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# CANADIAN TRADE NEGOTIATIONS IN AN ERA OF DEEP INTEGRATION

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## ABOUT THE GLOBAL ECONOMY PROGRAM

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Through its research, collaboration and publications, the Global Economy Program informs decision makers, fosters dialogue and debate on policy-relevant ideas and strengthens multilateral responses to the most pressing international governance issues.

## ABOUT THE AUTHOR



**Patricia Goff** is a CIGI senior fellow and associate professor of political science at Wilfrid Laurier University. She specializes in international political economy, international relations theory, and international organizations, with a particular interest in trade, intellectual property, and the cultural capacity of international organizations. She is the author of *Limits to Liberalization: Local Culture in a Global Marketplace* (Cornell University Press, 2007), co-editor (with Paul Heinbecker) of *Irrelevant or Indispensable? The United Nations in the 21st Century* (Wilfrid Laurier University Press, 2005) and co-editor (with Kevin C. Dunn) of *Identity and Global Politics: Theoretical and Empirical Elaborations* (Palgrave, 2004).

At CIGI, Patricia's research focuses on global, plurilateral and regional trade arrangements, including the Environmental Goods Agreement, the Trade in Services Agreement, the Canada-European Union Comprehensive Economic and Trade Agreement and the United States-European Union Trans-Atlantic Trade and Investment Partnership.

## ACRONYMS

CETA	Comprehensive Economic and Trade Agreement (Canada-European Union)
CUSFTA	Canada-United States Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
GPA	Agreement on Government Procurement
NAFTA	North American Free Trade Agreement
PTA	preferential trade agreement
RTAs	regional trade agreements
TIEA	Trade and Investment Enhancement Agreement
TTP	Trans-Pacific Partnership
WTO	World Trade Organization

## EXECUTIVE SUMMARY

The Canada-European Union Comprehensive Economic and Trade Agreement (CETA) is noteworthy for the expanded role that Canadian provinces and territories played in the negotiation. In this particular instance, these sub-federal actors had a seat at the negotiating table at the request of their EU partners. However, this paper argues that CETA is exceptional in this regard. Despite the fact that regional trade agreements increasingly contain provisions that relate to areas of provincial and territorial jurisdiction, each trade negotiation is distinct. The CETA experience should not create the expectation that provinces and territories will always participate in the same capacity. Any enhanced role will depend on the federal government's strategic assessment of any specific trade negotiation.

## INTRODUCTION

In October 2013, Stephen Harper and José Manuel Barroso, then respectively the prime minister of Canada and the commission president of the European Union, announced that they had reached agreement in principle on CETA. Ten months later, in August 2014, their governments released in English the complete text of the agreement. In the months that followed, CETA underwent a thorough "legal scrubbing" and translation into 22 EU languages, including French, Canada's other official language. CETA will likely be presented to the Canadian Parliament in early 2016. Following the October 2015 federal election, newly elected Canadian Prime Minister Justin Trudeau identified the implementation of CETA as a top priority in his mandate letter to his minister of international trade, Chrystia Freeland (Trudeau 2015). Ratification of CETA on the European side might be delayed until European concerns about investor-

state dispute settlement provisions can be allayed, but is also likely to proceed in 2016.

One of the distinctive features of CETA is the role that subnational actors played in the negotiations. In particular, the Canadian provincial governments were involved to an unprecedented degree. Why is this so? Why were Canadian provinces at the negotiating table for the first time for CETA? This paper will explore this question. First, it describes the distinctive sub-federal role in the CETA negotiations. Second, it considers the "usual" role that the provinces play in international trade negotiations. Third, it will offer an explanation for federal-provincial roles in CETA, grounded in observation of trends in the international trading system. It suggests that the provinces will be more fully implicated in trade negotiations in the future, although they might not always be "at the table." Finally, it presents some avenues for future research.

## THE CANADIAN PROVINCES IN CETA NEGOTIATIONS

CETA negotiations began in May 2009. It is generally recognized that a motive force behind CETA negotiations was the then Quebec premier, Jean Charest, "who established himself as the strongest proponent for closer economic and political ties with Europe" in 2007 (Hübner 2011, 1; Woll 2011, 52).

