiation and approval mechanisms used in the United States and three federalist governance systems regarding international agreements that bind subfederal governments. In recent years, U.S. Republican and Democratic state and local officials have increasingly raised concerns about how U.S. international trade agreements, which they have no role in formulating or approving under current processes, constrain their domestic policy space regarding an array of non-trade regulatory matters under state and local jurisdiction.

These preoccupations raise the question of what trade agreement negotiation and approval mechanisms can promote U.S. pursuit of international-trade expansion agreements in a manner compatible with the American federalist governance system. U.S. states have historically served the nation as essential laboratories for policy innovations designed to tackle cutting-edge problems. Thus, preserving the principle and practice of federalism in the era of globalization is a matter of considerable practical importance.

This paper reviews the international agreement negotiation and approval mechanisms, which we call ANAMs² for short, used

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1. Hayes, 2005 at 605 and 607. All documents and interview transcripts are on file with Public Citizen.
 2. Unless noted as a trade-related ANAM, this term will also include other *international* policy ANAMs.

by Canada, Belgium and the United Kingdom. We find that these countries' processes generally respect the role of subfederal regulatory authority in international agreement negotiations and approval to a greater degree than current U.S. trade agreement negotiations and approval. Particularly relevant are the Canadian trade ANAMs that the country has successfully used to expand commerce while providing a significant role for provincial governments. The U.S. trade ANAM — Fast Track (or Trade Promotion Authority) — was used for 13 major trade pacts since 1974, and expired in 2007.³ Many in Congress believe that the system is no longer appropriate to the scope of today's complex international commercial agreements. We hope that our comparative analysis will provide useful reference points for the foreseeable U.S. debate regarding what form of presidential trade authority should replace Fast Track.

In the first section of our paper, we provide background information on Fast Track, and briefly summarize the kinds of commercial agreements it has produced, and the ways in which such agreements impact state and local non-trade regulatory space. Prior to the 1988 Canada-U.S. Free Trade Agreement, the 1994 North American Free Trade Agreement (NAFTA) and the 1995 establishment of the World Trade Organization (WTO), U.S. trade negotiations and agreements encompassed traditional trade matters, such as setting tariff rates and quota levels. In contrast, today's trade agreements may be more accurately described as *international commercial agreements* which include expansive provisions that bind signatory countries regarding certain non-trade domestic policies. The affected spheres are as diverse as

3. These include the Tokyo Round of the General Agreement on Tariffs and Trade (GATT), NAFTA, WTO, Free Trade Agreements with Israel, Canada, Chile, Singapore, Australia, Morocco, Bahrain, Oman and Peru, and the Central America Free Trade Agreement (CAFTA).

health care; energy; immigration; education; zoning and land use; government procurement; environmental policy; and food and product safety. At the core of the WTO, NAFTA, and various "Free Trade Agreements" (FTAs) based on the NAFTA model is a requirement that signatory countries conform their existing and future domestic "laws, regulations and administrative procedures" at all levels (unless explicitly excluded) to the pacts' non-trade policy constraints.⁴ This includes many areas under primary or significant state jurisdiction.

However, Fast Track was designed before trade pacts' scope had become so expansive. Critics most often criticize Fast Track for its deleterious effect on the checks-and-balance safeguards provided by the separation of powers between the federal executive and legislative branches. However, while Fast Track constrained Congress' constitutional role, state and local officials were excluded altogether from a meaningful role in the trade ANAM, even when the resulting pacts bound policy areas explicitly reserved to the states. Under Fast Track, state and local governments had no access to trade negotiation documents until executive-branch negotiators made these available to the public.⁵ Moreover, federal officials had no obligation to even consult with subfederal officials before binding states and localities to comply with trade agreements' non-trade regulatory constraints, much less to obtain states' prior informed consent. As a result, state and local non-trade policy space has been subjected to sweeping new forms of international preemption.

4. See e.g. WTO, Agreement Establishing the WTO, Article XVI.4: "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."

5. As described below, only the few presidential appointees to a trade Intergovernmental Policy Advisory Committee were provided earlier access and these appointees serve on the condition that they keep such documents confidential.

We outline our comparative methodology in the paper's first section. In the second section, we provide a background on Fast Track and some of the provisions affecting subfederal authority included in the trade agreements enabled by Fast Track. In the third section, we present our findings on ANAMs employed in Canada, Belgium and the UK. As noted, we examine the methods that these three other countries with federal systems use to respect subfederal sovereignty when entering into international obligations that affect the latter's competence.

For a variety of reasons, we found the Canadian trade ANAM to be the most relevant to the U.S. context. Canada has a well-established system for intergovernmental consultations on trade agreements through the Federal-Provincial-Territorial Committee on Trade (C-Trade). This standing committee is comprised of trade representatives of the central government and each sub-federal province, and informs the provinces about trade issues in a timely manner. In turn, subfederal officials can shape the central government's proposed positions on issues of provincial jurisdiction. Canada has also at times utilized a form of domestic accession, or "opt-in" procedure, that allows provinces to decide whether, and when, to sign on to aspects of agreements that affect their jurisdiction.

In Belgium, which decentralized its government more recently, subfederal governments are empowered to take international action in the areas over which they have domestic jurisdiction. In determining the country's positions regarding international commitments, Belgium's federal and subfederal governments collaborate both through binding, written, cooperation agreements and consultations in which both levels of governments are on an equal footing. The third and final system is the new quasi-federal "devolution" of the United Kingdom, which allows Scotland to

participate in the international arena, alongside the central government, within a framework of written agreements and cooperative working relationships.

This paper has two companion pieces, one that reviews the major economic *outcomes* of the international commercial agreements established under Fast Track; another analyzes the history of Fast Track.⁶ Public Citizen recognizes the generous support of the Alfred P. Sloan Foundation in researching and publishing this material.

6. All papers are available at www.TradeWatch.org.

I. METHODOLOGY

The goal of this paper is to identify methods that federalist systems of governance use to consult and cooperate with subfederal governments when negotiating and entering into international agreements that include binding obligations on subfederal governments.

Our investigation spanned beyond trade agreements to encompass a broader set of international agreements that implicate subfederal authority. We did this for two reasons. First, prior to establishment of the WTO, trade agreements did not delve as deeply into areas of subfederal regulatory authority, thus no systems of consultation were necessary. An interesting future research paper would include an exploration of how various federalist governments dealt with the WTO as it was being negotiated.⁷ Additionally, for the nations with federalist systems of governance who have not participated — or not until recently — in “Free Trade Agreement” (or the European equivalent, Economic Partnership Agreement) negotiations, the issues of federal-subfederal consultation on trade agreements may not have been fully engaged since Uruguay Round talks.

Second, there is a paucity of formal federal-subfederal consultation on trade. For that reason, we concluded that an investigation of how intergovernmental consultations occurred in other arenas

7. Past inquiries into this question revealed that there is little published information available. Gathering this information would require identifying and interviewing numerous federal and subfederal officials in office in numerous countries at the time of the initial WTO negotiations. The scope of the General Agreement on Trade Uruguay Round negotiations was unprecedented, and many federal officials were unaware of the negotiation's implications for non-trade policy authority. Therefore, we suspect that if processes for federal-subfederal consultation were established in other countries, it was at the *end* of the Uruguay Round process, when the negotiations were largely complete and subfederal policy space had been already committed by federal governments.

implicating subfederal jurisdiction would be helpful in informing how to improve such consultations in the trade context.

To begin this research, we used reference materials on comparative law, and interviewed law professors, researchers and government officials to identify which of the world's 193 countries are organized under a federalist constitutional model with shared governing responsibility between federal and subfederal elected governments. We identified 24 such countries.⁸

For this paper, we initially examined nine of these in search of best practices.⁹ Factors that contributed to the selection of the nine include: availability of scholarly research on these federalist systems in English or French, constitutions that permitted meaningful power-sharing, and the existence of actual institutions or structures of federal-subfederal decision-making (such as standing committees of high-ranking federal and subfederal officials) that genuinely made it possible for subfederal governments to assert their interests.

We then reviewed descriptions of the nine federalist systems to narrow down a list of countries whose federalist systems were relevant to the U.S. system *that also* employed defined practices to involve their constituent subfederal governments when enter-

8. The Forum of Federations, an international network of federalist countries, identifies 24 nations with a federalist constitutional model: Argentina, Australia, Austria, Belgium, Bosnia and Herzegovina, Brazil, Canada, Comoros, Ethiopia, Germany, India, Malaysia, Mexico, Micronesia, Nigeria, Pakistan, Russia, St. Kitts and Nevis, South Africa, Spain, Switzerland, United Arab Emirates, United States of America, and Venezuela. According to this organization, "Federalism provides a technique of constitutional organization that permits action by a shared government for certain common purposes, together with autonomous action by constituent units of government for purposes that relate to maintaining their distinctiveness, with each level directly responsible to its own electorate." Watts, 2002.

9. Australia, Austria, Canada, India, Germany, Belgium, Switzerland, United Kingdom, and New Zealand.

ing into international obligations that affect areas of subfederal competence. In the course of the research, we consulted seven law professors from the United States, Canada, Australia and Germany, and 25 government officials, scholars and technical experts from the United States, Canada, Germany, the United Kingdom, Belgium, Switzerland and Austria. We also conducted an extensive literature review, mostly limited to law journals.

This paper describes four best practice models for ANAMs: two from Canada related directly to trade agreement consultations, and one each from Belgium and the United Kingdom that relate more indirectly to trade commitments. Factors that contributed to the selection of the three countries include: active (rather than dormant or simply "on paper") mechanisms for federal-subfederal consultation, and recent examples of the exercise of this mechanism in the arena of international affairs. We identified the existence of other potentially interesting structures of subfederal consultation, such as Australia's Treaties Council and India's Interstate Council, but we found that governments rarely utilized these mechanisms for international affairs.

Additionally, we have not included some European countries with federalist systems of governance because these countries have ceded significant trade authority to the European Union structure. We did include examples of federal-subfederal consultation in two EU member nations, Belgium and the United Kingdom, on issues that have implications for aspects of trade agreements. However, analysis of many European countries' procedures regarding trade agreements *per se* would have required explication of the complex shared authority mechanisms embedded in various EU-founding documents that were beyond this paper's scope. (For instance, Germany, which has a strong federalist system, has in recent years delegated to the European Commission a great

deal of authority over international affairs, creating problems for subfederal governments similar to those now raising concern in the United States.) Future research could more thoroughly examine Latin American and Asian federalist systems.¹⁰

10. Upon review of available literature on Latin American and Asian countries' system, we determined that the best use of our resources would be thorough examination of documents available in English and French.

II. THE CHALLENGE:

Establishing Trade Expansion Agreements That Respect Subfederal, Non-Trade Regulatory Authority

“[I]t is vital to maintain the principle that the federal government may request, but not require, states to alter their regulatory regimes in areas over which the states hold constitutional authority ...” — 2005 letter from 29 U.S. State Attorneys General to the U.S. Trade Representative¹¹

“Is it necessarily so that that subfederal governments can have no role in the global village of tomorrow?... The question becomes even more profound when one ponders it in the context of the WTO, which has established a new international trade constitution, for almost 150 nations, provides no role for subfederal governments, and holds federal governments strictly accountable for the laws, rules and regulations of their subordinate bodies.”
— Hal S. Shapiro, former associate general counsel in the Office of the United States Trade Representative¹²

11. Shurtleff, 2005.

12. Shapiro, 2006, at 105. Shapiro is now a partner in the Washington law firm of Miller & Chevalier. For an interesting discussion of U.S. state authority in *international commercial* matters (i.e., extending beyond states constitutional police powers for domestic regulation) see Shapiro's Chapter 7: “Is There a Role for the States?” We do not agree with the proposed system of enhanced federal powers regarding state activities presented here. However, the text does provide a good overview regarding the space provided by states in the *international* sphere by the U.S. Constitution as interpreted by the U.S. Supreme Court. This includes discussion of the Court's 2000 ruling in *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), in which it had an opportunity to strictly limit states' roles in international commerce and chose not to do so.

A. Today's trade agreements extend far beyond tariffs and quotas to impose constraints on non-trade domestic regulatory space

The WTO, a 153-member international commerce agency headquartered in Geneva, Switzerland, houses 17 major “Uruguay Round” agreements that went into effect in 1995. A number of these, such as the WTO’s service-sector and procurement pacts, contain provisions that directly limit the regulatory authority of state governments. Beyond the multilateral sphere, the United States has negotiated regional and bilateral agreements such as NAFTA (1994), the Central America Free Trade Agreement (CAFTA, in 2005) and various bilateral FTAs that contain additional service-sector and procurement constraints and far-reaching limits on the regulation of foreign investment and investors operating within the United States.

The early 1990s NAFTA and WTO trade agreements were dramatically different from all others that preceded them. These pacts were not so much about trade *per se*, but were designed to establish a uniform single global marketplace in which foreign investors, service providers — as well as goods — could freely move without being hindered by domestic policy differences. As well as newly covering an array of non-trade regulatory matters, the agreements included powerful enforcement mechanisms that ensured that signatory countries complied with the extensive rules. These agreements establish their own extra-judicial binding dispute resolution systems with tribunals that hear challenges brought by signatory countries against other countries laws. Unlike international environmental, labor rights or arms control treaties, the enforcement systems of these agreements allow im-

position of indefinite trade sanctions if countries fail to conform their laws to the pacts’ terms. As a result, the WTO, NAFTA and the various FTAs have established a form of international policy preemption over many areas of non-trade policy.

Subfederal officials have taken note of the move from traditional trade agreements that govern federal tariff policy to this new breed of mega-pacts that impact everything from the regulation of land use and development to state gambling, education, energy and health policies, to how local tax revenues may be spent. These subjects of traditional state and local jurisdiction are now covered by trade-agreement provisions and are increasingly caught up in hot-button “trade” disputes, even though the issues at stake have nothing to do with moving goods between countries. This section examines some of the provisions in today’s international commercial agreements that limit non-federal, non-trade domestic policy space.

1. Trade-Agreement Service-Sector Rules: The provisions of the WTO’s General Agreement on Trade and Services (GATS) and service chapters in NAFTA and various FTAs establish obligations and constraints on all levels of government policy regarding every conceivable way a service might be delivered.¹³ For instance, the GATS provides a “right of establishment” for foreign firms or

13. See e.g. WTO GATS Article I. “1. This Agreement applies to measures by Members affecting trade in services. 2. For the purposes of this Agreement, trade in services is defined as the supply of a service: (a) from the territory of one Member into the territory of any other Member; (b) in the territory of one Member to the service consumer of any other Member; (c) by a service supplier of one Member, through commercial presence in the territory of any other Member; (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member. 3. For the purposes of this Agreement: (a) ‘measures by Members’ means measures taken by: (i) central, regional or local governments and authorities; and (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities.” Under GATS, countries negotiated a ‘positive list’ of service sectors they agreed to bind to the GATS rules. (continued on pg. 14)

investors to set up new operations or buy existing service sector operations within an array of service sectors the United States has bound to GATS compliance.¹⁴ Once established, U.S. federal and state governments may only regulate the on-shore activities of these multinationals within the parameters set by the GATS rules. GATS also protects the rights of foreign service-firms operating abroad to deliver services to U.S. customers over the Internet, and covers U.S. residents traveling abroad to receive a service. Finally, GATS covers service delivery by people moving across borders, including a U.S. commitment that binds U.S. immigration policy to provide minimally 65,000 annual H-1B visas for skilled immigrant workers.

The GATS rules setting forth how foreign service-firms receiving “market access” must be treated extend well beyond requiring them treatment equal to that provided comparable U.S. firms. The rules prohibit any policies that limit the number of service providers in the form of quotas, public or private monopolies, or exclusive service-provider contracts.¹⁵ The hours of operation or size of such operations cannot be limited, posing hurdles for localities seeking to constrain large retail interests.¹⁶ Needs tests, a commonly used policy tool for health care and other sectors,

13. (continued from pg. 13) The U.S. GATS commitments include a rather random list of specific state-level exceptions under many otherwise committed service sectors, including legal services, financial service regulations and others. The services chapters of NAFTA and the FTAs cover all sectors not explicitly excluded in a ‘negative list.’ Among the U.S. FTA service sector exceptions is one for existing subfederal laws that do not comply with National Treatment, Most-Favored Nation Treatment, and Local Presence. New state laws and changes to existing laws are covered unless included under a sectoral carve out. The United States reserved its rights in NAFTA and the FTAs to exclude service sectors not included in U.S. GATS commitments, but has committed additional GATS-plus sectors in various FTAs.

