Twenty-First Century Trade Agreements: Challenges for Canadian Federalism

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CONTENT

INTRODUCTION

"Federalism and a spirited foreign policy go ill together"
(Wheare 1963: 186)

In the twentieth century, promoting trade between countries was focussed, for the most part, on tariffs and associated non-tariff barriers. Over time the focus has shifted to a much broader agenda such that we no longer speak of "trade" agreements per se but rather "economic and trade" agreements or "second-generation" trade agreements. As a small open economy, Canada is at the forefront of this trend and is currently negotiating (or at least contemplating) a wide range of bilateral and multilateral second- generation agreements with a diverse set of countries around the world (Clark 2012).[1] However, as the agenda expands beyond tariffs, the complexity of the agreements also expands. Even if a trade agreement like the North American Free Trade Agreement (NAFTA) is complex, newer agreements seek to address a wider range of issues including labour mobility, investor protection, mobility of business persons, public procurement, electronic commerce, and intellectual property. This wider agenda has important implications for federations or other broadly similar forms of multi-level governance (e.g., the European Union [EU]). In effect, negotiating such second-generation agreements requires close collaboration with provincial or state governments (member states in the EU), which have jurisdiction and responsibilities that are critical to the successful conclusion and implementation of a given agreement. In Canada, provincial and territorial governments, by virtue of their responsibility for health and education and their role as large buyers of goods and services, to name but two examples, have a critical role to play if Canada is going to successfully negotiate and conclude second-generation agreements.

In effect, second-generation international economic and trade agreements such as the Canada-EU Comprehensive Economic and Trade Agreement (CETA) give rise to a number of heretofore little studied questions. How are provincial and territorial governments integrated into the negotiations given that, traditionally at least, international agreements in general, and trade policy agreements in particular, are the purview of the federal government? What is Canada doing to manage the negotiation, ratification and implementation of these second-generation economic agreements? What are the implications for both Canada and its trading partners of different approaches to involving provincial and territorial governments in the negotiation, approval and implementation of these economic agreements?

To begin to address these questions, this paper takes a closer look at the current negotiations of a so-called Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union[2] (Hübner 2011). The proposed agreement, as its name implies, goes well beyond reducing tariff and non-tariff barriers and seeks to address a range of issues with a view to increasing trade, labour and investment flows between Canada and the European Union. The CETA negotiations are of interest because, for perhaps the first time, provincial and territorial governments are direct participants in parts of the trade negotiations. This innovation is the result both of the substantive nature of the issues being discussed as well as a direct and specific request from the European Union.

1. An overview of Canadian international trade agreements and current negotiations can be found here : http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/index.aspx?view=d
2. Basic information on the CETA is available here : http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/can-eu.aspx?lang=eng&view=d

However, in order to better understand the CETA negotiations and to put them in a certain context, this paper begins with an overview of the evolution of the provincial[3] role in trade negotiations with a particular emphasis on the NAFTA and other bilateral negotiations with the United States. Similarly, in order to evaluate and assess the role of provinces in the CETA negotiations, this paper also provides an overview of how other federations as well as the European Union address the reality of shared jurisdiction and the challenges associated with involving subnational and national governments in trade negotiations and, having made them parties to negotiations, give them a role in the finalization/approval of agreements and their implementation.

The principal finding of this paper is that the federal and provincial/territorial governments have taken steps to give the latter an unprecedented role in the negotiation of a Canada-EU economic agreement and this compares favourably to the practice of the EU itself. Conversely, the paper argues that when it comes to approval of a final agreement and the implementation of this agreement, the role of provincial governments remains unclear. Finally, the paper argues that this lack of transparency about the role of provincial governments in the approval and implementation of an eventual agreement could potentially undermine the effectiveness of the deal. The ambiguity as to how and to what extent provincial and municipal governments will implement a CETA may mean that European investors and firms who will want to sell goods and services in Canada may be less willing to engage. This will not only mean that some of the economic benefits of an economic agreement between Canada the EU will not be achieved, at least in the short and medium terms, it may also make it more difficult to negotiate trade and economic agreements with other countries or regions.

3. In this paper so as to avoid awkward references to both provincial and territorial governments, the term “provinces” and “provincial” will be used to designate not just provincial governments but the governments of the three northern territories.