The provinces and territories have long been privy to trade negotiations, but in the case of CETA, they were at the negotiating table alongside their federal colleagues. Numerous analysts have commented that CETA is unique in that the provinces and territories played an unprecedented role. For example, Stéphane Paquin (2013, 546) argues that "the negotiation and implementation of international trade agreements now include the jurisdiction of federated states and even municipal governments." Clearly, CETA is not the first time that the specifics of the provincial role in trade negotiations have been examined. Nonetheless, CETA does seem to be "an unprecedented negotiating process" because it "directly involved the federal and all ten provincial and three territorial governments across Canada" (De Beer 2012, 51). With regard to CETA, Paquin (2013, 550) reports that "for the first time in the history of Canadian trade negotiations, the provinces were directly involved in the planning for a set of international trade negotiations." He goes on to say that "it is true that the provinces were not consulted on the selection of the chief negotiator or, for that matter, any of the Canadian negotiators. They were, however, consulted at the crucial stage of defining the terms of the joint reports and the negotiation mandate" (ibid.).

The European Union asked for the provinces to be present, recognizing that negotiations would touch on many issues with direct or indirect consequences for areas of provincial jurisdiction (Fafard and Leblond 2012, 10; Finbow 2013, 2): "the worst that could happen for the EU is to devote time

and energy to negotiating CETA with Canada only to find out that many of the provisions are not being applied or implemented by some or all of the provinces” (Fafard and Leblond 2012, 10). To illustrate, the European Union had a strong interest in financial services, and “Canadian regulation of securities is, for example, still carried out by 13 provincial bodies, so that any EU supplier needs to get approval from each provincial regulator” (Woolcock 2011, 34).

Government procurement is another such negotiating topic that requires provincial and territorial involvement. History arguably taught this lesson. In the past, the provinces have been concerned about opening sub-federal procurement processes: “the role of the provinces is paramount. Provincial jurisdiction in the areas of procurement and investment was a major hurdle during the Trade and Investment Enhancement Agreement negotiations in the mid-2000s. But interprovincial trade cooperation and a willingness to collaborate with Ottawa on the groundbreaking procurement agreement with the United States have turned past adversity into new opportunity for Canada and the EU” (Drache and Trew 2011, 95).

Multilateral rules that govern central government procurement already exist at the World Trade Organization (WTO). These same rules contain provisions pertaining to sub-federal actors, but Canada has opted into this arrangement on a limited basis:

Both Canada and the EU are signatories to the WTO’s Government Purchasing Agreement (GPA),<sup>1</sup> which was most recently revised in 2007. They therefore both subscribe to the same rules on transparency, but Canada does not include sub-federal level procurement, because of the resistance in the past to such inclusion from the provincial governments. Nor does Canada typically include procurement by Crown Corporations (i.e. public enterprises). The EU schedules in the GPA cover central government, provincial/regional government and local government as well as so-called Annex III procurement undertaken by public corporations. But as coverage of the GPA is based on reciprocity the EU does not extend coverage or access to the sub central government level to Canadian suppliers. (Woolcock 2011, 37)

The European Union saw CETA as an opportunity to access Canada’s sub-federal procurement processes, providing the provinces and territories were at the table to signal their buy-in.

On other fronts, the European Union sought patent term extensions for pharmaceutical products, which could affect provincial and territorial health care provision costs; they wanted to relax a requirement in the province of Newfoundland and Labrador that fish caught in their waters be processed locally; and Europeans pursued greater access to the Canadian dairy market, especially for cheese. While this latter sector is not a provincial jurisdiction per se, the interests of certain provinces, notably Quebec and Ontario, come into play in any challenge to the supply management system that regulates these agricultural industries. These are just a few of the issues that were to be central in Canada-EU negotiations that show the degree to which provincial and territorial governments would be implicated and help in understanding why Europe insisted that sub-federal governments play an enhanced role in negotiations.

## PROVINCES AND TERRITORIES IN TRADE NEGOTIATIONS: THEIR EVOLVING ROLE

Canadian provinces have always played some kind of role in trade negotiations, and sometimes a very substantial one. Interestingly, this role has not been identical in every negotiation. Federal-provincial relations exist within certain parameters. There is some latitude for movement in the role that provinces and territories can and should play in any particular instance of international negotiations.

To what can one attribute this latitude? Christopher J. Kukucha explains (2011, 132) that “unlike other federal states, Canada does not have clearly defined constitutional guidelines regarding the international activity of non-central governments.” Further, a series of court decisions and constitutional provisions create “a level of constitutional ambiguity that grants Canadian provinces a degree of international legitimacy absent in many other federal states” (ibid., 133). Section 91(2) of the Canadian Constitution gives Parliament exclusive control over the regulation of trade and commerce. At the same time, “provinces were granted jurisdiction over property and civil rights, which includes the regulation of contracts in which international trade is conducted” (ibid., 133). Perhaps more significantly, Kukucha (ibid., 132) argues that, “in terms of ‘treaty-making power,’ the 1937 *Labour Conventions* decision noted that Ottawa had the power to negotiate international treaties but did not have the right to implement agreements in areas of provincial jurisdiction” (see also Delagran 1992, 18; De Beer 2012, 54).