14. For a searchable database of U.S. GATS commitments and offers, see Public Citizen’s GATS Directory, available at http://www.citizen.org/trade/forms/gats_search.cfm.

15. WTO, GATS Article XVI(2)(a).

16. WTO, GATS Article XVI(2)(b) and (c).

are also explicitly forbidden.¹⁷ Also forbidden are measures which restrict or require specific types of legal entity, for instance that certain human services be provided on a not-for-profit basis.¹⁸ As enumerated in a 2007 WTO ruling against the U.S. Internet gambling ban, regulatory bans (including criminal or regulatory prohibitions) in covered service sectors are considered barriers to market entry, and thus presumptive WTO violations.¹⁹ This ruling impacts innumerable state and local domestic policies — from bans on billboards, big-box stores, for-profit hospitals or waste incinerators; to state prohibitions on certain forms of gambling or tobacco advertising.

In addition, GATS “nondiscrimination” rules require that no domestic policy alter the “conditions of competition” in a way that results in less-favorable treatment for a foreign service-provider — even if the law applies equally to domestic and foreign firms.²⁰ This rule has broad implications for state and local policy space. For instance, in the construction sector (which the United States committed to WTO jurisdiction), land-use controls may be found to be more onerous to foreign firms *in effect*, even if domestic and foreign service suppliers face the same rules. The non-discrimination rules also require that public subsidies and grants be shared with foreign service-suppliers on the same footing as U.S. companies, unless those funds are specifically exempted from the agreement’s terms.²¹ This too has broad implications in many service sectors in which U.S. states and localities play significant regulatory roles where public grants are not specifically carved out, and thus must be shared with foreign service-providers on equal terms. For instance, the U.S. federal government protected National

17. WTO, GATS Article XVI(2)(a-d).

18. WTO, GATS Article XVI(2)(e).

19. WTO, 2005b.

20. WTO, GATS Article XVII(3).

21. WTO, GATS Article XVII(1).

Endowment for the Arts grants from GATS obligations, but failed to exempt any similar state grants or subsidies.

The GATS also contains an extremely limited clause that exempts some public services from the agreement's terms.²² However, in practice, few U.S. government services qualify for this exemption, which *only* covers services provided *exclusively* by the government. In the United States, with the exception of certain national security services, most services are provided both by the government and by private companies. They thus fall outside this limited exemption. If a nation seeks to withdraw a sector from the agreement's terms, GATS requires that nation to compensate other WTO signatory countries for real and theoretical lost business opportunities.²³ This makes the reversal of ill-advised GATS commitments costly and difficult, and thus increases the imperative for state and local regulatory authority to be taken into consideration at the time agreements are negotiated.

In 1994, with little discussion or understanding, Congress bound close to 100 sectors of the U.S. service economy to GATS strictures. These include the following services: financial (including insurance and health care); hospital, wholesale and retail distribution (implicating land use); information; telecommunication; media; advertising; gambling; recreational and tourism; rail and road transportation; library; construction; certain environmental; cultural; and certain state-licensed professional services (such as accountants, lawyers, engineers, and architects). States and localities are the primary regulators of many of these services. Currently, negotiators at the Doha Round of WTO talks are attempting to expand the GATS' scope and jurisdiction. In part,

22. WTO, GATS Article I(3)(b-c).

23. WTO, GATS Article XXI.

U.S. federal officials have proposed additional legally binding U.S. GATS commitments regarding higher education, warehousing and storage, and other services normally regulated by states and localities.²⁴

Examples of State and Local Non-trade Policies Covered by Trade-agreement Service Sector Rules

Energy: Under the category of “services incidental to energy,” the system of organizing and regulating public and private electric utilities, as well as rural electrical co-operatives, is covered. Some state policies in this category could conflict with GATS prohibitions on monopolies or exclusive service suppliers. State Renewable Portfolio Standards (RPS) may also conflict with GATS rules, as they could be perceived as changing competitive conditions in a way that “discriminate” against foreign distributors of energy.²⁵ Proposed new U.S. GATS commitments on “warehousing” implicate the safety and zoning regulations governing controversial liquid natural gas terminals (LNG), which are front-page news in many states.²⁶

Health Care: The United States has already signed up many “financial services” to comply with GATS strictures, including health insurance. WTO rules also cover retail and wholesale pharmaceutical distribution. While states attempt to address the lack of affordable medicines or health care for the 43 million uninsured Americans, certain reform proposals may violate GATS antimonopoly rules, especially those that create a subsidized low-cost

24. WTO, 2005a.

25. Eskridge, 2005.

26. Caspi, 2005.

health plan that successfully competes with private-sector plans in the market. Moreover, risk-pooling proposals may violate the rule against changing the terms of competition, while drug formularies may be considered GATS-illegal exclusive supplier arrangements.²⁷

Land Use: The United States committed retail services; franchising; hotel and restaurant services; and construction services to meet GATS rules. However, unlike some other WTO signatory countries, U.S. negotiators failed to include any safeguards for local land-use laws that prohibit development in certain areas (such as environmentally sensitive coastlines or historic districts), or that place limits on the size or number of retail operations or chain stores. Giant retailers such as Wal-Mart consider these zoning and land-use rules to be GATS violations, according to a document the big-box retailer submitted to the Office of the U.S. Trade Representative (USTR).²⁸

Libraries: The United States committed public libraries, archives and museums to GATS, without specifying that public funds for these institutions are limited to public institutions only. Since aspects of these services are included in competition with private sector for-profit service providers, they may not qualify for the GATS exception for services provided by the government.

Public Transportation: Because the United States failed to exempt public-transportation systems from its GATS commitments on “road and rail transport,” municipally owned public-transit systems — and even public-school bus services — may have to be opened up to competition from private foreign companies. In addition, public subsidies or grants may have to be shared with foreign firms on a “nondiscriminatory” basis.

27. Tucker and Bottari, 2008.

28. Bottari and Gould, 2005.

Higher Education: The United States is proposing to commit private *and public* “higher education” to WTO jurisdiction, even though trading partners have requested access only to U.S. private higher education (i.e., for-profit commercial and technical training colleges). This could require U.S. states and localities to provide for-profit foreign education service firms the subsidies now provided for public institutions, and also to limit licensing, professional qualification and other standards.

2. Trade-Agreement Investment Rules: The foreign investment rules in NAFTA, CAFTA and various FTAs provide the same “right of establishment” and limits on domestic regulation of foreign investors and their investment as does GATS, but these rules apply to a much broader array of commercial activities.²⁹ Investment is defined very broadly in these agreements to cover every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.³⁰

29. The investment chapters of NAFTA and the FTAs cover all sectors not explicitly excluded in a “negative list.” Among the U.S. exceptions is one for *existing* subfederal laws that do not comply with National Treatment, Most-Favored Nation Treatment, Performance Requirements and Senior Management and Board of Directors rules.

30. See e.g. CAFTA, Article 10-28: “Investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include: (a) an enterprise; (b) shares, stock, and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and loans; (d) futures, options, and other derivatives; (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; (f) intellectual property rights; (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.”

The investment chapters in NAFTA, CAFTA and various U.S. FTAs set a “minimum standard of treatment” that signatories must provide foreign investors,³¹ ban common performance requirements on foreign investors,³² and forbid limits on capital movements, such as currency controls.³³ Additionally, these pacts provide foreign investors operating in the United States with greater compensation rights for extended categories of “takings” than U.S. companies under domestic law.³⁴ Specifically, unlike U.S. law, the pacts allow foreign investors to demand compensation for so-called “regulatory takings,” i.e. government environmental, health or other regulatory actions that may undermine the value of an investment. (For instance, the Endangered Species Act may result in companies being prohibited from draining or paving over certain land and thus limits the property’s uses.) U.S. law seldom allows compensation for government actions short of actual permanent seizure of real property — for instance to build a road — or for regulatory acts that permanently eliminate all uses and value of an entire piece of real estate. In contrast, the trade-agreement investor rules expose state and local governments to challenge if they implement policies that undermine the expected future profits of a foreign investor regarding an array of investments that extend beyond real property. In addition, the trade-pact investor rules contain no sovereign-immunity shield for governments, a radical departure from longstanding U.S. protections. In numerous ways, these agreements provide foreign investors greater rights than U.S. businesses operating under U.S. law, and pose an unusual threat to governments’ regulatory authority.

31. See e.g. NAFTA Article 11.5 or CAFTA Article 10.5.

32. See e.g. NAFTA Article 11.9 or CAFTA Article 10.6.

33. See e.g. NAFTA Article 11.9 or CAFTA Article 10.8.

34. See e.g. NAFTA Article 11.10 and 11.39 or CAFTA Article 10.7 and 10.28.

Moreover, while most trade agreement provisions are subject only to those enforcement actions taken by signatory governments against each other, as described below, NAFTA, CAFTA and the FTAs include investor-state enforcement systems. These mechanisms allow foreign corporations and investors to sue the U.S. and other federal governments in tribunals operating outside of domestic court systems for cash compensation when foreign investors believe that federal, state and local laws or regulations negatively affect their new investor rights under the agreements. These cases are decided in private arbitral tribunals operating under the auspices of the United Nations and the World Bank. These institutions, designed to arbitrate private cases between contractual parties in narrow commercial disputes, are empowered under the NAFTA-style pacts to deal with significant public-policy issues. Several state and local public health, environmental and land-use policies have been successfully challenged to date.³⁵

The five successful foreign investor claims under NAFTA’s investor rules have resulted in \$35 million in public funds being paid to private entities. Most of the post-NAFTA FTAs include investor-state enforcement. An increasing number of investor-state cases are being filed with billions in taxpayer dollars being demanded. While the United States has been able to deflect four NAFTA Chapter 11 cases for various technical shortcomings, many more cases challenging U.S. policies are now pending.

35. For more information on the NAFTA investor-state challenges, see Bottari and Wallach, 2005.

Examples of State and Local Non-Trade Policies Covered by FTA Investment Rules

Land Use: The Mexican government was ordered to pay the U.S. Metalclad company \$15.6 million in compensation in the first of several land-use challenges.³⁶ In this case, a Mexican municipality denied construction and operating permits to a U.S. firm that had acquired a previously existing and heavily contaminated toxic waste transfer facility. The U.S. firm acquired the site after it had been closed by the local government, because of serious contamination problems during its previous operation under Mexican ownership. Under NAFTA, the local government's insistence that the new foreign investor meet the same clean-up requirements as the previous Mexican owner as a condition for operating was ruled to be a NAFTA-illegal "expropriation."

Public Health-Tobacco: Aspects of the state tobacco settlements, which have resulted in a dramatic drop in the rate of teenage smoking in the United States, are currently subject to a pending NAFTA investor-state challenge by Canadian tobacco traders.³⁷ In an example of the chilling effect such challenges can pose, Philip Morris threatened in 2004 to bring a NAFTA investor-state suit against a proposed, groundbreaking Canadian law restricting misleading claims made on cigarette packages.³⁸ That law never passed. Instead, Canada agreed to a voluntary agreement with the tobacco industry that has allowed them to substitute certain misleading marketing terms for others (i.e. "light: becomes "smooth").³⁹

Mining Law: In 2003, a Canadian mining enterprise, Glamis Gold, challenged a California regulation requiring the backfilling of open-pit mines. Glamis planned to develop a giant open-pit cyanide gold mine in the Imperial Valley, and owns and operates similar mines around the world.⁴⁰ A ruling on this challenge of a U.S. state law, demanding \$50 million in compensation, is expected imminently. The U.S. Interior Department had given the go-ahead for the mine, while the state of California objected, expressing concerns about the environmental impacts and the impacts on nearby Native American sacred sites. Because states have no standing in these cases, California must rely on the U.S. federal government to defend this state law, which the federal government does not support.

State Court Rulings: A particularly shocking development has been the use of NAFTA to attack U.S. state court decisions. In 1998, a Canadian funeral conglomerate, Loewen, used NAFTA's investor-state system to challenge Mississippi's rules of civil procedure and the amount of a jury award related to a case in which a Mississippi firm had sued Loewen in a private contract dispute in state court.⁴¹ A World Bank tribunal issued a chilling ruling in this NAFTA case, finding for Loewen on the merits.⁴² The ruling made clear that few domestic court decisions are immune to a rehearing in a NAFTA investor-state tribunal. However, the tribunal dismissed the case before the penalty phase thanks to a remarkable fluke: lawyers involved with the firm's bankruptcy proceedings reincorporated Loewen as a U.S. firm, thus destroying its ability to obtain compensation as a "foreign" investor.

36. ICSID, 2000.

37. UNCITRAL, 2004a.

38. Chase, 2002.

39. Physicians for a Smoke-Free Canada, 2007.

40. UNCITRAL, 2003.

41. ICSID, 1998, at 52-59.

42. ICSID, 2001.

Toxics Bans: Corporations have thrice challenged bans or phase-outs of toxic substances under NAFTA's Chapter 11. The U.S.-based Ethyl Corporation challenged Canada's proposed ban on the gasoline additive MMT and Canada negotiated a settlement — reversing the policy and paying \$13 million to the firm. In a second case, a Canadian firm called Methanex challenged California's ban on the gasoline additive MTBE. But in 2005, the tribunal ruled that the firm, which produced a component of MTBE but not the chemical mixture itself, did not have proper standing to pursue the case, because it could not prove that California's ban was sufficiently "related to" the company's U.S. investments.⁴³ While the \$3 million in federal government legal costs defending against this challenge were reimbursed, the costs of the lawyers from the Office of the California Attorney General who the federal government invited to help with the case were not.⁴⁴ Finally, in a pending case, a U.S. company has challenged Canada's phase-out of certain uses of the hazardous pesticide lindane.⁴⁵

3. Trade-Agreement Government-Procurement Rules: Although the past U.S. trade ANAMs did not require such, in negotiating trade-agreement procurement commitments, the federal government has chosen to recognize state jurisdiction over state procurement policies. Thus, in contrast to the trade agreement service and investment rules, only those states that "opt in" are covered by trade-pact procurement obligations. The Clinton administration bound many federal agencies to the WTO procurement agreement, and requested that governors volunteer to bind state-level procurement as well. Although setting state procurement policy is generally the role of state legislatures, the

43. UNCITRAL, 2005.

44. UNCITRAL, 2004b.

45. UNCITRAL, 2001.

administration consulted only governors. In the end, 37 governors sent letters that the USTR interpreted as agreeing to bind their state purchasing policies to the agreement. An annex to the WTO procurement lists the bound states and state agencies.⁴⁶

Early in 2003, the Bush administration bound the same 37 states — without consultations — to the terms of the U.S.-Chile and U.S.-Singapore FTAs' procurement chapters. State officials were outraged. In an apparent about-face, Bush's trade representative sent a letter to all 50 states in 2003 asking governors to provide an open-ended authorization committing his or her state to the procurement provisions in a list of additional trade agreements then under negotiation.⁴⁷ In essence, the administration asked governors to deposit a signature card good for five future procurement agreements, including CAFTA.

Initially, a number of states sent back letters granting consent. However, when word circulated that legislation up for debate in 30 states (banning the offshoring of state contracts) would be jeopardized by the procurement terms of agreements like CAFTA, many governors reconsidered their offers. In short order, a bipartisan group of governors from eight states withdrew their initial agreement to bind their states to CAFTA's government procurement rules.⁴⁸ Many other governors simply said "no"

46. Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming.

47. Zoellick, 2006. The letter stated the United States was in the midst of negotiations with Australia, Morocco, the five Central American nations (CAFTA), the five nations of the South African Customs Union and 34 countries in the Western Hemisphere regarding the Free Trade Area of the Americas.

48. Pennsylvania, Iowa, Missouri, Maine, Oregon, Minnesota, Kansas, and New Hampshire.

initially. In the end, only 19 governors signed their states onto CAFTA's procurement provisions. Most recently, only eight governors have signed their states onto the procurement provisions in the U.S-Peru FTA.

Each procurement pact requires that states provide the same (or more favorable) treatment to foreign goods and service-suppliers they provide to domestic firms supplying "like" goods and services.⁴⁹ This rule, called "non-discrimination" as with the aforementioned non-procurement policies, means state governments with purchasing policies bound by the pacts cannot favor the purchase of local goods or services for economic development (or even environmental) reasons.