1 HISTORICAL EVOLUTION OF THE ROLE OF PROVINCIAL GOVERNMENTS IN CANADIAN TRADE POLICY

1.1 A Look Back – Federalism and North American Trade Negotiations

In 1985 the Royal Commission on the Economic Union and Development Prospects for Canada, known more commonly as the Macdonald Commission, issued a major report that made a wide range of recommendations dealing not only with economic policy but also with Canadian political institutions (Inwood 2005). However the Commission is remembered primarily for having recommended that Canada negotiate a bilateral trade agreement with the United States. This set the stage for the decision by the government of Brian Mulroney to launch the negotiations that led to the Canada-United States Free Trade Agreement (CUSFTA) in 1989 and the North American Free Trade Agreement (NAFTA) in 1994, the latter being a trilateral arrangement which includes Mexico.

Free, or at least freer trade, first with the United States and then more broadly with Mexico, had profound implications for the Canadian economy. Opening up Canadian markets to foreign competition, while perhaps beneficial overall, required significant restructuring and adjustment particularly in Ontario (Inwood 2005; Courchene 1988). Not surprisingly, therefore, the Government of Ontario (along with Manitoba and Prince Edward Island) staked out an aggressive position opposing free trade with the United States and, in the advent of an agreement, calling on the Government of Canada to provide considerable financial assistance to sectors, firms and workers negatively affected. Other provincial governments also raised concerns although some provinces, notably Alberta and Saskatchewan, came out strongly in favour of a trade deal with the United States (Inwood 2005; Kukucha 2008). While a free trade agreement also meant painful restructuring in Quebec, the provincial government expressed cautious support for the FTA for a number of reasons including Premier Bourassa's training in economics that made him particularly aware of the virtues of freer trade and the strategic opportunity provided by the FTA negotiations to bolster the role of the province in Canadian intergovernmental affairs, (Kukucha 2008). Others have argued that, on balance, increased economic integration with United States was a high priority for successive Quebec governments and this helps explain Quebec's support for the FTA (Bernier and Thérien 1994).

In general, the prospect of a free trade agreement with the United States and the subsequent transformation of the Canadian economy generated considerable pressure on provincial governments to defend those sectors that might be negatively affected. For its part, the Government of Canada needed mechanisms to manage the politics of free trade and underscore the fact that while some provincial governments were opposed to at least some aspects of a bilateral trade deal, others were strongly supportive. Moreover, while the final text of the CUSTFA and the NAFTA had limited direct impact on areas of provincial jurisdiction, at the outset of the first set of bilateral negotiations with the United States, a free trade agreement was thought to potentially have a major impact on provinces. The result was a decision to convene regular meetings between the Prime Minister and the provincial Premiers to discuss the CUSFTA negotiations (Hulsemeyer 2004).

At a more technical level, the Government of Canada also needed input from provincial governments with respect to a few areas where provincial governments had either information or jurisdiction. Ottawa was also interested in sharing at least some information on the evolution of the negotiations with provincial governments. In effect, the CUSFTA negotiations precipitated the deepening of an existing set of arrangements that brought together federal and provincial officials to discuss trade issues. The result was the Continuing Committee on Trade Negotiations (CCTN), which later evolved into what today is known as the C-Trade committee system. C-Trade involves meetings between federal and provincial officials, usually four times each year. It is not a negotiating vehicle or even a particularly effective means of consultation. Instead, it is a forum for information sharing (Kukucha 2008: 54). In the

case of the NAFTA, the C-Trade process became particularly important when, in order to secure congressional approval, it was necessary to develop "side deals" on environment and labour policy, areas of shared or predominantly provincial jurisdiction.

However, it is important to emphasize that while the federal government engaged extensively and publicly with provincial governments during the negotiations leading to the FTA and the NAFTA, provincial governments were never formally part of the negotiations. At best, provinces were consulted and encouraged to provide information and analysis of the impact of various possible elements of an agreement. And even here, provincial governments were not given privileged access. The federal government engaged in similar consultations with the business community during the negotiations leading to both the CUSFTA and the NAFTA. To a large extent, this is because the final CUSTFA had little direct impact on areas of provincial jurisdiction.

Even when the NAFTA negotiations moved more squarely into areas of provincial jurisdiction, because of the labour and environment side deals, provinces were consulted but there was no requirement for all them to agree. In fact, only three provinces (Quebec, Alberta, and Manitoba) formally signed onto both of them. Moreover, the significance of their formally adhering to the side agreements is unclear and may amount to nothing more than a political commitment to be bound by the terms of the agreement, a commitment that may or may not be used by the Government of Canada at some future date (Kukucha 2008).

The downside of a limited provincial role in approving both NAFTA and trade agreements in general is demonstrated by three bilateral trade disputes with the United States, two involving NAFTA-related financial penalties paid by the Government of Canada, the other involving the recent bilateral negotiations between Canada and the United States with respect to government procurement.