These various provisions establish roles for both the federal and provincial governments in international trade treaty making — for the federal government, in setting the mandate, conducting negotiations and ratifying the agreement; for the provinces, in implementation. In previous trade talks, the degree to which areas of provincial jurisdiction were under negotiation was more

<sup>1</sup> Scholars have referred to this agreement by various terms; the WTO’s formal name for it is the Agreement on Government Procurement.

limited. However, CETA — as its name indicates, both a *comprehensive* and an *economic* agreement, in addition to its trade elements — moves more squarely into areas such as sub-federal procurement, services and intellectual property. These are areas not only *affecting* the provinces, but ones over which the provinces exercise some control.

Patrick Fafard and Patrick Leblond (2013) interestingly advise that thinking in terms of the provinces and territories versus the federal government — as if they function as a monolithic whole — is not always helpful. Instead, they show that some issues can have special significance to one province or territory in particular. It is certainly the case in CETA that provinces have a range of interests. In some cases, they all share similar concerns, such as on procurement. Other issues only apply to some provinces. For example, the European Union's desire to open liquor markets has special resonance in the wine-producing regions of British Columbia, Ontario and Quebec. On the other hand, EU statements in opposition to the seal hunt are of special significance to Newfoundland and Labrador. This sets up a much more complicated dynamic that cannot be captured in the overly simplistic "provinces/territories versus federal government" dyad. Nor is there an adequate process for navigating it (*ibid.*).

Importantly, Jeremy De Beer (2012) observes that a number of issues on the table in trade negotiations are "new" issues in the sense that they pertain to sectors that did not exist when provincial and federal jurisdictions were first delineated. As a result, they are not included in the lists of powers laid out in Sections 91 and 92 of the Constitution Act of 1867. "More difficult to categorize are regulations covering technology-related topics, including both biotechnologies and information communications technologies. Since such matters were not contemplated when the Canadian federation was formed in 1867..." (*ibid.*, 52). De Beer confines his analysis to three specific issues relating to intellectual property. However, he notes that the list of relevant topics is much longer, including "agricultural biotechnologies, biofuels, pharmaceuticals, telecommunications policy, Internet regulation, online speech, electronic commerce, unsolicited mail (spam), copyright including digital rights management (DRM), privacy, industrial designs, trademarks, confidential business information, and geographic indications"; what unites these various issues is the fact that "none are legally well established as either matters of pure federal or provincial jurisdiction" (*ibid.*, 53).

If provincial legislation must be enacted to give a trade agreement full force, the provinces can exercise genuine control by threatening not to implement required legislation (Delagran 1992, 18). De Beer (2012, 52) explains that "not all obligations require legislative action; many are rather commitments to refrain from taking certain measures, that is, commitments not to act. However, where action is required, the authority to take such action

is determined by a division of powers under the Canadian constitution. Implementation of treaty obligations may, therefore, require the cooperation of the legislative branches of the federal and all provincial governments" (see also VanDuzer 2013, 538; Paquin 2005). Therefore, the constitutional and institutional makeup of the Canadian federation is such that the sub-federal units have leverage, though perhaps no direct power, in international negotiations. This reality places the federal government in an interesting position. It possesses a formal responsibility and takes on obligations internationally, but the provinces and territories are integral to the execution of these responsibilities and obligations (Hübner 2001, 8).

WTO agreements acknowledge the special challenges of compliance by federal states. The so-called "federal clause" in the General Agreement on Tariffs and Trade (GATT) article XXIV:12 "requires each Member to employ such 'reasonable measures' as 'may be available to it' to ensure compliance by regional and local governments with GATT obligations" (Hayes 2004, 5). This provision is ambiguous in the sense that it does not provide clear guidance on how it should be applied (Hayes 2004). J. Anthony VanDuzer (2013, 536) points out that the federal government is responsible should any level of government contravene treaty obligations — "the provinces are not directly accountable." He goes on: "While the federal government has exclusive authority to commit Canada to international obligations, according to the Canadian constitution, compliance with such obligations where they extend into areas of provincial competence is solely within provincial jurisdiction" (*ibid.*, 537); this is why the European Union wanted provinces at the table — "incentives for provincial compliance are weak" (*ibid.*, 537).