The trade-pact procurement agreements also contain rules limiting technical specifications that states can use when states request bids from companies seeking to provide goods or services. The pacts require that procuring entities shall not prepare, adopt or apply any technical specification describing a good or service "with the purpose or the effect of creating unnecessary obstacles to trade," and that technical specifications are limited to performance requirements rather than design or descriptive characteristics.⁵⁰ This rule means that procuring entities are prohibited from setting specifications describing goods or services sought based on how a good is made or how a service is provided, such as recycled content in paper or renewable-source energy.

The procurement agreements also restrict what sorts of qualifications and criteria states may employ to choose suppliers of goods and services. For instance, procuring entities can set only those

49. See e.g. WTO, AGP Article II; NAFTA Article 1003.

50. CAFTA, Article 9-7.

conditions for supplier participation in procurement that are essential to ensure that the supplier has the "legal, technical, and financial" abilities to fulfill the requirements of the contract.⁵¹ This means that distinctions based on a firm's labor or environmental compliance record or operations in cooperation with human rights violating foreign governments cannot be considered.

Examples of State and Local Non-trade Policies Covered by Trade-agreement Procurement Rules⁵²

Buy Local and Other Economic Development Policies: Trade procurement rules prohibit an array of state procurement policies that give preference to locally produced goods and services (so-called "Buy America" or "Buy Local" policies).

"Green" Procurement Policies: Policies at risk include requirements for recycled content in goods or a percentage of energy from renewable sources, as well as preferences for certain environmental or consumer safety labels and eco-friendly packaging requirements, which may have the unintended "effect" of creating an obstacle to trade.

Policies Targeting Companies' Environmental or Labor Conduct: Under trade-agreement procurement rules, suppliers cannot be disqualified due to companies' labor, human rights or environmental records or practices. Similarly, "sweat-free" rules that ban the purchase of goods from companies employing sweatshop labor or child labor are prohibited.

51. CAFTA, Article 9-8.

52. For more information on the implications of trade policy for state procurement policy, see Bottari and Wallach, 2007.

Prevailing and Living Wages and Project-Labor Agreements:

Trade-agreement procurement rules place limits on the requirements that can be imposed on contractors, such as requiring payment of prevailing wages and living wages. These pacts also prohibit project-labor agreements that require fair treatment of workers and their unions as a condition for a bidder to qualify for state public-works projects. Needless to say, procurement policies that give actual preference to unionized companies or public providers are also prohibited.

Policies Targeting Countries' Human Rights, Labor Rights

or Other Conduct: Under trade-agreement procurement rules, governments cannot treat companies differently based on the human-rights, labor-rights or environmental records of their home countries or countries in which they are operating. This removes tools used by states in the past to demand corporate responsibility in the face of human-rights abuses, including the 1980s' nationwide anti-apartheid divestment effort.

B. Federal governments must ensure compliance with non-tariff terms by state and local governments

WTO, NAFTA and the various FTAs were not treaties: the U.S. Senate did not approve them by a supermajority vote, as the Constitution requires for treaties. Rather, these agreements are “international executive agreements with congressional approval.” Congress approved implementing legislation for each deal by simple majority votes in each chamber. The implementing legislation included Congress' official consent to the pact and simultaneously approved changes to swaths of federal law to conform existing law to pact terms. Once approved by Congress, the agreements have the status of binding federal law, which, like other federal law, preempts conflicting state law. The agreements additionally include provisions that explicitly require the federal government to ensure state and local compliance with pacts' expansive non-trade regulatory terms.⁵³

For instance, the GATS' policy constraints apply specifically to “measures by Members” taken by “central, regional or local governments and authorities; and non-government non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities.”⁵⁴ The WTO requirement that “[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements”⁵⁵ establishes an affirmative

53. See e.g. WTO, Agreement Establishing the World Trade Organization, Article XVI-4. “Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.”

54. WTO, General Agreement on Trade in Services, Article 1-3.

55. WTO, Agreement Establishing the World Trade Organization, Article XVI-4.

obligation on the U.S. federal government to secure the compliance of states and localities with an array of non-trade regulatory provisions. NAFTA requires signatory countries to take “all necessary measures” to ensure observance by state and provincial governments.⁵⁶ And a past General Agreement on Tariffs and Trade (GATT)⁵⁷ ruling specifically requires that the U.S. government take all constitutionally available steps to force state compliance, including preemption, litigation and cutting off federal funds.⁵⁸

State and local laws that conflict with the terms of various trade agreements can and have been challenged. These challenges are launched either by other signatory governments or in the case of NAFTA and the other FTAs by foreign investors, in tribunals established by the agreements that operate outside the U.S. domestic court system. If another WTO nation challenges a state policy as a violation of one of the many WTO agreements, for instance, the case goes to the powerful, binding dispute-resolution system built into the WTO.⁵⁹

Tribunals are staffed by a rotating roster of trade lawyers who are not required to have any expertise in the matter at hand. The rules concerning who may qualify as a WTO tribunalist — for instance having served in the past on a country’s GATT or WTO delegation or having worked within the institutions — tend to result in inherent bias in favor of the institution relative to

56. NAFTA, Article 105. WTO rules require each country to “take such reasonable measures as may be available to it” to ensure subnational compliance. See WTO, Uruguay Round Agreement, “Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994,” at 13, available at http://www.wto.org/english/docs_e/legal_e/10-24_e.htm. See Hayes 2004, at 1.

57. GATT preceded, and is now administered by, the WTO.

58. GATT, 1992. (This case is known as “Beer II”).

59. WTO, DSU.

challenged state laws.⁶⁰ These tribunals are empowered to judge whether a local health, labor or environmental policy has resulted in a trade-pact violation — without reference to U.S. law or jurisprudence on the matter. In fact, tribunals have ruled against domestic laws 90 percent of the time.⁶¹ (Of the 137 completed WTO challenges, tribunals ruled that domestic laws were WTO-compliant in only 14 instances.)

If a WTO tribunal rules against a state law, policymakers must eliminate or amend the measure; until that happens, the federal government is subject to punitive trade sanctions from other WTO members.⁶² Further, WTO trade *sanctions* can and have been constructed to target specific local economies. For instance, when the Bush administration placed temporary tariffs on imported steel in 2002, the European Union responded by “pulling out the electoral map” and placing retaliatory tariffs on products from regions of the United States where they thought President Bush was electorally vulnerable, targeting farm products from the Midwest and textiles in the Carolinas.⁶³

60. WTO, DSU, Article 8. “Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.”

61. See PC, 2008, for a complete tally of WTO cases decided to date.

62. WTO, DSU, Article 22. This article sets forth the procedures for “Compensation and the Suspension of Concessions” when a WTO signatory country has not complied with a WTO ruling. The obligation on signatory federal governments to ensure subfederal compliance is discussed below.

63. Sanger, 2003.

In addition to the investor-state enforcement systems described above, NAFTA, CAFTA and the other FTAs provide for government-government enforcement systems similar to that in the WTO.⁶⁴ State and local officials have no standing before either the government-government or investor-state tribunals and must rely on the federal government to defend a challenged state or local policy.⁶⁵

After an initial wave of WTO cases and NAFTA foreign investor challenges, enforcement of NAFTA and WTO non-trade policy constraints has gotten more subtle — with challenges being threatened as a way to chill innovation or trigger federal-government pressure against state initiatives. Given that trade attacks on health and environmental laws draw terrible press and controversy and are expensive to litigate, foreign governments and investors have found that threatening challenges rather than formally filing them is a cheaper and politically safer tactic.⁶⁶ For instance, after NAFTA threats were raised against a Canadian provincial proposal to institute a single-payer form of auto insurance, the proposal was dropped. Often these cases never come to public attention unless one party leaks the documents. Thus, while there is not a long list of formal WTO or NAFTA cases against U.S. state policies, increasingly state officials have begun speaking about trade

64. See e.g. NAFTA Chapter 20, Institutional Arrangements and Dispute Settlement Procedures.

65. E.g., the WTO's Disputes Settlement Understanding refers to the rights and roles of "Members," which are the national governments who are signatories to the agreement.

66. For instance, the European Commission issues an annual list of U.S. regulatory policies at the federal, state and local levels that they consider trade barriers. On this list are many state policies with historical antecedents long preceding the WTO, such as state regulation of insurance and alcohol control states. A high-level forum called the Transatlantic Economic Council has also been developed to discuss the elimination of such "trade barriers" on both sides of the Atlantic. For the 2007 list of U.S. trade barriers see EC, 2008.

threats made against their initiatives.⁶⁷ Moreover, the cases that have been launched are illustrative of the threats posed to normal governmental activity and legislative prerogatives by the NAFTA-WTO model. One commenter summed up this bizarre situation precisely, calling NAFTA a "hunting license" for those seeking to challenge state laws in the name of "free trade."⁶⁸

In addition to the NAFTA investor-state cases described above, several WTO cases have targeted state law and policy.

EU and Japan challenge Massachusetts ban on procurement with firms doing business in Burma: In 1997, the European Union (EU) and Japan challenged a Massachusetts law — based on the anti-apartheid laws of the 1980s — that was aimed at the dictatorship in Burma. The challenge was based on the fact that the policy imposed procurement conditions that were not "essential to fulfill the contract," which is the WTO standard. Massachusetts officials were flummoxed to learn that they were bound by WTO procurement rules that they had never approved. They later learned that a previous governor had agreed to bind the state's purchasing laws to WTO rules without legislative consultation, much less approval. This WTO suit was ultimately withdrawn before it came to a ruling, after the same business

67. See Rein, 2008. ("The Office of the U.S. Trade Representative alerted the Chinese government, which sent a letter from Beijing to protest the bill as a barrier to trade... Then came a four-page missive from the World Trade Organization's Committee on Technical Barriers to Trade — and in English and Chinese — opposing another of Hubbard's bills, to ban a chemical compound called bisphenol A that is central to the plastics industry.") See also Gram, 2007: "A Canadian company wants to open a new plant in Claremont, N.H., to bottle fresh water from a source in Stockbridge, Vt. However, if Vermont wants to limit how much water the company takes, it may run afoul of the North American Free Trade Agreement. States around the country are growing increasingly worried about the threats posed to their laws and regulations by the secret tribunals that resolve disputes in international trade. Experts say everything from environmental rules to the licensing of nurses and other professionals could be affected."

68. Sager, 2002, at 94.

interests that pushed for the WTO challenge won a parallel suit in the U.S. court system.⁶⁹ However, the U.S. State Department went on to invoke the WTO attack on Massachusetts' law in its successful lobbying campaign to derail Maryland's passage of similar legislation, which banned procurement with firms operating in Nigeria based on the Nigerian dictatorship's human rights violations. Federal government officials descended on the Maryland state capital, lobbying to kill the proposal, which had been expected to pass easily. In the end, the bill was defeated by a single vote.⁷⁰

Various state and federal gambling regulations challenged at WTO: In 2003, the island nation of Antigua launched a WTO challenge of a variety of U.S. federal and state laws banning Internet gambling, which they claimed represented “barriers to trade” in cross-border gambling services. Various investors had set up Internet gambling websites in Antigua targeting U.S. customers. When U.S. officials started to enforce the U.S. ban, a WTO case was filed. Happily, the plaintiffs made a technical error in their initial filing (regarding the listing of state laws), and a WTO tribunal suspended that aspect of the case. However, in 2005, the WTO ruled that the United States had inadvertently signed up the entire U.S. gambling service-sector to meet GATS requirements by committing a broader category of “recreational services” to GATS jurisdiction.

69. Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000). The Supreme Court narrowed lower court rulings which had delved into broad issues of states rights in the international commercial sphere to rule against the Massachusetts law on narrow preemption grounds related to Congress' establishment of policy on the Burma trade issue.

70. Marchick, 1998. Maryland House Bill 1273 on Floor March 25, 1998, Senate Bill 354 on Floor Mar. 31, 1998. See also Silverstein, 1998.

The astounding WTO ruling (and USTR mistake) meant that a wide array of state gambling laws are presumptive WTO violations, including state and local policies that ban certain or all types of gambling, state lotteries and Indian gaming compacts. Additionally, the panel ruled that four U.S. federal anti-organized crime statutes that in effect imposed an Internet gambling ban comprised a GATS-illegal “quota” of zero. Thus, the bans constituted a violation of the “market access” requirements for any service sector under GATS jurisdiction. However, the tribunal also ruled that despite this, the federal government could maintain its laws prohibiting Internet gambling under a narrow exception if, and only if, the United States changed a specific law related to the use of the Internet to place interstate horse-race bets that the tribunal found to be discriminatory against foreign gambling operators.

After first agreeing to change the noncompliant federal laws, the United States failed to comply with the WTO ruling, then the WTO authorized trade sanctions, and Antigua began calculating the most effective targets for retaliation. Meanwhile, for years, the U.S. federal government simply failed to respond to a 2005 letter from 29 state attorneys general who urged the USTR to take the only action that would safeguard the diversity of state gambling laws from future WTO challenges: specifically, to take the unprecedented action of removing the entire gambling sector from GATS coverage.⁷¹ Finally, in the face of sanctions, in late 2007, the Bush administration gave notice to the WTO that it would remove gambling from its WTO commitments. However, under WTO rules, to do so requires negotiation with and compensation of any other WTO country that claims lost market access. Anti-

71. See Shurtleff, 2005.

gua has demanded at least \$3.4 billion and four other countries are demanding compensation. U.S. federal officials are alleged to have offered to bind new U.S. service sectors to WTO, including postal services, warehousing and storage (which includes LNG terminals) and testing services, in exchange for removing gambling.⁷²

72. For more information on the Antigua Internet Gambling case, see Gould, 2005.

C. State and local officials' growing concerns about trade-agreement regulatory obligations and the extremely limited system for federal-state consultations

While the federal government generally works cooperatively with states and state international trade offices in the area of export promotion, in other extremely important areas, consultation has been extremely limited or nonexistent. U.S. trade agreements are negotiated by the Office of the U.S. Trade Representative, a cabinet-level, executive branch agency. The assumptions underlying the current system used by USTR for consulting states on trade-related matters date back to the 1970s when the Fast Track ANAM process was first established and the 1980s when an advisory committee for state officials was added to the Fast Track process. (Fast Track is discussed in the next section.)

The fundamental premise behind Fast Track and the federal-state consultation system was that trade agreements covered only traditional trade matters (such as tariffs and quotas), over which states have no authority. While WTO and the NAFTA-style FTAs thoroughly shattered that premise by delving deeply into matters under state jurisdiction, neither consultation nor trade agreement approval processes have been accordingly modified.

State and local officials' concerns about the erosion of subfederal non-trade policy space by trade agreements have spanned partisan divides. This is not surprising, given at issue are the fundamental principles of American democracy: separation of powers and federalism. To date, federal government executive branch officials have rejected state officials' recent requests for better consultation mechanisms. For instance, USTR flatly rejected a 2005 proposal

by the National Conference of State Legislatures (NCSL) to simply *carbon-copy* state legislatures on trade-related communications by USTR to governors.⁷³ More extensive proposals aimed at reforming the state and local trade advisory committee were also rebuffed.

Increasing numbers of governors, attorneys general, and state legislatures are demanding protections in trade agreements for specific state laws and regulations and a greater role in trade policy development,⁷⁴ but the Bush administration has largely rebuffed these efforts.⁷⁵ U.S. federal administrations have simply presumed that they have the authority to commit all levels of government to comply with the sweeping non-trade regulatory constraints included in today's trade pacts.

State officials first raised concerns about the possibility of intrusion on state sovereignty posed by WTO and NAFTA negotiations in the early 1990s.⁷⁶ The National Governors' Association, Western Governors' Association, the National Conference of State Legislatures and other organizations representing state officials sought assurances that NAFTA and WTO would not ride roughshod over state law. And state attorneys general co-signed a letter expressing concern.⁷⁷

73. See NCSL, 2005.

74. See, for example, 2006 letters from the Governors of Maine, Michigan, Iowa and Oregon asking that certain state policy sectors be excluded, available at <http://www.citizen.org/trade/subfederal/services/>. More information about each state is also available on the "Spotlight on Your State" feature of that website.