1.2 Provinces and Recent Canadian Trade Disputes

Under the terms of Chapter 11 of the NAFTA, governments agreed to a set of provisions designed to provide investors with a predictable, rules-based investment climate, as well as dispute settlement procedures. The forest products company AbitibiBowater used these provisions to challenge the 2008 decision of the Government of Newfoundland and Labrador to expropriate the majority of the company's assets in the province after the company announced the closure of its last operating mill in Grand Fall-Windsor (Best 2010). However, because provincial governments are not parties to the NAFTA, the Government of Canada was left to try and defend the decision and pay any penalties arising from the dispute settlement process. In June 2010, the federal government agreed to settle the claim and announced its intention to reimburse Abitibi for the expropriation in the amount of $130 million, much less than the $500 million sought. And while the Government of Canada indicated it would not try and recoup the $130 million from the province, the Prime Minister did indicate that it was the intention of his government to create a mechanism to be able to do so in future (CBC News 2010).

More recently, a NAFTA tribunal ruled in favour of two US-based oil companies in a dispute over research and development expenditure requirements imposed by Newfoundland and Labrador (Hepburn 2012; Gray 2012). While the oil companies had asked for $50 million in compensation, the final amount they will be awarded is not yet known. What is clear is that the Government of Canada is responsible for paying any compensation. In effect, these cases suggests that, absent the explicit adherence of a provincial government to a trade agreement or a bilateral agreement with the Government of Canada to implement a trade agreement, the only recourse open to the federal government is to try and monetize the problem.

A somewhat similar dynamic is evident with respect to government procurement. In response to a wave of protectionist measures in the United States following the recession that began in 2008 (i.e., limiting local and state government procurement to U.S. based suppliers), the Canadian and American governments entered into negotiations that eventually led to a formal agreement. In this agreement, provinces accepted for the first time to allow U.S. firms to bid on provincial or municipal procurement contracts.[4] However, what is of interest is the mechanism by which provinces indicate their consent. Essentially, all provincial and territorial governments with the exception of Nunavut agreed to be bound by the terms of the WTO plurilateral Agreement on Government Procurement (GPA). However, provinces did not sign the GPA as such. Rather, they agreed to be listed in the list of Canadian government entities that will be subject to the terms of the Agreement (Cox and Palmer 2010).[5] The Government of Canada remains the signatory to the agreement and there is no formal indication of provincial consent to be bound by the GPA. The implication of this is that, in the event that a province or municipality were to discriminate against a U.S.-based supplier in violation of the 2010 agreement between Canada and the United States, the Government of Canada would be subject to any retaliation or penalties arising from the violation. Moreover, absent an agreement between the federal government and provinces, it would appear that Ottawa would have no way of sanctioning the recalcitrant provincial government or recouping any financial penalties that might arise.

4. Agreement Between the Government of Canada and the Government of the America on Government Procurement. The text of the Agreement can be found here: http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/ENG-Canada-USA_Government_Procurement.pdf. This agreement was signed in order for Canadian businesses to be exempted from the Buy American provisions of the U.S. Recovery Act (i.e., the American stimulus package).

5. The list of provincial and territorial commitments under the GPA can be found here: http://www.wto.org/english/tratop_e/gproc_e/can2e.doc.

2 THE CANADA-EUROPEAN UNION (EU) COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT (CETA)

2.1. What is CETA?

CETA is known as a "second-generation trade agreement" because its emphasis is on non-tariff barriers (NTBs) such as standards, regulations and procedures. Such "behind the border" (as opposed to "at the border") barriers have become the main source of impediments to international trade since tariffs are now quite low, especially between rich countries, as a result of the successive rounds of tariff reductions within the General Agreement on Tariffs and Trade (GATT) since the 1950s and the creation of the World Trade Organization (WTO) in 1995. For instance, in 2007, Canadian goods faced an average tariff of 2.2 per cent when they entered the EU, whereas at that time European goods were hit with an average tariff of 3.5 per cent to enter the Canadian market. Since then, Canadian tariffs on many imported goods have been reduced to zero. In addition to trade in goods and services, CETA aims to encourage investment between Canada and the EU; for example, by providing greater protection of firms' assets in each jurisdiction or by facilitating access to public procurement contracts. This is why, after free trade with the United States, CETA would be the most important bilateral trade agreement ever negotiated by Canada. It is also hoped, especially from the EU's perspective, that CETA will eventually become a stepping stone to a free trade zone across the (northern) Atlantic (Woolcock 2011: 23-24).[6]