This same feature reveals itself in trade disputes in which the provinces are involved. Two high-profile cases occurred in recent years. In 2010, the Japanese government requested consultations with Canada on Ontario's feed-in tariff program, a component of the province's renewable energy policy. It was the federal government's responsibility — and not the province's — to appear before the WTO and mount a defence of this policy. That same year, the Canadian government settled a dispute under the terms of the North American Free Trade Agreement's (NAFTA's) Chapter 11 to the tune of \$130 million in another case involving a Canadian province (Fafard and Leblond 2012, 6; VanDuzer 2013, 540). The government of Newfoundland and Labrador ostensibly expropriated the assets of the pulp and paper company, AbitibiBowater; however, it was the government of Canada that was legally obliged to pay compensation. European officials were acutely aware of this reality when they entered into negotiations with Canada. They also knew that the provinces and territories had rarely, if ever, participated as equal partners in previous Canadian negotiations.

This reality of the federal government's need for sub-federal support and buy-in has led to various mechanisms of consultation and intergovernmental communication. Leslie Delagran (1992, 20) chronicles the discussions that went on in 1985 concerning the provincial role and the provinces' desire for "full participation" in the Canada-United States Free Trade Agreement (CUSFTA) process: "The process issues discussed in those six months among the provinces and with the federal government included the provincial role in setting and approving the Canadian mandate, the extent of consultation and information sharing, whether provinces would be 'at the table' or 'in the room' during negotiations, the extent of decision-making involvement of premiers at key points in the negotiations, and the extent of provincial involvement in preparations for the negotiations."

VanDuzer (2013, 538) argues that "the federal government has a practice of consulting with the provinces prior to committing to the treaty. Nevertheless, the federal government has no legal obligation to consult, much less an obligation to obtain prior provincial consent to treaty commitments, even for commitments in areas of provincial jurisdiction." Kukucha (2011, 133) notes, "Historically, Ottawa limited the provinces to a consultative role." This role has evolved through work in a series of committees, the degree of participation depending on the trade negotiations in focus at the time. "During the Tokyo Round of GATT, for example, the Canadian Trade and Tariffs Committee (CTTC) was established, which was responsible for gathering briefs from business, unions, consumer groups, the provinces, and other interested parties" (*ibid.*). This role developed into an arrangement whereby the provinces had actual representation on a committee. Later, the process led to regular meetings between the provinces and the federal government (*ibid.*). Interestingly, as early as 1992, Delagran argued that "the increasing encroachment of trade negotiations into areas of provincial jurisdiction in recent years has forced a greater recognition of provincial interests in international trade issues" (1992, 15). Indeed, the 1980s process that led to CUSFTA "constituted an unprecedented level of provincial involvement in international trade negotiations" (*ibid.*, 20; see also Paquin 2013, 548).

Provinces and territories were not at the table in CUSFTA, nor did they have direct input into the negotiating mandate, but they were in close consultation with the federal government. They "made their positions known not only personally via first ministers' conferences but also at the official level via representatives to the Continuing Committee on Trade Negotiations" (Paquin 2013, 549), a committee that had been established by chief Canadian negotiator Simon Reisman. In addition, then prime minister Brian Mulroney met frequently with the premiers, and the larger provinces hired consultants to communicate their views in Ottawa (*ibid.*, 546).

The Continuing Committee on Trade Negotiations "later evolved into what today is known as the C-Trade committee system" (Fafard and Leblond 2012, 5), which facilitates quarterly meetings between federal and provincial officials. This process indicates that extensive consultation has gone on between the provinces and the federal government, although it was informal (*ibid.*, 6). It was these consultation processes that would prove to be insufficient for CETA negotiations. CETA did not represent the first or even the second time that the government of Canada entered into negotiations with Europe. "Historically, however, Ottawa did not consult with provincial governments on matters of EU trade. The provinces, for example, were not active players in Pierre Trudeau's 1976 Canada-Europe Contractual Link (or Third Option) as most issues fell under federal jurisdiction" (Kukucha 2011, 131).

The bilateral Trade and Investment Enhancement Agreement (TIEA) between Canada and the European Union was a precursor to CETA. TIEA negotiations began in 2005. In this negotiation, the European Union was already concerned with the importance of including Canadian provinces: "The EU argued that many barriers to market access, especially to public procurement and other regulatory barriers, were at the provincial level" (Woolcock 2011, 27). Woolcock suggests that TIEA talks were derailed in 2006 precisely because provincial participation was not assured: "As EU liberalizing measures reach down below regional/provincial level and into the local level within the EU, the Commission sought broad reciprocity that the Canadian federal government could not deliver."

Kukucha (2011, 131) observes that the European Union belatedly recognized the importance of provincial participation in TIEA negotiations: "The new accord was to expand discussion beyond market access and include investment, mutual recognition of professionals, regulatory practices, financial services, e-commerce, sustainable development, science and technology, and consultation with civil society. Although these issues had sub-federal implications European negotiators did not engage Canadian provinces until late in the talks." Kukucha notes that the provincial governments themselves may have been preoccupied at the time with ongoing Doha Round multilateral negotiations (*ibid.*).