75. The clearest evidence of the new level of awareness and attention among state and local officials is in the one area in which federal trade officials recognize states' rights to decide whether they will be bound to trade pact terms – procurement. Only 19 governors signed their states onto the procurement provisions of CAFTA in 2005 and only eight (plus Puerto Rico) to the 2007 Peru Free Trade Agreement. This was many fewer than the 37 states that originally signed onto the WTO's procurement agreement in the mid-1990s. However, the federal government has rebuffed attempts by states to assert jurisdiction in most other areas of policy, where it does not recognize their right to decide whether to be bound to the pacts.

76. Sager, 2002, at 94-111.

77. Sager, 2002, at 96-99.

To assuage these concerns and defuse trade pact opposition, the federal government agreed to a number of measures. These included: consultation through the existing Intergovernmental Policy Advisory Committee, a trade advisory body made up of representatives of state and local governments⁷⁸; establishment of a federal-state consultation process within the USTR, using a "single point of contact" communication with the states; and notice and consultation if a state law was challenged in the trade agreements' dispute resolution processes. (We describe these mechanisms in more detail below.)

Many of the "concessions" states received during the NAFTA debate were merely superficial or never materialized. With regard to the GATS specifically, U.S. Sen. Kent Conrad (D-N.D.), who first won statewide office as North Dakota's Tax Commissioner, succeeded in 1993 in getting then-U.S. Trade Representative Mickey Kantor to promise to carve out state tax policy from GATS rules. However no such broad carve-out appeared in the final GATS text.⁸¹ States did succeed in creating a mechanism in NAFTA that allowed for the grandfathering-in of existing state laws that contradicted certain terms of NAFTA's service-sector, investment and financial-services chapters. This important achievement was not replicated in the WTO. Further, while existing laws were protected from certain NAFTA challenges, any innovations or changes to existing laws were not.

78. IGPAC was created by a 1984 addition to the Trade Act of 1974, 19 U.S.C. § 2114c(2)(A) (ii), for the purpose of consultations on matters affecting the regulatory authority and procurement of nonfederal governments. See also 1993 NAFTA implementing legislation, 19 U.S.C. § 3312(b); 1994 Uruguay Round Agreements implementing legislation, 19 U.S.C. § 3512(b).

79. Sager, 2002, at 108.

80. 1994 Uruguay Round Agreements implementing legislation, 19 U.S.C. § 3512(b).

81. Waren, 2006.

Moreover, thanks to state officials' protestations, the Clinton administration added provisions to the WTO implementing legislation and NAFTA's nonbinding administrative report that call upon federal officials minimally to notify and consult with states on disputes that affect their interests.⁸² However, the actual record of this cooperation has been mixed.⁸³

On the strength of such promises and measures, state officials withdrew their threats of opposition to WTO and NAFTA. In a 1994 letter to the USTR, Maine's Attorney General went so far as to hail "the type of productive communication and interaction between [the USTR's] office and the states that gives us confidence that not only the letter but the spirit of this agreement will be adhered to."⁸⁴

This confidence proved not to be justified. By May 2005, state attorneys general had become so frustrated with USTR's lack of responsiveness that they signed onto a letter stating, "[I]t is vital to maintain the principle that the federal government may request, but not require, states to alter their regulatory regimes in

82. See, for instance, Uruguay Round Agreements Act, Public Law 103-465, § 102, Dec. 8, 1994.

83. For instance, states were not afforded a role in the WTO challenge to various state and federal gambling laws. However, when the Canadian corporation Methanex challenged California's MTBE ban under NAFTA, federal lawyers relied upon the expertise of four lawyers in the California attorney general's office. These lawyers spent an enormous amount of time on the case, and report a generally cooperative relationship with federal officials. However, they were not allowed to speak before the tribunal or otherwise formally participate in the litigation. When the tribunal dismissed the case on standing (the plaintiff's lack of direct connection to the product regulated by the law in question), the federal government received \$3 million in compensatory legal fees. However, the California attorney general's office was not compensated for its lawyers' time. In this instance, the federal government's MTBE position was somewhat complimentary to that of California. It remains to be seen how California's lawyers will be treated by federal officials in the NAFTA case involving a Canadian mining operation's challenge to a California mining reclamation law. In this case, the federal position on the matter at hand is diametrically opposed to that of the state government.

84. Quoted in Sager, 2002, at 98.

areas over which the states hold constitutional authority ... [S]tates must receive more detailed and frank information from your office."⁸⁵ Federal officials have continued to rebuff attempts by state officials to have a more meaningful trade policy role. The current consultation system includes the following features:

Direct Consultation: On rare occasions, the federal government directly consults with states in the form of a letters to governors. This consultation usually involves the federal government requesting that a state to agree to be bound to an agreement's government procurement provisions. Thus, even in the rare circumstances when the USTR consults directly with governors, the consultation is not designed to ascertain the wishes of the "state" as an entity, but rather of individual governors. Regarding trade agreements' service-sector and investment rules, the USTR simply binds states without asking for consent, and regarding procurement, does not consult with state legislatures, even though they typically have jurisdiction over setting state procurement policy.

The USTR continues to claim that "state commitments to cover government procurement in trade agreements are voluntary; a state decides whether, and the extent to which, it will cover its procurement under the new agreements; a state decides the manner in which it will make a commitment to cover its procurement; a state may exclude sensitive goods and services."⁸⁶ However, the USTR has refused specific state requests to list some state laws as exceptions (i.e. listing state laws that would not be required to comply with the agreements' constraints) when governors have

85. Shurtleff, 2005.

86. USTR, 2005.

signed on to past trade-pact procurement rules.⁸⁷ For instance, in 2004, Gov. Gary Locke of Washington submitted a list of laws he wanted the USTR to exclude as a condition for Washington State signing on to meet CAFTA procurement rules.⁸⁸ Then-USTR Robert Zoellick simply refused to include Locke's reservations for sensitive state procurement policies, and listed the state as bound to CAFTA procurement rules without any exceptions. Unfortunately, such treatment characterizes federal trade officials' treatment of state requests and demands, putting into perspective the oft-repeated promise by trade officials that states can define participation in trade agreements on their own terms. For instance, USTR also bound Maryland to CAFTA's procurement provisions *after* the state legislature passed a law — overriding the governor's veto — that explicitly rejected being so bound.⁸⁹

SPOCs: The USTR occasionally sends communications on other matters via the state “single point of contact” (SPOC) system which was established in the mid-1990s to placate the concerns of state officials during WTO and NAFTA negotiations. Under that system, a single person in each state was to be designated to receive USTR communications. Then and since, state SPOCs are usually someone in the state's Washington, D.C. office or the state's Department of Commerce, whose activities focus on export promotion. Many states' designees lack the expertise to understand the domestic regulatory impacts of trade, and are

87. For example, the state of Maryland, in agreeing to be bound by the WTO's procurement agreement, requested that laws giving preferences for recycled products and selective purchasing laws targeting South Africa and Namibia, among other policies, be listed as *exceptions* to the state's commitment because they violated the clear terms of the agreement. The WTO procurement agreement's text did not list such exceptions.

88. See Locke, 2004.

89. Maryland Senate Bill 401, “International Trade Agreement – Procurement Rules – General Assembly Approval,” authored by Senator Paul Pinsky, available at <http://mlis.state.md.us/2005rs/bills/sb/sb0401t.pdf>.

often unaware of the importance of their role. Often, legislative leaders or other state officials with enormous interest in trade talks do not even know the name of their state's SPOC.

Because of this extremely limited system, state officials with interest or expertise in the matter at hand do not obtain important communications from the USTR. The SPOCs have been the primary avenue of federal-state consultation over the ongoing WTO service-sector negotiations, and the result has been a haphazard response from inappropriately low-level state employees. NCSL has recommended that the federal government not utilize SPOCs, and instead develop a better system for communicating with states.

In January of 2003, for instance, the USTR sent state SPOCs a 400-plus page document regarding complex WTO service-sector negotiations that were then underway. Meaningful state consultations on the GATS negotiations would have required that the technical document be accompanied by an extensive set of explanatory materials and be sent to state attorneys general and state legislative leaders. Instead, a cover letter sent by the USTR stated that any actions to bind states to new GATS commitments “would be voluntary and subject to consultation.”⁹⁰ In fact, USTR later refused to carve out certain states' specific services markets (including higher education, health care, zoning, and libraries) from U.S. GATS offers, even though four governors wrote to USTR in 2006 specifically making this request.⁹¹

The cover letter that was included focused mainly on the very narrow issue of whether legislatures may have subsequently

90. See Padilla, 2003.

91. See 2006 letters from the Governors of Maine, Michigan, Iowa and Oregon asking that certain state policy sectors be excluded from GATS, available at <http://www.citizen.org/trade/subfederal/services/>.

changed laws listed as exemptions in the original 1995 GATS agreement, and thus federal negotiators needed to update U.S. GATS schedules to reflect such changes.

There is no evidence that the federal government consulted any state legislature or AG office. Communications with SPOCs after this episode revealed that most were at a loss as to how to respond to this document and failed to do so. Many SPOCs failed to realize (because it was not explained to them in accompanying documents) that these complex WTO service-sector negotiations could one day have a significant impact on the future policymaking options of state officials.

In 2005, a similar process was repeated despite protest about the 2003 debacle. States were provided less than a month to review and comment on the lengthy 2005 U.S. revised “offer” in the GATS negotiations, which included a proposal to submit the U.S. higher education sector GATS jurisdiction. State officials formally objected to “the insufficient amount of time for GATS document review, the limited opportunity for state consultations with interested parties, and the inadequate level of federal-state consultations overall.”⁹² As we show in the next section, in Canada, where provincial officials were meaningfully consulted, subfederal education officials were given time to study the issue and commission research and legal opinions. In the end, they decided that the potential risks to higher education — especially to educational subsidies — far exceeded the potential gains, and they effectively vetoed efforts by Canadian federal trade negotiators to bind Canada’s higher education sector to comply with GATS requirements. In contrast, the original U.S. proposal to bind the higher education sector to GATS authority “went to

92. IGPAC, 2005a.

the World Trade Organization without being seen by the major representatives of the higher education community,” according to the Council for Higher Education Accreditation.⁹³

IGPAC: In addition to these processes, there is an Intergovernmental Policy Advisory Committee (IGPAC). IGPAC is one of the advisory committees in a system originally established by Congress in the 1974 Trade Act to provide private-sector input on trade policy. These trade advisory bodies were established in part to obtain private-sector support for Fast Track, which by limiting Congress’ role in trade policy also significantly limited the private sector’s ability to shape policy through traditional congressional lobbying. IGPAC was created by a 1984 addition to the Trade Act, which had the purpose of consultations on matters affecting the regulatory authority and procurement of nonfederal governments.⁹⁴

Today, there are 27 trade advisory committees reporting to USTR that include 700-plus advisors who are appointed by the president.⁹⁵ The vast majority of advisors, who are provided access to confidential negotiating documents and U.S. government position papers, are organized by sector and represent large businesses and campaign contributors focused on exports and overseas

93. Foster, 2002.

94. 19 U.S.C. § 2114c(2)(A)(ii).

95. Congress first established the private-sector trade advisory committee system as part of the 1974 Trade Act that also established Fast Track. Congress has modified the system a number of times since. It is the primary mechanism by which the USTR consults U.S. exporting businesses on trade. Currently, the system encompasses five policy advisory committees; six technical advisory committees on agriculture issues; and 16 industry advisory committees. While a separate federal law, the Federal Advisory Committee Act, requires balance on all U.S. advisory committees, trade advisory committees are notably lacking in balance. Public interest groups have pursued multiple lawsuits just to get one environmental representative on a few key committees, such as those dealing with chemicals, paper and wood.

investment.⁹⁶ IGPAC, by contrast, is comprised of approximately 48 state and local officials who also are appointed by and serve at the behest of the president. Many of its advisors represent rather associations of state and local officials.

IGPAC operates under significant constraints that undermine its ability to have a meaningful role in the process. Most fundamentally, under the current U.S. federal-state consultation system, there is no mechanism to respect the *legal* authority of subfederal governments regarding various policy subjects. IGPAC has the same status as various private-sector trade advisory committees. That is to say that the views of elected subfederal governments (representing their legal authority under the U.S. Constitution to protect the public interest) have the same weight as corporate representatives (representing their companies' specific commercial interest) in the trade advisory system. There is no requirement to incorporate the advice given by any of these committees into the official government negotiating position. Thus, recommendations made by IGPAC (and the handful of other advisors who do not rubber-stamp administration proposals) are easily ignored. Moreover, given that the 48 IGPAC representatives comprise one trade

96. The USTR trade advisory committee system includes: the Advisory Committee for Trade Policy and Negotiations (ACTPN), Trade and Environment Policy Advisory Committee (TEPAC) (which includes industry and environmental-group representatives), Intergovernmental Policy Advisory Committee (IGPAC), Labor Advisory Committee (LAC) (which is comprised of union representatives), Agricultural Policy Advisory Committee (APAC), Agricultural Technical Advisory Committee for Trade (ATAC), Animal and Animal Products ATAC, Fruits and Vegetables ATAC, Tobacco, Cotton and Peanuts ATAC, Sweeteners ATAC, Grains, Feed and Oilseeds ATAC, Processed Foods ATAC, Industry Trade Advisory Committee (ITAC)-1 Aerospace Equipment, ITAC 2 - Automotive Equipment and Capital Goods, ITAC 3 - Chemicals, Pharmaceuticals, Health/Science Products & Services , ITAC 4 - Consumer Goods, ITAC 5 - Distribution Services, ITAC 6 - Energy and Energy Services, ITAC 7 - Forest Products, ITAC 8 - Technologies, Services and Electronic Commerce, ITAC 9 - Non-Ferrous Metals and Building Materials, ITAC 10 - Services and Finance Industries, ITAC 11 - Small and Minority Business, ITAC 12 – Steel, ITAC 13 - Textiles and Clothing, ITAC 14 - Customs Matters and Facilitation, ITAC 15 - Intellectual Property, and ITAC 16 - Standards and Technical Trade Barriers.

advisory committee in a system of 27 committees that includes 700 mainly private-sector industry advisors, the views of state and local governments in the U.S. trade policymaking process have considerably less representation than those of industry.

There are still other constraints on IGPAC's ability to function successfully. For instance, the Bush administration has begun classifying the texts of trade agreements — bizarrely claiming alleged national security reasons — to try to limit who can have access to them. This is a relatively new classification practice that has not yet been tested in court. However, all trade committee advisors must undergo a background check and receive a national security clearance to have access to such documents. IGPAC and other advisory committee members can be criminally prosecuted for giving classified documents to any other state official (even their own governors) or other individuals who have not been cleared for this purpose, and are extremely limited in what they can even say about IGPAC matters. IGPAC does not include a represent from each U.S. state, receives no federal funds to bring IGPAC members to Washington, D.C., for in-person meetings or to support independent counsel or professional staff to assist in the challenging task of analyzing complex trade matters. Further, IGPAC does not meet frequently.⁹⁷

Recognizing these major shortcomings, in 2004 IGPAC members proposed a reform of committee processes and functions, including ensuring that the committee simply had timely ac-

97. A 2002 government report found that even during the formulation of U.S. positions to the GATS expansion negotiations which would directly affect wide swaths of subfederal authority, IGPAC met only once in 2000 and once in 2001, each time by teleconference. See GAO, 2002, at 24.

cess to key documents that the federal government had already tabled in negotiations.⁹⁸ In its 2005 annual report, USTR touted the improvements it had made in the trade advisory committee consultancy process including “creating a secure encrypted advisors’ website with password protection” for posting draft negotiation documents and monthly conference calls with all advisory committee chairs.⁹⁹ However, the IGPAC recommendations were largely rejected.

Indeed, during the very period covered by the report, USTR had refused to grant IGPAC access to critical negotiation documents. For instance, USTR submitted a document on the topic of the “transparency in domestic lawmaking” to the WTO GATS’ Working Party on Domestic Regulations. This is a subject of great importance to states, as new rules in this area could impose new and costly obligations on state and local governments to make draft legislation and regulations available to all WTO signatory country governments and accept comments on drafts from these countries. Towards the end of 2005, IGPAC had *still* not seen the U.S. submission on transparency, noting with irony “[w]hile it is available to all delegations of the WTO, the U.S. paper on transparency is not public, however, and not available to IGPAC.”¹⁰⁰ Because of these many factors, IGPAC remains significantly disadvantaged in its efforts to safeguard subfederal policy space from trade agreement conflicts.

98. IGPAC, 2004. In 2006, IGPAC noted that its members “remain hopeful that our document submitted to the USTR on Aug. 5, 2004 entitled ‘Recommendations for Improving Federal-State Trade Policy Coordination’ may eventually be considered by Congress and the USTR and implemented in some form.” See IGPAC, 2006, at 6.

99. USTR, 2006, at 253.

100. IGPAC 2005b, at 4.

D. The Fast Track trade negotiation and approval system additionally limits subfederal role

Fast Track (renamed Trade Promotion Authority by its supporters in 2002) was a trade negotiation and approval mechanism first developed by President Nixon in 1973, finally approved by Congress in 1974 and signed into law by President Ford in 1975. Fast Track was President Nixon’s idea of how the executive and legislative branches should “coordinate” their respective constitutional authorities related to trade negotiations. The U.S. Constitution grants Congress the exclusive authority “to regulate commerce with foreign nations” and to “lay and collect taxes [and] duties,”¹⁰¹ while giving the executive branch the exclusive authority to conduct relations with foreign sovereigns. Thus, only the legislative branch can authorize entry into a trade agreement, while only the executive branch can negotiate such agreements. But Nixon’s Fast Track effectively delegated nearly all of Congress’ authority over trade to the executive branch.

Fast Track authorized the president and USTR staff to determine with which countries it will seek agreements, decide the desired content, negotiate the trade agreements, and sign them all *before* Congress had a vote. The executive branch gave notice to Congress of its intent to enter into negotiations, and later of its intent to enter into and sign agreements, but Congress had very limited rights to stop the process. Moreover, Congress’ only vote was on implementing legislation that legally adopted the previously signed text and conformed U.S. law to the pact’s rules. The executive even *writes* this legislation through a process that bypassed normal congressional procedures, such as committee mark-ups.

101. U.S. Constitution, Article I-8.

Fast Track also preset the rules for congressional consideration of this package. After the executive branch dropped the legislation into the hopper, the House was required vote on it no more than 60 days later, and the Senate no more than 90 days after the initial action. Effectively, the process ceded control of the House and Senate floor to the executive branch. Further, normal Senate unanimous consent procedure is waived, no amendments are permitted in either chamber, and debate is limited to a maximum of twenty hours. Fast Track permits Congress only a “yes” or “no” vote on a pre-signed final trade agreement and the implementing legislation written by the executive branch to conform U.S. law to it.

Past presidents, perhaps recognizing how extraordinary the procedure was and thus the prospect for congressional backlash at actually being forced to take a vote, used the threat of a forced vote to obtain cooperation from congressional leaders in a process of informally scheduling Fast Tracked trade votes. Recently President Bush actually employed the full Fast Track procedure to try to force a vote on the Colombia FTA *after* congressional leaders explicitly requested further discussions on the pact. Bush’s action awakened many in Congress to Fast Track’s full implications. The House promptly took formal action to reassert its constitutional authority and led by Speaker Nancy Pelosi, the House replaced the Fast Track forced-vote rule for that FTA with procedures that allow the Speaker to determine when the vote will occur.¹⁰² But even under the changed rule no-amendments, limited debate rules of floor consideration apply.

Even before the Colombia FTA episode, not surprisingly, since NAFTA and WTO, each attempt to get Congress to cede so much authority with Fast Track is a *battle royale* in Congress. In

102. The rule change, H. Res. 1092, passed by a 224-195 vote on April 10, 2008.

1995 and 1997, legislation that would have provided the president a delegation of Fast Track authority was withdrawn to avoid its defeat. And in 1998, the House rejected another attempt to obtain Fast Track by a margin of 63 votes. After having lapsed for seven years, Fast Track was ultimately re-established in 2002 only for a five-year period — by a two-vote margin after a two-year effort. In June 2007, this final delegation of Fast Track expired.¹⁰³

With the exception of the members of the four congressional committees specifically named in the Fast Track statute, most congresspeople had no access to negotiation documents or draft texts. The degree of access provided to such materials for those on the named committees was at the discretion of U.S. negotiators. The 2002 Fast Track established a Congressional Oversight Group (COG) that was designed in part to improve congressional access to critical documents and information, but in operation the COG has not obtained good reviews. Meanwhile, under Fast Track, state and local officials had no access to these documents, nor did the public. Fast Track’s design — which excluded the public, and state and local officials, and strictly limited and backloaded the timing of Congress’ role — granted executive branch negotiators enormous discretion about the substantive policies contained in the agreements they negotiated and signed.

103. We go into this legislative history in more detail in one of the companion pieces also for the Alfred P. Sloan Foundation, so will not belabor the point here.

While Congress established negotiating objectives in each grant of Fast Track authority, executive branch negotiators systematically ignored Congress' objectives.¹⁰⁴ Because the agreements are fully negotiated and signed before Congress has any role in approving the contents, Congress' only recourse when executive branch negotiators ignore their objectives and include unacceptable provisions is the unpalatable option of rejecting an entire agreement. Because Fast Track effectively eliminates traditional checks and balances, the executive branch becomes largely unaccountable to Congress (or the public) regarding the "trade" pacts' scope and contents.

While Fast Track cuts Congress off from meaningful participation in the formative aspects of the trade-agreement policymaking process, state and local officials are *totally* excluded, even concerning areas of state authority explicitly reserved to the states

104. For instance, although the 1988 Fast Track required it, negotiators did not include enforceable protections for workers' rights in the trade agreements – NAFTA and WTO – completed under that Fast Track. Similarly, even though the 2002 Fast Track required that "foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States," (Public Law 107-210, § 2102 (b)(3)) the agreements negotiated under this authority did precisely that. Indeed, the flagrant dismissal of this negotiating objective was so obvious, that the NCSL, which had previously supported each grant of Fast Track reversed its policy. NCSL's 2007-08 "Free Trade and Federalism" policy position states: "Unfortunately, the 'no greater rights' language in the 2002 Trade Promotion Authority (TPA) has been interpreted to cover only substantive rights. The ability of foreign investors to bring claims in front of an international investment tribunal, as opposed to through the U.S. courts, is clearly a greater procedural right than that enjoyed by U.S. investors; and NCSL is concerned that these tribunals, because they are frequently unfamiliar with U.S. federalism and jurisprudence, would in any case provide foreign investors with greater substantive rights. At present, such language is not inserted into the operational text of investment chapters of these trade agreements, but rather, is only found in the preamble. NCSL will only support a grant of presidential trade negotiating authority if such a grant of authority includes a "no greater procedural or substantive rights" mandate." Similarly, the "Kennedy Amendment" to the 2002 Fast Track set out a negotiating objective that U.S. negotiators "respect the Declaration on the TRIPS Agreement and Public Health, adopted by the World Trade Organization at the Fourth Ministerial Conference at Doha, Qatar on November 14, 2001" (Public Law 107-210 § (b) (4)(C)). Yet each FTA negotiated using that Fast Track grant has violated those standards.

under the Constitution. Under Fast Track rules, executive branch negotiators have no obligation even to consult with state and local officials before binding states and localities to trade-agreement terms, much less to obtain their prior informed consent. Even federal congresspeople have been unable to address the concerns that state and local officials have brought to their attention. This is because the Fast Track process provides Congress with no recourse to fix elements of trade agreements that offend the principles of federalism, unless there is a credible threat that the inclusion of some provisions will cause Congress to reject the entire deal. This allows negotiators to cavalierly ignore even the most serious concerns expressed by state and local officials.

In sum, when Fast Track was established in the 1970s, the scope of negotiations and agreements subject to this extraordinary process was limited to traditional trade matters — cutting tariffs and lifting quotas. The Fast Track mechanism has become grossly outdated relative to the expansive non-trade scope of today's international commercial negotiations. This mismatch means that the executive employs Fast Track to force Congress to accept trade *and* non-trade domestic policies previously rejected on the merits, and to internationally preempt state and local authority regarding subjects in their jurisdiction. While hundreds of trade deals were approved without Fast Track, many observers believe that the most controversial — such as the WTO, NAFTA and CAFTA — would not have passed in their current forms without Fast Track. Specifically, without the way the mechanism was used to limit a wary Congress from exercising its constitutional authority to set the terms of U.S. trade policy and to use its normal oversight, debate or amendment rights.

III. FINDINGS:

Best Practices for Negotiating and Approving Trade Agreements in a Manner that Promotes Trade Expansion and Respects Subfederal Regulatory Authority

A. Canada: Federal and provincial officials cooperate up front on trade agreement negotiations to avoid provincial opposition later

The Canadian Constitution provides authority to the provinces regarding an array of policy areas. Canadian courts have interpreted the allocation of authority between the federal and provincial governments to give the federal government the authority to enter into international obligations, but federal government authority to *implement* international agreements in areas of exclusive provincial jurisdiction is limited. This understanding has motivated federal officials to consult with provinces and to work to convince provinces of the merits of federal positions or to modify federal positions to ensure successful trade pacts with full provincial support and implementation. Some provinces have interpreted this allocation of authority as providing them with what amounts to a right of approval over the decision to enter into an international obligation in areas that are within the provinces' jurisdiction.¹⁰⁵

Accordingly, Canada has developed intergovernmental consultative procedures and practices to manage the process of trade

agreement negotiation and approval where agreements affect matters within provincial jurisdiction. Canada's trade ANAM was first developed during the negotiation of the Canada-U.S. FTA and has continued to evolve and become more institutionalized since. In recent years, provinces have used the process to reject a Canadian federal government proposal to expand Canada's WTO GATS obligations by adding higher education to a list of sectors Canada was offering to bind to WTO. Earlier, some provinces declined to sign on to the NAFTA side agreements on labor and the environment. While Canada's ANAM process provides a significantly more meaningful role for Canadian provinces relative to U.S. states, many provincial officials remain concerned that provinces' role regarding trade agreement investment and other provisions remains insufficient to safeguard provincial policy space in these areas.

Canadian Government Structure: Canada's federal system divides power between the national government in Ottawa and 13 subnational units (10 provinces and three territories). The country's constitution gives the national government exclusive power over such matters as regulation of interprovincial and international trade and commerce, navigation and shipping, money and banking. The national government also has residual authority to make laws for the peace, order and good government of Canada in all matters not assigned exclusively to the provinces.¹⁰⁶ The provinces have exclusive jurisdiction over such matters as property and civil rights, most aspects of their natural resources, education, and much of labor law.¹⁰⁷ Many subjects, including agriculture and the environment, are within the competence of

105. While some provinces supported NAFTA, some including British Columbia and Ontario were adamantly opposed. Federal officials worked to address provincial concerns for instance, by supporting a special carve out for existing subfederal policies from certain articles of the agreement, but at the end of the day, the federal government signed NAFTA over the objections of some provinces.

106. ACIR, 1981; Constitution Act of 1867, Article 91.

107. ACIR, 1981, at 7; Constitution Act of 1867, Articles 92, 92A and 93.

both levels of government.¹⁰⁸ For most matters, if federal and provincial laws conflict, the former prevails.¹⁰⁹

International Agreements Involving Policies over

which Provinces Have Authority: Although the Canadian federal government has sole power to negotiate treaties, it does not have power to implement them in areas of provincial jurisdiction. A 1937 court case established this rule, when the attorney general of Ontario challenged the Canadian federal government's right to bind the province to an international labor convention without the province's assent.¹¹⁰ While this case pertained to labor policy (over which Canadian provinces have exclusive constitutional authority), provincial authorities continued to exert their authority and push for a greater role. As a result, the practice now applies to additional policy areas, including regarding subjects of shared federal-state competence such as environmental policy. Thus, Canada's trade ANAM for NAFTA provided provinces a more significant role than that provided by the Clinton administration to U.S. states. More recently, the provinces, under the leadership of the provincial Ministers of Education, effectively vetoed a federal proposal to submit Canadian higher education services, which fall under provincial authority, to WTO jurisdiction.

108. The division of authority in agriculture has been expressed as "everything up to the farm gate is federal and everything behind the farm gate is provincial." Schacter, 2006a. Court decisions have established that both levels of government have the authority to enact environmental legislation. DiGiacomo, 2005, at 15.

109. Forsey, 2005. While the federal government has the authority to annul provincial legislation, this power has not been used in over half a century.

110. A.G. Can. v. A.G. Ont., et al. (Labour Conventions Case) [1937] 1 D.L.R. 673; Sullivan, 1987, at 67-68. Some Canadian scholars noted that the case might well be decided differently today. However, departing from its precepts while it remains in effect would, at a minimum, raise questions about the legality and reliability of Canada's trade commitments. Gould, 2006; Schacter, 2006a.

"Ontario has an effective veto over any free trade deal negotiated with the U.S.," noted David Cooke, chair of an Ontario Legislative Committee.¹¹¹ "They can negotiate all they want but cannot force" states to implement the pact, noted another official.¹¹² In 2002, Quebec further asserted its provincial authority by adopting a law stating that the province will not be bound by an international agreement pertaining to any matter within its constitutional jurisdiction unless it has agreed to be bound. Moreover, Quebec declared that all "important international commitments," including international trade agreements, must be approved by the provincial legislature.¹¹³

Canadian Intergovernmental Relations: C-Trade

Mechanism Key to Meaningful Provincial Involvement

in Trade Policymaking: Canada manages federal/provincial relations through an established network of committees, starting at the highest level with a "First Ministers Conference" composed of the Prime Minister of Canada and the provincial premiers (counterparts to U.S. governors). Although no statute or regulation has institutionalized this system,¹¹⁴ it has functioned for 100 years.¹¹⁵ Historically, the intergovernmental machinery has been kicked into motion on very short notice, and has proved capable

111. Quoted by Sullivan, 1987, at 63-64.

112. Public Citizen telephone interview with a Canadian official who wanted to remain anonymous, 2006.

113. See An Act Respecting the Ministère des Relations Internationales, R.S.Q. chapter M-25.1.1, §§19-22.7, available at <http://www.canlii.org/qc/laws/sta/m-25.1.1/20060614/whole.html>. That this legislation does not bind the federal government has been identified as a problem in Harrington, 2006a, at 121 and 156.

114. Canada's provincial governments have pressed for a written agreement formalizing the intergovernmental consultation process for international negotiations, but the federal government has resisted their request. See Klein, 2005; Cook, 1999.

115. Bolleyer, 2006, at 14.

of dealing with enormously complex matters.¹¹⁶ This grouping operates on a full range of issues including but extending beyond international trade agreements.

The main Canadian mechanism to facilitate on-going intergovernmental consultations on trade is called the Federal-Provincial-Territorial Committee on Trade (C-Trade). C-Trade meets at the senior-official level on at least a quarterly basis. In addition, the top-ranking officials responsible for international trade at both the federal and provincial levels meet approximately once a year.¹¹⁷ (At the federal level, this is the Minister of International Trade in the Department of Foreign Affairs and International Trade Canada. At the provincial level, international trade generally falls within the purview of the agency responsible for economic development.)¹¹⁸

In addition to the quarterly meetings, C-Trade participants confer by telephone on a weekly, or, when events demand, even on a daily basis.¹¹⁹ When Canadian federal-subfederal trade consultations take place, each provincial government is given an opportunity to represent its specific provincial government's interests.¹²⁰ Provincial and federal government officials have equal rights to place subjects on C-Trade meeting agendas.¹²¹ The federal government may also meet on a one-on-one basis with provinces concerned about particular issues.¹²² Requests to the provinces by the Canadian federal government regarding the former's positions on prospective trade matters are generally made through

116. ACIR, 1981, at 32 and 36.

117. DFAIT, 2008.

118. See, for example, MED, 2008.

119. Devine, 2006.

120. Schacter, 2006a.

121. Cardinal, 2006.

122. Devine, 2006.

the C-Trade consultation process, and may be followed up in writing.¹²³ When communicating a province's position on a trade commitment that could bind future governments, provincial trade officials secure formal direction from the provincial premier, and then transmit the province's decision in writing to the federal minister of international trade.¹²⁴ In Canada, a premier is the leader of the political party that wins the most seats in the legislative assembly in a provincial election. Under Canada's parliamentary system of government, the premier also holds his or her seat in the provincial legislative assembly during his or her premiership, which is to say that the position represented by the premier is the position of the majority party in the provincial legislature.