The federal government sought to restart talks with the European Union by bringing the provinces and territories on board. In 2007, the Europeans agreed to launch a joint study of the pros and cons of deepening economic ties between the European Union and Canada (Woolcock 2011, 28). Numerous reports suggest that provincial pressure was instrumental in restarting talks between Canada and the European Union. In particular, Jean Charest, then the premier of Quebec, used his connections in Europe, in particular with Nicolas Sarkozy, then the president of France, to get officials to the negotiating table. "[T]he

federal government established a negotiating process in which the provinces participate. The Federal government not only consulted the provinces extensively before each round of negotiation, but the provincial governments were also represented in the Canadian delegation” (ibid., 27). According to Paquin (2013, 550), “the direct involvement of the provinces and territories has included the co-determination of the negotiating positions as well as direct participation as members of the Canadian delegation, both under the direction of the Canadian head of delegation and as head of delegation in specific discussions. The provincial and territorial governments have also had access to the overview briefings before and after every negotiating session on all areas of interest both during and, when necessary, outside of regular C-Trade meetings.”

Kukucha (2011, 134) notes that, in CETA, “Canadian provinces enjoy an expanded level of engagement,” with provinces participating directly in several of the negotiating groups; furthermore, “[a]ccording to provincial officials, this is a significant departure from previous practices and is directly tied to EU demands for a ‘meaningful’ provincial role in negotiations.” According to Pierre Marc Johnson, Patrick Muzzi and Véronique Bastien (2013, 561), “This full participation has entailed direct provincial and territorial involvement in the negotiations as members of the Canadian delegation, presence during negotiating rounds dealing with topics falling within their jurisdiction, and initiative capacity in the development of Canadian negotiating positions on such topics.” Provincial officials also had access to key texts, as well as consultation on topics outside their jurisdiction but likely to affect them (ibid.). Kukucha (2011, 134) hastens to add, however, that “these developments do not represent a change in the ‘culture’ of federal-provincial engagement in matters of trade policy.” He suggests that it might be a question of interpretation; one might point to the positive — that the provinces were involved in several negotiating groups for the first time — or note the negative — that the provinces were *not* invited to participate in all negotiating groups.

One could argue that municipalities are as implicated in procurement decisions as the provinces. Indeed, several municipalities across Canada sought exemptions from CETA on this basis. For example, the City of Stratford and the Township of Pelee in Ontario passed resolutions calling for “a clear, permanent exemption for local governments from the Comprehensive Economic and Trade Agreement” (Council of Canadians 2011). Scores of other Canadian municipalities did the same, passing a CETA resolution of some kind, often asking their province to exclude local governments from any procurement commitments in the trade deal. Both the Union of British Columbia Municipalities and the BC School Trustees Association asked British Columbia to exclude the so-called MUSH sector (municipalities, universities, school boards and hospitals) from the Canada-EU trade deal

(ibid.). Meanwhile, a motion “to protect City of Toronto interests and existing powers in any trade agreement signed between the Government of Canada and the European Union” came before Toronto’s city council with a motion from Councillor Glenn De Baeremaeker, seconded by Councillor Kristyn Wong-Tam (City of Toronto 2012). These efforts by municipalities are noteworthy partly because they drive home the degree to which trade agreements have ramifications across multiple levels. However, they also show that not all levels of government exercise the same influence. While it is clear that the provinces played a crucial role in CETA, there is not much evidence to suggest that the municipalities’ views were weighed heavily in negotiations, although they had flagged the agreement’s relevance for them.

It is worth pointing out another indicator of the enhanced influence that sub-federal actors had in CETA negotiations. Trew (2013) shows that civil society groups with concerns about the agreement not only approached the federal government, but they also engaged the provincial governments and, to a lesser extent, municipal ones. Trew claims that civil society organizations will not suspend their efforts with the provinces in the near future (ibid., 575).

## WHAT CHANGED? THE EVOLVING TRADING SYSTEM

In the last several decades, the trading system has changed in significant ways. The shift from the treaty-based negotiating rounds of the GATT system to the brick-and-mortar institution of the WTO; the rise of China as a big trader (Wolfe 2015); the evolving centrality of the multilateral system (Pauwelyn 2008); and the increasing importance of globalized production processes and global value chains (Baldwin 2013) are just some of the noteworthy occurrences. In addition to these, two developments have had profound consequences for the role that Canadian provinces and territories might be asked to play in trade negotiations. First, governments have shifted their focus from the multilateral trading system toward preferential agreements. Second, the substantive focus of trade agreements is evolving from the removal of tariffs and related border measures to non-tariff, behind-the-border measures, including regulatory harmonization. These developments ensure that provinces and territories will be more fully implicated in international trade agreements in a sustained way in the years to come.