C-Trade also provides an interesting model for ensuring that sub-federal officials have access to necessary documents. For the past ten years, confidential trade negotiations and other documents have been posted on a website to which all C-Trade representatives have access.¹²⁵ Provincial trade officials have the discretion to grant access to the website to colleagues from other departments or to provide them copies of materials.¹²⁶ Informational and negotiating documents developed by federal trade officials are shared with provincial officials using this website. That such access by subfederal officials for a decade to critical trade information has not undermined Canadian trade negotiating goals and processes belies the claims made by U.S. federal officials to justify their insistence that ICPAC members are forbidden from sharing documents with even their own state's elected leaders. Provincial officials are given an opportunity to weigh in before

123. Schacter, 2006b.

124. Perttula, 2006b.

125. Cardinal, 2006.

126. Cardinal, 2006.

such documents are submitted as the Canadian position in negotiations.¹²⁷ While there have been occasions when provincial officials found the time provided for comment insufficient,¹²⁸ they report that this problem has been recently remedied.¹²⁹ As explained by David Devine, Director of the Consultations and Liaison Division of International Trade Canada:

We certainly share schedules [GATS negotiating documents] with the provinces. When we sit down with them, we give them as much information as we can. Otherwise, at the end of the day, if they find out you didn't tell them something, it explodes in your face.¹³⁰

Canadian federal representatives view the C-Trade meetings as the means to reach agreement in advance with their provincial counterparts, and so avoid the possibility that the federal government would take a position in conflict with the provinces on matters that are under provincial purview.¹³¹ Foreign trading partners are aware of Canada's constitutional division of powers, and expect assurances from the federal government that provinces will honor an undertaking.¹³² To satisfy this expectation, federal officials use the C-Trade and other intergovernmental processes to consult up front with subfederal officials to obtain their consent before the federal government tables a position or proposal.

127. Cardinal, 2006.

128. Sinclair, 2006.

129. Cardinal, 2006.

130. Devine, 2006.

131. Gould, 2001. What would happen if penalties were imposed for a province's failure to adhere to a trade provision to which it had not consented remains an unsettled question. Some provinces have taken the position that the federal government would be responsible. Schacter, 2006. Other provincial officials consider the issue of liability to be unclear. Perttula, 2006a. For its part, the federal government has informed local governments that it will not indemnify them for losses under NAFTA. Gould, 2004, at 3.

132. Anderson, 2001, at 45 and 50.

Provincial officials also often accompany the Canadian delegation during trade negotiations so that they can quickly respond to the vagaries of the negotiation process. However, subfederal officials are not present in the room during negotiation sessions.¹³³ Rather, federal officials consult with them as questions develop related to subfederal areas of competence.¹³⁴ For instance, during the WTO negotiations on agriculture in July 2006, eight provincial agriculture ministers and several provincial trade ministers were present in Geneva.¹³⁵

Canada's Trade ANAM Resulted In Subfederal Views Shaping the Canadian Position on Submission of Higher Education to GATS Jurisdiction:

In Canada, as in the United States, authority to license institutions of higher education and to confer degree-granting status resides with subfederal governments.¹³⁶ Since education services generally fall within provincial jurisdiction, the Canadian federal government "would get their [provinces'] approval" before taking a position or making an offer on education.¹³⁷

Canada initially excluded education services from its GATS commitments in 1995.¹³⁸ When GATS negotiations resumed in 2000, the Canadian federal government used the C-Trade process to float the idea of committing some higher education services to WTO jurisdiction.¹³⁹ In a discussion paper that was made publicly available, the government attempted to distinguish

133. Cardinal, 2006.

134. Devine, 2006.

135. Devine, 2006.

136. AUCC, 2003.

137. Devine, 2006.

138. IISD, 2001, at 1.

139. Cardinal, 2006.

between public and commercial (for-profit) higher education services, maintaining that public education would be protected from GATS coverage by the GATS exemption of services “supplied in the exercise of government authority.”¹⁴⁰ Trade officials hoped to encourage educational institutions to view commitment of “commercial” education services in GATS as an opportunity for overseas expansion.¹⁴¹

The consultation process eventually allowed an array of potentially interested parties to consider the proposal. Although the Canadian federal government’s discussion paper presented a different view, many provincial officials and higher education experts concluded that the risks posed to public education by any GATS commitment of education services were substantial.¹⁴² For instance, the Association of Universities and Colleges of Canada (AUCC), along with its European and U.S. counterparts, issued a statement in 2001 opposing GATS commitments in higher education.¹⁴³ In addition, AUCC produced an analysis of the specific problems that could result if the federal government extended Canada’s GATS commitments to cover higher education.¹⁴⁴ The Canadian Association of University Teachers commissioned a legal opinion that disputed the federal claim that the “government authority” exclusion of GATS would protect public higher education.¹⁴⁵ Given the complicated GATS rules, including the limited definition of public services noted above, the paper concluded that the distinction between public and commercial

140. IISD, 2001, at 2.

141. Schacter, 2006a.

142. For further information see Bottari, 2007.

143. AUCC, 2001b. The declaration notes that, with the exception of ongoing dialogue in Canada, there had not been effective consultation between trade officials and their organizations.

144. AUCC, 2001a.

145. Gottlieb & Pearson, 2001.

higher education is not well defined. The Province of Manitoba held a legislative briefing assessing the risk to education and other public services posed by GATS inclusion.¹⁴⁶ Informed educational institutions and associations made sure that provinces that might have gone along with the federal position were provided the relevant information and heard from those concerned with the proposal.¹⁴⁷

The Canadian Council of Ministers of Education, representing provincial/territorial education officials responsible for elementary, secondary and higher (“advanced”) education, formed a working group to monitor the GATS negotiating process.¹⁴⁸ Utilizing research produced by this group, provincial education officials were able to work with their C-Trade representatives to ensure that the negotiating proposal was informed by how the Canadian education system actually works and what specific implications were posed by the proposal. Despite “heavy lobbying” from the federal government, the process allowed the provinces to assert their authority. The provinces refused to consent to the federal proposal regarding GATS commitments in higher education services¹⁴⁹ and thus, Canada’s new GATS offers did not include higher education.

In sharp contrast to the Canadian process, a 2000 U.S. federal government offer to bind the U.S. higher education sector to GATS “went to the World Trade Organization without being seen by the major representatives of the higher education community,” according to the *Chronicle of Higher Education*.¹⁵⁰ No

146. Robinson, 2006.

147. Schacter, 2006a.

148. CME, 2002.

149. Sinclair, 2006.

150. Foster, 2002.

state higher-education officials or legislators were consulted, much less provided an opportunity to study or stop the federal government proposal that would directly curtail their authority. To this day, the vast majority of governors, state legislatures or state higher education officials have yet to analyze the actual detailed proposal, even though state-level education policies and funding are most affected by new WTO commitments in this area.¹⁵¹

Canada's Trade ANAM Provided Canadian Provinces with Opt-In Rights on Certain NAFTA Obligations: Canada took a slightly different approach to the provinces' decision-making role regarding the NAFTA environmental and labor side agreements. The federal government signed the side agreements on its own behalf and committed to comply with environmental and labor requirements within federal jurisdiction. Regarding matters within subfederal jurisdiction, however, Canada negotiated an "opt-in" procedure that left it up to the provinces to decide whether to sign on to the side agreements.

151. In 2006, various state governors did learn of the U.S. higher education proposal and asked that their states be carved out of any such GATS commitment. These states include: Maine, Oregon, Michigan and Ohio. For an analysis of the U.S. GATS commitments in higher education see: For further information see Bottari, 2007.

The NAFTA Labor and Environmental Side Agreements

The NAFTA side agreements came about because of an American election-year pledge. There was widespread public concern that the pending trade agreement would lead to environmental degradation, exploitation of workers, and loss of jobs in the nations with higher standards. Presidential candidate Bill Clinton supported NAFTA but vowed in 1992 that, if elected, he would sign "supplemental agreements" to address labor and environmental standards.¹⁵² What resulted were two limited side pacts, the North American Agreement on Environmental Cooperation (NAAEC) and the North American Agreement on Labor Cooperation (NAALC), which the three NAFTA governments signed in 1993 and which went into effect (along with NAFTA) on January 1, 1994.¹⁵³ Basically, the two agreements call on governments to 'strive to enforce' the environmental and labor standards in effect within their jurisdiction. The pacts also set up a process through which governments and citizen groups could try to bring attention to a country's failure to enforce its laws as required by initiating complaints that proceeded on different tracks depending on their source.

152. Charnovitz, 1994, at 257-258.

153. Charnovitz, 1994, at 257-258.

For purposes of illustration, this memo focuses on Canada's approach to the environmental agreement.¹⁵⁴ It is an issue more relevant to the U.S. context, because unlike labor policy, provinces do not have exclusive authority over environmental policy. Under the environmental accord, an independent tripartite body has the power to investigate complaints that any of the three countries has failed to enforce its laws. If the complaint comes from a non-governmental organization, the process ends with preparation and possible publication of a factual record.¹⁵⁵ For government-to-government complaints, the accord establishes a system of consultation, dispute resolution and, ultimately, the remote possibility of small monetary or trade sanctions.¹⁵⁶

In an annex to the NAFTA environmental side agreement, Canada agreed to file a declaration listing the provinces covered under the agreement.¹⁵⁷ If a province decides to “enjoy the rights” and “be bound by the obligations” of the NAAEC, it enters into a formal written agreement with the federal government — the Canadian Intergovernmental Agreement Regarding the North American Agreement on Environmental Cooperation (CIA-NAAEC). Through the CIA-NAAEC, the province gives the

154. The principle difference between the two agreements is that the labor agreement has no equivalent to the independent tri-governmental Commission for Environmental Cooperation established under the NAAEC. Instead, the NAALC requires each government to receive public communications on labor law matters arising in the territory of the other governments, and gives each government complete discretion over the decision whether or not to pursue a complaint. Knox, 2006, at 429.

155. NAAEC, Articles 14-15. The government-to-government dispute resolution process has never been used for the NAAEC. The citizen submission process, on the other hand, had been initiated 64 times as of June 2008. See <http://www.cec.org/citizen/status/index.cfm?varlan=english>, accessed June 25, 2008.

156. NAAEC, Articles 22-36 and Annex 36A. In the case of the United States and Mexico, trade sanctions can be imposed if monetary sanctions are not paid. Canada did not consent to subject itself to trade sanctions, but agreed instead to make a monetary award enforceable in its domestic courts.

157. NAAEC, Annex 41.

federal government permission to add it to the NAAEC list of covered entities. In return, the federal government agrees to follow certain procedures to ensure that the provinces receive adequate notice and can directly participate in NAAEC proceedings. These safeguards include: a reasonable opportunity for a province to provide the federal government with written advice *before* the latter provides information about the former to the NAAEC investigative body; a provincial right to be represented, along with the federal government, during consultations with another country involving a provincial enforcement measure or before the NAAEC investigative body; and a provincial right to take the lead in the dispute resolution process when a provincial enforcement practice is the subject of the dispute. Additionally, provinces may withdraw from the CIA-NAAEC on six months notice.¹⁵⁸

Unless the declaration specifically lists a province, the federal government cannot impose jurisdiction on the province in the instance of NAAEC government-to-government dispute resolution processes.¹⁵⁹ Take an example where another NAFTA country requested consultations, or triggered the dispute resolution process, about a Canadian province's failure to enforce environmental laws. If that province had not signed the CIA-NAAEC, the complaint cannot advance. While Canada made only a partial NAAEC commitment, the other two countries did not take similar reservations. To address this asymmetry, another section of Canada's annex explicitly provides that the country cannot proceed beyond the level of consultations in the dispute resolution process unless one of two things happens. Either it must be certified that the matter at issue would be within federal jurisdiction, or alternatively, if the matter would be within provincial

158. CIA-NAAEC, Articles 5, 7, and 14.

159. NAAEC, Annex 41 § 3.

jurisdiction, it must be certified that the listed provinces together account for 55% of Canada's GDP and 55% of production in relevant industry.¹⁶⁰

One scholar called this “opt-in” mechanism a “creative approach to treaty compliance in federal systems.”¹⁶¹ Others have referred to it as “a formal domestic accession procedure for the Canadian provinces,”¹⁶² analogous to the accession process by which a country agrees to be legally bound by a treaty. U.S. states, by contrast, were given no role in deciding whether or not to sign onto the NAFTA side agreements.¹⁶³

Interestingly, this “opt-in” process does not appear to have been used outside the context of trade *side* agreements.¹⁶⁴ Perhaps this was because of the power dynamics inherent in the political economy of trade agreements. Provinces were allowed to decide if they would be subjected to *additional* environmental obligations (which powerful interests would oppose), but were not provided with the same opt-in rights on non-tariff provisions that *limited* provinces' environmental, health or other regulatory authorities. However, power dynamics aside, the successful use of the opt-in mechanism provides an example of how subfederal governments could be provided a means to determine to which non-tariff regulatory constraints in their jurisdiction they choose to be bound.

160. NAAEC, Annex 41, § 4. The comparable figures for the labor agreement are that the provinces listed in the declaration account for 35 percent of the labor force and at least 55 percent of the workers in the relevant industry.

161. Charnovitz, 1994, at 257 and 271.

162. DiMento and Doughman, 1998, at 651 and 717, quoting Johnson and Beaulieu, 1996.

163. Charnovitz, 1994, at 257 and 271. Furthermore, while the Clinton administration promised not to introduce NAFTA panel reports as evidence in federal courts, it did not make any similar promise about use of NAAEC panel reports.

164. The Canada-Chile Free Trade Agreement that went into force in 1997 has similar side agreements.

Despite Canada's obligation to “use its best efforts to make this Agreement applicable to as many of its provinces as possible,”¹⁶⁵ only three provinces, Quebec, Alberta and Manitoba, signed on.¹⁶⁶ In a speech in Canada's House of Commons, Quebec Member of Parliament Stéphane Bergeron explained that Quebec signed onto the side agreements only after “serious negotiations” with the federal government that resulted in the NAFTA environmental commission being headquartered in Quebec. Noting that “[r]egardless of what this centralist government may believe, labour and environment are largely areas of provincial jurisdiction,” Bergeron correctly predicted that “[s]ide agreements which for now apply only in areas of federal jurisdiction are not likely to apply to all provinces equally anytime soon.”¹⁶⁷

Resistance to the agreement appears to stem both from a reluctance to accept exposure to the complaint process¹⁶⁸ and from a desire to assert provincial sovereignty after provinces felt that they had “no meaningful input” on the federal government's actual negotiation positions on non-side agreement aspects of NAFTA.¹⁶⁹

Provincial upset about the lack of input into other aspects of NAFTA reflects the limits to the C-Trade system. First, the expansive scope of today's international commercial agreements

165. NAAEC, Annex 41, § 7.

166. NAAEC website, http://www.naaec.gc.ca/eng/implementation/implementation_e.htm. The labor agreement has been signed onto by the same three provinces plus the Prince Edward Islands.

167. Bergeron, 1994.

168. Kirton and Richardson, 2006, at 18.

169. De Boer, 2002, at 6. Provinces became particularly alarmed about NAFTA Chapter 11 after the agreement was finalized and when provinces were asked to work on a list of subfederal exceptions to the agreement. (An article of NAFTA authorized this carve-out list for provincial and state governments and set out a timeframe for finalizing it.) The alarming list of regulatory policies potentially subject to NAFTA challenge resulted in the subfederal governments successfully demanding a carve out of all existing subfederal regulations to key NAFTA articles.

such as NAFTA implicates many areas of shared federal and subfederal authority, including subjects important to the provinces about which federal officials did not feel obliged to consult. Second, at the time of the NAFTA debate in Canada, some provinces supported the proposal and some opposed, allowing the federal government to proceed with some subfederal support. As Canadian provincial authorities have become increasingly aware of the broad implications of international commercial agreements on their authority, the debate in Canada about appropriate systems of consultation and agreement adoption continues.

In sum, while the existing Canadian system of federal-provincial consultations and the limited opt-in rights provinces have exercised have not fully safeguarded subfederal authority, they do provide for an enormously enhanced system of consultation relative to the existing U.S. system. For instance, the process did function to allow Canadian provinces to have significant input into the decision on whether or not to be bound by international trade agreement obligations regarding both higher education under GATS and the NAFTA side agreement. Existing U.S. federal-state consultation policies do not give U.S. states a comparable ability to determine whether and on what terms matters within state jurisdiction will be subject to international commitments.

The Canadian Constitution provides exclusive authority to provinces regarding more policy areas than those exclusively controlled by U.S. states, and thus created a legal necessity to establish robust intergovernmental consultative processes. However, political pressure by Canadian provincial officials has extended such consultations beyond the parameters of subjects under exclusive provincial authority. Moreover, creating a system that works for 13 units of subfederal government is inherently simpler than ensuring meaningful consultation with 50 U.S. states and

a half dozen U.S. territories. However, Canada has established such mechanisms and shown their operations to be supportive of completing trade negotiations. This demonstrates that if there is political will to allow meaningful subfederal consultation in trade agreement processes, the means to do so are available.

B. Belgium: Domestic subfederal jurisdiction gets internationalized

In 1993, Belgium decentralized authority to its six subfederal entities so that each level of government is competent internationally for all matters for which it is competent domestically. This means, for example, that in areas over which subfederal governments have exclusive jurisdiction, they can execute treaties and give binding direction to Belgium's diplomatic representatives. If an international agreement concerns matters within the competence of both subfederal and central governments, both levels of government collaborate in developing the country's position. Subfederal governments retain the final authority to decide the country's position on the matters within their competence. For example, the recent United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Protection and Promotion of the Diversity of Cultural Expressions addresses issues that are within the jurisdiction of both levels of government. Subfederal governments decided Belgium's position concerning the matters within their competence, and then acted as equal partners with the central government during the actual negotiation process. The treaty must now be ratified first by the subfederal governments and then by Belgium's national parliament.

Government Structure

Over the course of multiple constitutional revisions between 1970 and 2001, Belgium has progressively transferred powers from the central to the subfederal level.¹⁷⁰ Belgium transformed its previously unitary system of governance into a truly federalist system in 1993.¹⁷¹ The country is divided into three geographic regions, Flanders, Wallonia and Brussels, and three linguistic communities, French, Flemish (a dialect of Dutch) and German.¹⁷² Flanders has a single 124-member assembly that represents both the region and Flemish-language speakers. Wallonia has two assemblies, one chamber for the region with 75 members, and additionally a chamber for all French-speakers with 94 members. Finally, Brussels has 75 members in its regional body, and the German language community has a 25-member assembly.

The central government retains authority over defense, justice, taxation, and social security. Regions have jurisdiction over “territorial” matters such as environment, housing, agriculture, water, employment and some aspects of external trade.¹⁷³ Linguistic communities have jurisdiction over “personalized” matters such as culture, language and education.¹⁷⁴ There is very little overlap in the powers granted to each level of government and few areas of concurrent jurisdiction, although the central government retains authority to enact general framework legislation in some

170. Van Ginderachter, 1994.

171. Hooghe, 2004, at 73.

172. Swenden, 2003. The division into subcentral units is not symmetric. There is no separate German region. The Flemish region and Dutch community have combined into one elected governmental unit, but the Wallonia and Brussels regions and the French community maintain separate elected governmental structures.

173. External trade and agriculture were added to regional competence in 2001. Hooghe, 2004.

174. Belgian Constitution, Articles 127-130.

of the areas of subfederal competence such as energy and health policy, with detailed legislative and executive work delegated to the subfederal entities.¹⁷⁵

International Treaties Involving Matters within

Subfederal Competence: The Belgian Constitution explicitly gives the regions and linguistic communities the power to “engage in international cooperation” and to sign treaties regarding matters within their competence.¹⁷⁶ Subfederal entities have external treaty-making competence where they have internal competence.¹⁷⁷ On matters of shared competence, Belgium has devised a system to establish positions through negotiation between the six subfederal units’ representatives and federal officials. It is this system that is of special relevance to this review.

Intergovernmental Relations: A “Deliberation Committee” handles intergovernmental relations, operates by consensus, and is composed of central, regional and linguistic community government representatives. The committee has established more than a dozen Interministerial Conferences, composed of representatives of both levels of government. These entities have the authority to enter into legally binding agreements. For example, in 1994, the Interministerial Conference for Foreign Policy adopted a formal, written cooperation agreement, signed by central government, regional and linguistic community representatives, setting out procedures for handling so-called “mixed” treaties, i.e. treaties that touch on matters within the competence of more than one level of government.¹⁷⁸ Under the terms of the cooperation agreement, whenever the central government, region or linguistic

175. Hooghe, 2004, at 74.

176. Belgian Constitution, Article 167.

177. Maes, 2006.

178. BOG, 1996.

community intends to begin negotiations on a mixed matter, it must notify the Interministerial Conference for Foreign Policy. Conversely, in central government-initiated negotiations, a region or linguistic community has 30 days to decide whether or not to opt into participation. A working group set up by the Interministerial Conference is responsible for determining what position to take in negotiations and the official delegation's composition. If a region or linguistic community chooses not to participate in negotiations, it has the option of signing or rejecting the ensuing agreement, but cannot amend it.

While the federal Ministry of Foreign Affairs coordinates the negotiation, the Cooperation Agreement specifies that all members of the delegation negotiate “on an equal footing.”¹⁷⁹ The operative rule is that where there is shared competence, there is no hierarchy.¹⁸⁰ If a region or linguistic community chooses not to sign on to a treaty, the Belgian federal government will make a reservation to that effect when signing the agreement. Otherwise, ministers from both levels of government sign the treaties. The Belgian Parliament must ratify such agreements, along with the parliament(s) of each affected subfederal government that has signed on.¹⁸¹

179. BOG, 1996.

180. Maes, 2006.

181. BOG, 1996.

Belgium's Intergovernmental Consultation Process Gave Regions Equal Footing with Federal Government in Determining Position on U.N. Treaty: In October 2005, the 193-member UNESCO adopted a new convention on cultural diversity.¹⁸² The convention had to be ratified by UNESCO member nations and went into effect after thirty nations did so. Negotiations of this treaty were spurred in part as a response to certain GATS rules that could undermine various countries' cultural diversity policies.¹⁸³ Belgian policymakers saw the treaty as a means to establish that other nations could not challenge funding for domestic film and television production, or rules to ensure language diversity in media content as GATS violations in WTO trade tribunals. The convention recognizes the right of signatory parties to adopt cultural policies, including use of funding and other forms of governmental support and protection, to foster a diversity of cultural forms, both domestically and in cooperation with developing countries. The convention had strong support from Belgium's linguistic communities, as well as from coalitions of cultural and media reform groups around the world.¹⁸⁴

In Belgian parlance, the UNESCO convention is “mixed,” in that it address culture (a competence of the linguistic communities), but also human rights, trade in cultural goods, intellectual property rights, and development (matters entirely or in part within the competence of the central government). Therefore, Belgium's position on the convention required the concurrence of the central government and the three linguistic communities.¹⁸⁵ The linguistic communities conducted consultations

182. UNESCO, 2005.

183. Krajewski, 2005.

184. EECD, 2006.

185. Billiet, 2006.

among themselves to establish Belgium's position on the matters that are within their exclusive competence. As one interviewee noted: "The position is discussed between representatives of each Community before the meeting. If there is an agreement, there is no problem. If there is no agreement, the representative does not take any position."¹⁸⁶

The coordination for this international agreement was particularly complicated and provides an interested example for the United States, in that it involved a greater number of parties in the formulation of negotiating positions. This was because aspects of the treaty were also under the competence of the EU. The EU was comprised of 25 countries at the 2005 adoption of the UNESCO convention. Thus, the Belgian ANAM for this treaty had to coordinate the views of 31 parties. The Belgian central government's Ministry of Foreign Affairs took the lead in coordination with the EU. Representatives of both the Belgian central and six subfederal governments participated in overcoming opposition to the convention from some European countries, and in determining the common position of the European Union regarding the specific wording of the convention.¹⁸⁷ Because the linguistic communities do not have diplomats credentialed to multilateral organizations like UNESCO, Belgian Ministry of Foreign Affairs diplomats were responsible for presenting the common position of the communities concerning the matters within exclusive community competence.

Then, at UNESCO, a representative of the EU negotiated on behalf of all member states. But each member state additionally

186. If the subcentral governments do not agree, the central government is precluded from taking a position on issues within subcentral jurisdiction. Vosters, 2006; Billiet, 2006.

187. Billiet, 2006.

had representatives on hand in Paris for consultation during the negotiating process. In the Belgian case, the delegation included representatives from the central government and each linguistic community.¹⁸⁸ Following the convention's overwhelming adoption, the procedure in Belgium will be for each community to ratify it and then for the central government to ratify it on behalf of Belgium. The French Community took the first step, ratifying the convention in June 2006.¹⁸⁹

Because the linguistic communities were all in favor of the UNESCO convention, Belgium was able to promote its consensus position in negotiations with the international community. The central government *could not* have presented a position, far less undertaken a commitment, on a matter within community competence that was opposed by any of the linguistic communities. While there is no U.S. parallel for representation of linguistic communities, Belgium provides an example of subfederal governments having both the right to participate in formulating national government positions in international agreements, *and* the right of veto in areas of subfederal competency in a process that involves many participants. If the 31 governmental entities — the 24 other EU nations, six Belgian subfederal entities and the Belgian federal government — could cooperate to formulate a common position, certainly the U.S. federal government and U.S. states and territories should be also able. The mechanism that makes this complicated process possible is a collaboration and consensus process rooted in the subfederal governments' legal authority to externally control the issues that are within their internal jurisdiction. U.S. states currently have no comparable

188. Billiet, 2006.

189. Vosters, 2006.

protection when they oppose federal action to submit a matter under their authority to the jurisdiction of an international pact.

C. United Kingdom: Scotland's role in international agreements

“Devolution” is the name given to the form of limited federalism that the United Kingdom (UK) established in 1998 when London transferred certain powers to regional governments in Scotland, Wales and Northern Ireland. For a number of reasons, including the existence of a distinct Scottish legal system, the powers and interrelationships differ among the three “devolved administrations.”¹⁹⁰

For purposes of illustration, this memo focuses on Scotland and its newly created and elected administration and parliament. Scotland participates in the international arena both on behalf of the UK and in its own right.¹⁹¹ The consultation process by which the UK and Scottish government develop a single position on matters within subcentral competence is set out in a series of written agreements. These agreements are essentially pledges to reach consensus between the subfederal and central governments on issues of subcentral competence, and are backed by a high-level dispute resolution process to adjudicate any intergovernmental disputes. This system also creates the authority for Scotland to act alone in signing international agreements that affect matters of shared

190. In what has been termed “graduated federalism,” Scotland has now been granted the greatest measure of local control of the three subnational units. Packer, 2002, at 45 and 55. England, as a constituent unit of the United Kingdom, has no “devolved” identity separate from Westminster.

191. Under the U.S. Constitution Article I section 10, “no State shall, without consent of Congress, . . . enter into any agreement or compact . . . with a foreign power.” However, what is relevant for this review is the system by which the UK central government and Scotland consult and coordinate on areas of shared competence.

competence. For instance, because Scotland had enacted the necessary implementing legislation, while the UK had not, Scotland found itself in the unprecedented position of ratifying an international agreement (the Hague Convention on International Protection of Adults) that the UK had not ratified.

Government Structure: The UK's devolution system divides powers between two levels of government. Devolution differs from traditional federalism, however, in that the central authority retains the power to legislate in areas of devolved competence and to “take back” the devolved powers.¹⁹² Under the Scotland Act of 1998, the powers “reserved” to the central UK government include international relations, regulation of international trade, defense, pensions, benefits, energy, and economic and monetary policy.¹⁹³ “Devolved” powers include education, health, housing, some aspects of transport, environment, agriculture, forestry, fishing and planning.¹⁹⁴ Though residual powers technically rest with the “devolved administration,” the list of powers reserved for the central government is extensive.¹⁹⁵ In the event of conflict between UK and Scottish law, the former prevails.¹⁹⁶

The working relationship between the UK and Scotland is embodied in several written agreements, including a Memorandum of Understanding (MOU), a Concordat on International Relations – Common Annex, applicable to all three “devolved administrations” and a Concordat on International Relations

192. Packer, 2002, at 59. The author notes that it is legally unclear whether the consent of the Scottish people would be required to return the devolved powers but “politically implausible” to think that it could happen without their consent.

193. Scotland Act, c.46, Schedule 5.

194. Scottish Executive Devolved and Reserved Issues, Scottish Executive website, available at <http://www.scotland.gov.uk/About/18060/11552/Q/editmode/on/forceupdate/on>.

195. Scotland Act, c.46, Schedule 5.

196. Packer, 2002, at 45.

for each devolved administration.¹⁹⁷ Although the MOU states that it does not create any legal obligations and is “intended to be binding in honour only,” the UK government has undertaken in the MOU not to legislate with regard to devolved matters without the agreement of the Scottish Parliament.¹⁹⁸ If the Scottish Parliament agrees to have the UK proceed with legislation on a devolved matter, it expresses its consent by passage of what is referred to as a “Sewel motion,” named after the UK official who made the commitment not to act without the consent of the subcentral parliament in its areas of competence.¹⁹⁹

International Treaties Involving Matters within

Subnational Competence: In the MOU, the central government pledges to “involve the devolved administrations as fully as possible in discussions about the formulation of the UK’s policy position on all EU and international issues which touch on devolved matters.”²⁰⁰ The Concordat on International Relations – Common Annex, in addition to setting up the intergovernmental process discussed below, provides that the devolved administrations may hold working-level discussions on devolved matters with foreign national governments or “appropriate counterparts” in international organizations. However, when doing so, the devolved administrations must consult with the UK in advance about any contact that is “novel or contentious” or might otherwise have implications for international relations.²⁰¹

197. MOU, 2002.

198. MOU, 2002, § 2.13. In the Concordat on International Relations, Common Annex, D4.12, the UK government acknowledged the possibility of urgent reasons why full consultation and agreement would be impractical and expressly stated its intent to continue to prepare and implement UN Security Council Resolutions at the central level.

199. Scotland Office, 2005. Between 1999 and 2003, the Scottish Parliament agreed to 39 Sewel motions.

200. MOU, 2002, at § 19. The central government has the power to prohibit Scottish legislation or executive actions that it considers to be incompatible with the UK’s international obligations. See Scotland Act c.46, §§ 35 and 58.

201. MOU, 2002, D4.7.

One expert on federalism and international law has noted that the UK, though endowed with full reserved power over international relations, nonetheless chose to accept a Canadian-style dual competence for implementation of international obligations.²⁰² Central and devolved administrations jointly decide whether international commitments that relate to devolved matters are to be implemented separately by each government or by the UK alone. The two levels of government jointly agree on their implementation proposals.²⁰³

Intergovernmental Relations: The MOU and Concordats are founded on the unwritten principle of “no surprises.”²⁰⁴ The MOU states that its primary aim is “to allow administrations to make representations to each other in sufficient time for those representations to be fully considered.”²⁰⁵ Central and devolved administrations commit to alert each other as soon as practicable to relevant developments within their areas of responsibility, to give appropriate consideration to each others’ views, and to make arrangements to develop policies jointly where responsibility is shared.²⁰⁶ Disputes among central and subcentral officials that cannot be resolved at a lower level are to be referred to a Joint Ministerial Committee composed of the British Prime Minister (or representative) and the First Ministers of the other administrations.²⁰⁷

202. Harrington, 2006a, at 121 and 148.

203. MOU, 2002, D4.11.

204. ERSC, 2005. Lord Advocate, 1998.

205. MOU, 2002, § 4.

206. MOU, 2002, § 5.

207. MOU, 2002, §§ 22-25, and Agreement on the Joint Ministerial Committee.

The Concordats provide that “full and detailed” working-level contacts are to be maintained between the UK and Scotland.²⁰⁸ If negotiations “bear directly” on devolved matters, the Concordats specify that the negotiating position will be developed in consultation between the two levels of government and that “it may be appropriate” for a Minister or official from one of the devolved administrations to be part of the negotiating team to “advance the single UK negotiating line.”²⁰⁹ “In appropriate cases,” an official of a devolved administration can speak for the UK in international settings.²¹⁰

The commitment to establish “full and detailed” working relationships has been borne out in the experience of a Scottish Justice Department official who describes her UK counterparts as “very accommodating.”²¹¹ Because civil and family law are within Scotland’s competence, the Scottish Justice Department, similar to a state attorney general’s office, works with the UK in developing international policy positions in these areas and participates as a member of the team when international agreements are negotiated. Although Scotland does not put forward an independent position, presence as a member of the team enables the Scottish official to “feed in” the Scottish policy angle and the procedural differences of Scottish law. Officials from the two levels of government are “constantly in touch” via email, telephone and

208. MOU, 2002, D1.6.

209. MOU, 2002, D4.8.

210. MOU, 2002, § 19, and D4.8. Despite these formal written procedures, intergovernmental relations actually take place predominantly on an informal basis according to the findings of a Report by the Constitution Committee of the UK Parliament. Noting that the prevailing harmony of one party control over both central and subcentral governments could not be expected to last forever, the Committee Report recommended that the formal procedures be followed consistently and even strengthened by giving the Concordats binding effect but limited duration, subject to renegotiation and renewal. House of Lords, 2002.