As Michael Trebilcock, Robert Howse and Antonia Eliason (2013, 83) put it, “‘proliferation’ is the word most often used to describe the rapidly rising number of Preferential Trade Agreements (PTAs) in the international community.” Only 70 PTAs came into force between 1948 and 1990. That number had reached 300 by 2010 (ibid.). The WTO Secretariat reports that, between 1948 and 1994, it received

124 notifications from GATT signatories of participation in regional trade agreements (RTAs), the term used by the WTO to capture PTA activity. Since the birth of the WTO in 1995, the Secretariat has been notified of over 400 additional arrangements (WTO 2015). The average WTO member is party to 13 PTAs (WTO 2011, 47). Canada has 11 PTAs in force, not including CETA and the Trans-Pacific Partnership (TPP), which have not yet been ratified, and half a dozen ongoing negotiations at various stages. A vast literature explores why there has been a shift toward preferential agreements, whether it is good or bad and for whom (Dieter 2009; Dür, Baccini and Elsig 2014; WTO 2011). Suffice to say that this trend seems likely to continue in the near future.

Just as the number of PTAs has changed noticeably in recent years, so has the content of these agreements. Various terms have been used to capture this trend, including “second-generation agreement” (Hübner 2011, 1) and “twenty-first century trade agreements” (Fafard and Leblond 2012). Trebilcock, Howse and Eliason (2013) describe the phenomenon with the term “deep integration” (see also Dür, Baccini and Elsig 2014). “‘Deep integration’ PTAs include rules on ‘behind-the border’ domestic policies such as intellectual property, competition, investment, environment and labour standards. In contrast, ‘shallow integration’ is focused on the removal of border measures” (Trebilcock, Howse and Eliason 2013, 86). One measure of an agreement’s deep integration is the inclusion of “WTO+” and “WTO-X” provisions. WTO+ issues are ones already covered by WTO agreements, but PTAs go further than the WTO in these areas. WTO-X domains are not yet covered by WTO agreements but find their way into PTAs (ibid., 87). The number of WTO+ and WTO-X areas in PTAs has increased substantially in recent decades (WTO 2011, 131). Hübner (2011, 1) calls CETA a “second-generation agreement,” predicting that its importance would derive from “its truly comprehensive agenda that focuses on non-tariff barriers in trade with goods and services, market access and mutual recognition of regulations and standards, the radical opening of public procurement markets, issues of competition policy and intellectual property rights, tax and investment issues, as well as cooperation in arenas such as the environment and labour standards.” As so-called second-generation agreements move deeper into services liberalization, which have implications for sectors such as health and education, provincial and territorial governments’ role will naturally be greater (Fafard and Leblond 2012, 3).

These two trends in the trade system suggest that we have entered a phase when liberalization of domains within provincial jurisdiction will be a focus. The fact that Canada intends to pursue preferential agreements with other trading partners in the near future suggests that this is not a one-time occurrence. Instead, these issues will likely come up in some form in all future talks. While these

trends suggest that provinces will be more fully implicated in future trade negotiations, they do not provide insight into *how* they will be involved. For example, these trends do not guarantee that the provinces will be given a *seat at the negotiating table* in all subsequent negotiations, as they had in CETA. There is no evidence to suggest that the provinces were at the table in recent TPP talks. What, then, determines the nature of the role that the provinces and territories will play in any negotiation? The answer will be a function of two factors. The first one springs from the trends just described — trade agreements are increasingly, and frequently, encroaching on areas of provincial and territorial jurisdiction. The second factor, however, acknowledges that the federal government still holds a leading position in determining trade negotiating strategy. If the federal government sees the political or strategic value of involving subnational actors directly in the negotiating process, it may choose to do so. If it does not, as appears to be the case in the TPP, it might rely on provincial and territorial support through consultation and at the implementation stage.

This analysis aligns with the approach of Christopher Alcantara, Jörg Broschek and Jen Nelles (2015) to multi-level politics. The starting point for these authors is the “irrefutable (and somewhat trivial) fact that politics today is often conducted through at least two governmental tiers” (ibid., 5). At the same time, multi-level politics denotes the diffusion of authority across levels of government and, in some cases, away from the state toward non-state actors. This observation captures much more than the two tiers of federalism. It describes the particularly noteworthy case of the European Union, where member state governments have ceded sovereignty to the supranational institutions of the Union (see, for example, Hooghe and Marks 2003). But, it also provides an opening to distinguish among a surprising variety of cases of multi-level politics, as well as to track the evolution in specific strains of multi-level politics.

Alcantara, Broschek and Nelles (2015) usefully differentiate between a “systems” approach and an “instances” approach. A systems approach understands multi-level politics in a holistic way, leaving less room to capture the movement and dynamism inherent in relations between multiple tiers of government. An instances approach looks at “distinct ‘instances’ or occurrences” of multi-level politics (ibid., 5). From an “instances” perspective, “each policy interaction should be evaluated on its characteristics and should not be assumed to be one type or another based solely or even primarily on the characteristics of the political system within which it occurs” (ibid., 6). This conceptualization helps to explain why the Canadian provinces had a seat at the negotiating table in CETA, but did not enjoy the same direct involvement in the TPP. Each trade negotiation constitutes a distinct instance or episode of

federal-provincial relations. The role that the provinces will play is necessarily enhanced due to the changes in the trading system outlined above. But, the exact nature of the role — will they be directly involved in negotiations; will they exercise their influence at implementation? — is a function of the federal government's own political and strategic assessment. From this standpoint, CETA becomes a bellwether only of the increased relevance of the provinces and territories to trade negotiations generally, and not of their direct involvement in international trade talks.

## FUTURE RESEARCH

This survey of the changes in Canadian trade-negotiating processes on display in CETA points to at least three avenues for future research: First, if sub-federal actors are going to be more fully implicated in trade agreements in future, at what stage will this occur? Second, can one extrapolate from the Canadian experience to all federal actors? What might a comparison across cases of multi-level trade negotiations reveal? Third, how does CETA compare to other trade negotiations?

**If actors at the subnational levels are going to enjoy greater prominence in trade negotiations, at what stage or stages in the process will they exert their influence?** Will it be during agenda setting? While drafting a negotiating mandate? During negotiations? Throughout the approval and ratification stages? At implementation? Will they merely be consulted or will they be active partners? Paquin (2013, 546) identifies two stages in Canadian treaty making: “1) conclusion of a treaty, that is, negotiations, signature, and ratification; and 2) implementation.” Kukucha (2013, 529) identifies three phases for any international agreement, trade or otherwise: “negotiation, ratification, and implementation.” Both models would interpret the CETA experience as one in which the provinces played a much bigger role at the early stage or stages. Future research should focus less on establishing that subnational actors *will* be involved in trade agreements and more on establishing *when* they will be involved.

Enhancing the participation of multi-level actors at any stage in the process might require institutionalization. In their ground-breaking study of multi-level governance, Liesbet Hooghe and Gary Marks (2003, 239) observe that “its chief cost lies in the transaction costs of coordinating multiple jurisdictions” They ask, now that “central states are shedding authority to supranational and subnational authorities...what kinds of jurisdictional architecture might emerge?” (ibid., 241). The European and Canadian cases provide an interesting comparison in this regard. In the European context, the Lisbon Agreement provides this institutionalization by specifying an enhanced role for the European Parliament and providing a legal basis for it. The same thing has not yet happened for the provinces in Canada, so uncertainty results. Even now, after deep

and extensive participation by the provinces in CETA, Fafard and Leblond (2012, 4) argue that “when it comes to approval of a final agreement and the implementation of this agreement, the role of provincial governments remains unclear.”

What form might institutionalization take in the Canadian context? Some scholars have explored the prospect of introducing new instruments to shift the relationship between the federal and provincial/territorial authorities. For example, VanDuzer (2013) explores the possibility of an intergovernmental agreement between the provinces and the federal government. Similarly, Fafard and Leblond (2013) suggest a new, multi-pronged intergovernmental process that expands provincial and territorial influence to all issues that affect them; expands federal cooperation with its sub-federal units beyond the negotiating phase to decision making and implementation, and; ultimately delivers greater transparency and legitimacy of the trade agreement process. Ten years ago, Paquin (2005) had already begun to think about the need for institutionalized processes to solidify the consultation between provinces and the federal government in trade negotiations. Regardless of the direction, it seems that the deeper provincial involvement present in CETA will not be an enduring feature of Canadian trade negotiations in the absence of some kind of innovation to institutionalize it.

**What conclusions can be drawn from the Canadian case?** Is Canada a distinctive federal state or a distinctive example of multi-level politics with regard to trade negotiations? Can observations about the specific Canadian context apply more generally to other federal contexts?

Not all federal systems distribute power over international negotiations in the same way. Canada, for example, ostensibly has a weaker federal tradition than the United States with regard to international trade negotiations (Hayes 2004, 11). The relationship between federal and sub-federal units in some jurisdictions has been studied extensively. However, in others, such as Russia and India, the relationship is less well understood — a situation that will become increasingly relevant to the international trade system. Some countries, such as China, would not accurately be classified as federal states. Nonetheless, subnational actors, such as cities, are active in national policy-making circles and an understanding of their influence is important to this discussion.