211. PC, 2006.

teleconference and meet in person before negotiating sessions to go over all the instruments article by article. In the area of international family law, the two levels of governments have never had a breakdown that would require recourse to the Joint Ministerial Conference dispute resolution process. Indeed, policymakers consider the eventuality so remote from the ordinary course of events that one Scottish official calls it the “nuclear option,” saying she views herself as a member of the team and regularly speaks for the UK in international settings.²¹²

A Signature on the UK Line Commits Scotland

Alone to an International Agreement: In a rare act for a sub-central official, in 2003 the Scottish Deputy Minister of Justice signed the Hague Convention on International Protection of Adults on behalf of the UK.²¹³ Scotland was able to ratify the convention before the rest of the UK because it had already enacted legislation to carry out the treaty’s provisions.²¹⁴ With his signature, the Scottish official committed to the international agreement only that part of the UK’s territory that is Scotland. The convention concerns the private international law issue of assigning legal responsibility for an incapacitated adult who has connections to more than one country.

When the convention was presented to the national Parliament in Westminster in July 2003, the Parliament declined to bring it into force for all of the UK. Accordingly, a note was entered when the convention was ratified, declaring that it applies only

212. PC, 2006.

213. Harrington, 2006a, at 121 and 150.

214. Scottish Government, 2003.

in Scotland.²¹⁵ A scholar who has researched the field described it as unprecedented for a subnational unit to ratify an international agreement that the national government has not ratified in an area of shared competence.²¹⁶ When Scotland amended its domestic legislation on incapacitated adults to conform to the Hague Convention, a Scottish MP noted, “The incorporation of international law puts Scotland ahead of Westminster, which cannot be bad.”²¹⁷

The MOU and Concordats on International Relations gave Scotland the power to decide whether or not to proceed with adoption of an international convention. The written agreements that establish the intergovernmental relationship in the UK are technically not legally binding. But they commit the national government to keep Scotland fully informed (“no surprises”), to consult and develop a coordinated position when an international undertaking affects matters within subnational jurisdiction, and to refrain from acting in areas of subnational competence without the Scottish Parliament’s express consent.

215. Harrington, 2006a, at 150. The UK’s announced position was that it supported the convention and hoped to ratify it after it had passed its own implementing legislation. Scottish Government, 2003.

216. Harrington, 2006b.

217. Grahame, 2000.

IV. ANALYSIS & CONCLUSION

When trade agreements only covered subjects within the traditional scope of trade — setting tariff and quota levels, for instance — federal versus state authority was clear. The traditional trade pacts were federal government business. Because there was no U.S. public discussion of — much less a formal process or transparent decision to — drastically expand the scope of international agreements to include an array of non-trade regulatory issues, the implications of doing so for U.S. state authority were also not aired.

Yet under the Tenth Amendment to the U.S. Constitution, which provides that “powers not delegated to the United States . . . are reserved to the States respectively,” states are empowered to regulate a wide array of industries and issues in the interests of the health and welfare of the state’s population.²¹⁸ It is this “right to regulate” that is being increasingly undermined by federal trade negotiators.

To date, no official discussion has occurred in the United States, nor have Congress or the states made a decision to radically change the federal-state balance of power. At the same time, no new process for federal-state cooperation to ensure that international commercial agreements do not result in a dramatic shift that balance of power has been discussed. To the extent that mechanisms exist for U.S. federal-state consultation on trade agreements, they are premised on a model of trade negotiations focused on limited, traditional trade matters, and are thus woefully outdated relative to the expansive scope of today’s agreements.

218. In *Federalist Paper Number 45*, Alexander Hamilton wrote, “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”

Future trade ANAMs should balance U.S. goals of trade expansion and the maintenance of the U.S. federalist system of governance by creating a new system for federal-state consultation and cooperation. A high-level standing committee of appropriate state and federal officials (that includes representation from *each* state) could greatly facilitate the formulation of U.S. negotiating positions that meet both goals. States could determine the process by which their state representative was chosen. Having to ensure such a representative is able to provide an informed view of a state's position would promote more to enhance their intrastate review and policymaking processes on trade agreement-related issues.

Such a formalized system of consultations — combined with a clear opt-in mechanism regarding how and when states would agree to be bound to agreements' investment, service sector and procurement terms — would provide significant improvement over current practice. Canada has utilized such a domestic accession or “opt-in” procedure (which takes the form of a written agreement between the federal and subfederal government, and which allows provinces to decide whether, and when, to be bound to the aspect of an international agreement covering their jurisdiction). This process has achieved the goals of trade expansion and the preservation of domestic subfederal policy space. Finally, this process would allay growing public and policymaker concerns about the direction of our trade policy.

The Canadian system provides interesting insights. The Canadian Federal-Provincial-Territorial Committee on Trade (C-Trade) — the standing committee composed of trade representatives of the central government and each subfederal province — incorporates several important elements.

First, C-Trade meets regularly and in person. This enables the provinces to become informed about trade issues in a timely manner and to participate in the formulation of the official Canadian trade negotiating position on an on-going basis. The regular dialogue within C-Trade also provides an opportunity for provincial leaders to educate federal officials in real time and on a continuing basis. The on-going dialogue allows federal trade officials to obtain new perspectives based on the provincial officials' greater understanding of subfederal laws and regulations, and of the practical prospective effects of various trade proposals on subfederal policies and practices.

Second, C-Trade is comprised of representatives of *each* province who are chosen *by the provincial government* to bring the province's views on specific trade matters to this forum where individual and crosscutting provincial interests can be discussed. The current U.S. consultation process has no parallel venue. The U.S. IGPAC is comprised of various representatives of different levels of state government and staff of associations representing subfederal officials who are chosen by the president to represent subfederal interests. When specific states are directly contacted, it is *only* about whether a specific state will agree to be bound to a specific procurement agreement.

The C-Trade system does have drawbacks. Most importantly, while the federal government may meaningfully consult with and may even be persuaded by concerns of the provinces, the federal government is ultimately empowered to make final decisions with regard to negotiating positions. Federal officials have been willing to exploit differences between states to advance their own perspectives. Further, generally, federal trade officials are dealing with provincial *trade* officials whose priority is export promotion. These particular provincial officials may not be as concerned as provincial

non-trade officials about the loss of sovereignty and the myriad of regulatory implications posed by trade agreements. However, one means to address this limitation is within the authority of states themselves: intrastate processes to ensure that the appropriate sub-federal regulators are being meaningfully consulted on issues under their jurisdiction and that positions brought to such a standing committee are formulated in a manner that includes input of state legislatures. To date, three U.S. states have adopted intrastate processes to coordinate information sharing and require legislative consideration of certain federal government requests for states to be bound to certain trade-agreement non-tariff provisions that are described below.

The C-Trade system also excludes *local* governments, whose jurisdiction is also affected and who have an array of unique concerns regarding trade agreements' non-tariff constraints. A mechanism for local officials to have input is important unless future trade agreements exclude local jurisdiction from their scope.

The Belgian and Scottish systems provide a remarkable insight into the political context underlying various countries' federal-subfederal consultation processes. In both instances, the relationship is premised on the notion that the subfederal governments have important rights and roles that must be respected. This context has resulted in consultations and a role for subfederal governments regarding issues in international negotiations that are beyond the formal jurisdictions the federal government would be legally required to respect. This contrasts unfavorably with the perspective taken by the U.S. federal government. Federal officials have largely viewed state requests to participate in trade-policy formation as a political nuisance to be defused, while making the minimum accommodations possible.

In each instance, another key component underlying the consultation processes is the recognition that subfederal governments must be treated differently than private-sector parties interested in shaping a nation's trade policy. That is to say, the three systems we describe include robust intergovernmental mechanisms explicitly designed to manage federal-subfederal negotiations of international agreements. In contrast, the U.S. Single Point of Contact system provides a largely *ad hoc*, one-way mechanism for the federal government to selectively transmit information to states. There is no expectation, or even process, for ongoing, two-way interaction. More alarmingly, the IGPAC — the formal standing advisory committee that is to represent subfederal interests in trade policy in the United States — has the same status as a long list of private-sector industry advisory committees. Moreover, given that the current U.S. trade NAM forces 48 IGPAC representatives onto a single committee — while 700 mainly private-sector industry advisors have an additional 26 — the views of state and local governments have considerably less representation than those of industry under the current system.

Some of the mechanisms used to protect subnational sovereignty in international-agreement making outlined in this memo may not be directly replicable in the United States. However, they do describe elements of effective systems that could be adopted to remedy the defects of the current U.S. federal-state consultation process. The most basic missing element in the U.S. system is the requirement that the national government engage in meaningful consultation with states during negotiations, and that it secure the prior informed consent of the states before taking actions that affect matters within state jurisdiction. For years, the IGPAC, state governors, attorneys general, legislators and associations representing state and local officials have struggled unsuccessfully to fix this serious problem. Typically, the federal response to requests

for improved consultation is premised on the notion that such processes are not practicable. Our comparative analysis demonstrates that, in fact, prior informed consultations and cooperation in formulation of positions to be taken to international negotiations are not only practicable, but are already being employed by other countries.

Meaningful improvement in the U.S. intergovernmental consultation process on trade will require both state-level changes and federal-level reforms. Regarding the state-level reforms that are required, at least two states, Maryland and Rhode Island, have enacted laws requiring that federal government requests regarding trade agreements be circulated throughout state branches of government. Moreover, these states require that explicit state legislative approval be obtained before the state can be bound to the non-tariff investment, procurement and service-sector terms of a trade agreement.²¹⁹ Hawaii has a more limited system regarding bindings to trade-agreement procurement rules. These measures express the desire of states to have a meaningful role in the development of trade agreements that affect subfederal jurisdiction, and provide an efficient way to coordinate the branches of state governments' timely responses to federal officials. However, such state laws cannot directly compel federal government compliance. Thus, a new federal level consultation policy is required to further operationalize the state-level reforms.

Nothing illustrates the need for a two-pronged approach of improvement on both the federal and subfederal levels better

219. Maryland Senate Bill 401, "International Trade Agreement – Procurement Rules – General Assembly Approval," available at <http://mlis.state.md.us/2005rs/bills/sb/sb0401t.pdf>; Rhode Island 2006 –H6885, "An Act Relating to Public Property and Works – State Purchases," available at <http://www.rilin.state.ri.us/BillText/BillText06/HouseText06/H6885aa.pdf>.

than the experience of Maryland's legislature when it took important state-level action to protect its sovereignty from trade agreement encroachment. In December of 2003, Maryland Governor Robert Ehrlich communicated to federal trade officials that his state could be bound to CAFTA's procurement obligations. Ehrlich transmitted this position without consulting the Maryland legislature, even though setting the state procurement policy is clearly a legislative function. Moreover, strong separation of powers language included in the Maryland Constitution prohibits the encroachment by one branch of government into an area reserved for another branch. Ehrlich's action clearly altered the legal rights and duties of the state in relation to the other parties to the agreement. For example, in procuring goods and services while being bound to CAFTA, Maryland would not be allowed to give preference to Maryland suppliers or contractors over suppliers or contractors from the signatory countries.

The Maryland legislature decided that it had to take action to prevent this state executive branch encroachment into a legislative matter. The legislature not only voted to rescind the governor's consent to be bound to CAFTA's procurement rules, but also enacted a law mandating that only the Maryland General Assembly — not the governor — has the power to bind the state to comply with trade agreements. The governor vetoed the bill and the legislature overrode his veto. The bill became Maryland law. Despite this, the USTR refused to remove Maryland from the list of states bound to CAFTA's procurement rules. Maryland legislative leaders were outraged. A Maryland congressional representative, Ben Cardin, then a Ways and Means Committee member, protested to the USTR at a public hearing and demanded that they respect Maryland's law. The USTR claimed that since they had already signed the agreement, it was too late to rescind their

initial offer. However, Congress had not approved CAFTA. Moreover, USTR ignored the CAFTA provision that allows a party to adjust its commitments under, withdraw from and add parties bound to the procurement chapter under certain rules even once it is in effect.²²⁰ Moreover, demonstrating the enormous discretion provided the executive branch under current processes, USTR did change considerably more wide-reaching aspects of the Peru, Colombia, and Korea FTAs after those pacts had been signed under Fast Track.

Further, USTR has given no indication that it will respect the Maryland, Rhode Island or Hawaii laws in the future. To be sure, states can develop internal procedures for ensuring that the legislature be consulted on whether or not to participate in trade agreements. Nevertheless, the only way to ensure that U.S. trade pacts reflect such decisions is to establish a new intergovernmental trade consultation system in federal law. Such a process must require that states have a formal role in working with federal officials to develop U.S. positions on matters under their jurisdiction and the ability to opt in — through a prior informed consent process — before they can be bound to the resulting trade pact non-trade regulatory constraints.

On July 1, 2007, the last delegation of “Fast Track” authority expired, and Congress refused to grant new authority for President Bush. Many in Congress are eager to replace Fast Track with a new process that reflects the need for Congress to have a greater role in trade agreement policymaking, given the expanded scope of today’s complex international trade agreements also delve

220. CAFTA, Article 9-16.

expansively into Congress’ non-tariff regulatory jurisdiction. Consensus is growing that Fast Track is not necessary to accomplishing U.S. trade expansion goals. “[W]hatever challenges U.S. Presidents face in securing approval for trade agreements, the mechanisms for doing so in our constitutional structure surely pose no greater hurdles than the Swiss or the EU face. Thus it is safe to conclude there is nothing so unique about the U.S. form of government that makes Fast Track necessary.”²²¹

U.S. states now have a unique opportunity on the national stage to help develop a new consultation process that is both meaningful for states and binding for federal trade negotiators. The examples described in this paper of processes for negotiating and approving international agreements that provide a meaningful and legally binding role for subfederal governments can provide a useful reference for this future debate.

221. Shapiro, 2006, at 104.

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Public Citizen's Global Trade Watch

Public Citizen is a nonprofit organization founded in 1971 that is based in Washington, D.C. Public Citizen Foundation produces scores of research and investigative reports and legal and medical journal articles annually. It operates numerous websites that present searchable, publicly accessible government and other data, including information we obtain through Freedom of Information Act requests and compile through investigative research. Public Citizen Foundation's areas of interest include openness and accountability in government; health, safety and environmental protections; energy policy; health care and prescription drug safety; and the economic and social implications of trade and globalization policies.

Public Citizen's Global Trade Watch division was created in 1995 to explore an array of globalization issues that touch on Public Citizen's core agenda. Thus, Global Trade Watch conducts research on the implications for health and safety, environmental protection, economic justice, and democratic, accountable governance of various trade and globalization policies. We have built unique substantive and analytical capacities, including by investing in the development of staff with expertise in trade law, economics, and international and domestic regulatory regimes. Global Trade Watch's work seeks to make the measurable outcomes of the current trade and globalization model accessible to the public, press and policy-makers to promote informed dialogue on these critical issues. We work with researchers around the world in this effort. A significant aspect of our work is translating technical trade agreement text into prose that is accessible to a non-expert audience. For instance, we created a searchable database of all U.S. commitments at the World Trade Organization's General Agreement on Trade in Services (GATS) — translated into accessible text. We also operate several in-depth monitoring projects which track the outcomes of various trade agreements within the United States and in trade partner countries. Among the data services we provide in this arena is the only searchable database providing U.S. Trade Adjustment Assistance (TAA) trade-related job loss findings.