Fafard and Leblond (2012, 14) argue that Canada's federal system makes it somewhat unique when it comes to the negotiation of international agreements. Interestingly, they maintain that Canada resembles the European Union more than other federal state systems. The government of Australia, for example, differs from Canada in that it has the authority not only to negotiate and ratify treaties, but also to implement them even when they deal with sub-federal jurisdiction (ibid., 12). As a result, it does not face

the same sorts of challenges that emerged in the early stages of Canada-EU talks. (See also Paquin 2005 for a comparison of federal models.)

Such a comparison provides some insight into the necessity (or lack thereof) of consultation or involvement of sub-federal governments in international trade negotiations. However, it does not speak to the political necessity of ensuring a widely inclusive process — whether constitutionally mandated or not — so that all citizens who are touched by a trade agreement can make their voices heard.

#### **Is CETA distinctive — the exception that proves the rule?**

Or is CETA indicative of a new role for the provinces in trade negotiations generally?

Delagran argued in the 1990s, with respect to CUSFTA, that “the factor most influencing the extent of provincial and congressional involvement in the negotiation of the FTA was the level of political interest in the issue in the two countries” (1992, 15). In Canada, there was a vociferous debate and very extensive media coverage for CUSFTA and, subsequently, NAFTA. Comparatively speaking, the same has not been true for CETA. If Delagran is right, sub-federal actors will not likely be involved systematically in all trade negotiations. Instead, they can be expected to wade in only when the political stakes are high.

CETA is not the only significant trade agreement that Canada has negotiated in recent years. In January 2015, Canada’s free trade agreement with the Republic of Korea was brought into force. Interestingly, the role of the provinces in this particular negotiation seems to be less prominent. Similar observations can be made about sub-federal involvement in TPP talks. “As of November 2013, Canada has participated in trade negotiations with a total of 64 countries, about one-third of the countries in the world! In none of these negotiations, however, except those with Europe, do the provinces have a seat at any table. That the CETA experience will set a precedent is therefore unlikely” (Paquin 2013, 551).

According to Kukucha (2013, 534), “despite direct involvement in the CETA negotiations, provinces and territories are unlikely to be included in a similar capacity in the future, thereby limiting sub-federal governments to a more ‘traditional’ role in upcoming bilateral talks with India, as well as the TPP.” Nonetheless, Kukucha draws a distinction between process and outcome (ibid., 530). Although the provinces and territories might not formally be included in the process leading to other agreements, there is no doubt that they will influence the outcome.

At the end of the day, perhaps the CETA proceedings are more a demonstration of the changing nature of the trade agenda than a revelation of governance innovations in trade negotiations.

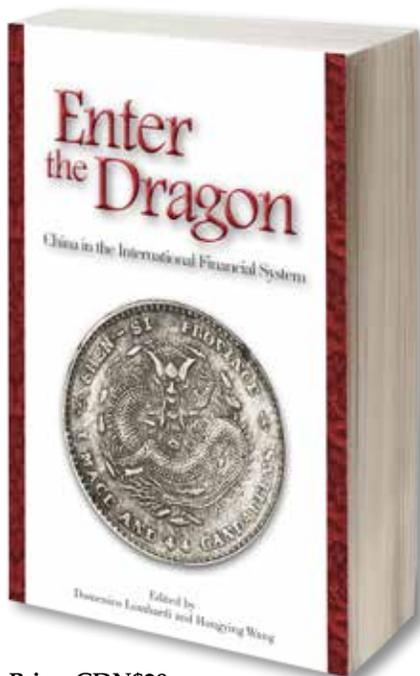
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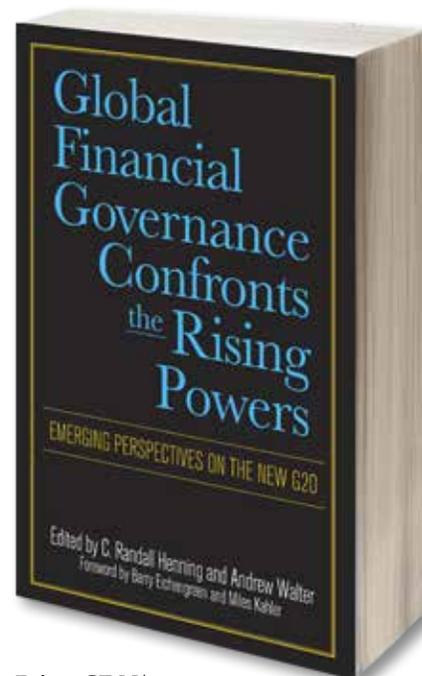
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