A joint study conducted by the European Commission and Government of Canada (2008) concluded that a second-generation type of economic partnership agreement would allow Canada to increase its exports of goods and services to the EU by $12.5 billion while, in return, the EU would be able to increase its exports to Canada by $25 billion.[7] The report also suggested that GDP would increase by $17 billion and $12 billion, respectively, for the EU and Canada. The joint study also outlined several fields where Canada and the EU would benefit from collaborating more than they do at present: science and technology, energy, the environment, transport, customs and education. Greater collaboration in these fields would help to improve the exchange of ideas and best practices with the ultimate goal of getting more people and companies on both sides of the Atlantic to do deals with each other.

At the beginning of the negotiations, it was decided that no sector of the economy would be excluded a priori and that both tariff and non-tariff barriers would be examined.[8] For instance, in spite of the agreement's second-generation nature, the elimination of tariffs on traded goods remains a key negotiation issue. According to the joint study, a quarter to a third of the benefits arising from a partnership agreement would come from getting rid of such duties. Both sides have made it clear that no tariff lines were to be excluded from the negotiations, even on agricultural goods. It remains to be seen, however, whether this will indeed be the case when the final agreement is signed, especially since there are some politically powerful agricultural lobbies on both sides of the Atlantic that prefer the status quo (e.g., the Canadian dairy industry wishes to protect its supply management system).

6. The EU and the U.S. are currently examining the possibility of such an agreement (Palmer 2012); however, it would be a bilateral agreement between the EU and the United States, not an interregional agreement. For an explanation of the difficulties associated with interregionalism between Europe and North America, see Aggarwal and Fogarty (2005).
7. The joint study forecasts that the current trade deficit that Canada has vis-à-vis the EU would be maintained in the foreseeable future, because economic structures in both jurisdictions are assumed to remain unchanged. This is a reasonable assumption since such structural changes occur over long periods of time; moreover, it is difficult, if not impossible, to foresee if and how an agreement such as CETA might in fact modify the economies of the signatories. Leblond and Strachinescu-Olteanu (2009) make a similar assumption in their analysis of the trade benefits associated with free trade between Canada and Europe.
8. The Joint Report on the EU-Canada Scoping Exercise can be found here: http://trade.ec.europa.eu/doclib/docs/2009/march/tradoc_142470.pdf.

Barriers to trade in services are also high on the negotiating agenda. The objective is to improve market access and eliminate discrimination in favour of national service providers. For example, an agreement would involve the mutual recognition of professional qualifications across the Atlantic. This would make it easier for firms to send Canadians to Europe (or Europeans to Canada) to work with subsidiaries and/or business partners. The overall intention here is to build on the two partners' existing WTO commitments under the aegis of the General Agreement on Trade in Services (GATS).

Both Canada and the EU are also keen on eliminating non-tariff barriers in areas other than services. For instance, building on the WTO's Agreement on Sanitary and Phytosanitary (SPS) Measures as well as the Canada-EU Veterinary Agreement, health-related standards and regulations that restrict trade in goods and services would have to be eliminated through harmonization or mutual recognition. In addition, there is a need for transatlantic cooperation with respect to conformity assessments. The same logic applies to customs procedures, where, for example, both sides will need to cooperate in order to ensure compliance with rules-of-origin provisions. In this case, CETA would build on the existing Canada-European Community (i.e., EU) Agreement on Customs Cooperation and Mutual Assistance in Customs Matters. Finally, concerning non-tariff barriers, the negotiations will also attempt to ease market access and put in place non-discrimination measures in matters of investment and government procurement as well as increase the protection and enforcement of intellectual property rights by improving on the WTO's TRIPS (Trade-related intellectual property rights) agreement.

Another critical part of the negotiations is Canada and the EU's willingness to harmonize their intellectual property regimes or, to put it more accurately, move Canada closer to the EU model. The central issue here is the extent to which Canada is willing to extend patent protection for large pharmaceutical. Doing so might mean increased research and development spending but would also penalize the so-called generic drug companies who produce equivalent but less expensive versions of popular prescription drugs once the patent protection has expired. Accepting the EU intellectual property regime would effectively mean an increase in the price of drugs, a further cost pressure on provincial budgets.[9]

In addition to eliminating tariffs on goods and services as well as reducing the impact of non-tariff barriers through harmonization and regulatory cooperation measures, the CETA negotiations are addressing the following topics: dispute-settlement mechanism, competition policy, movement of persons, labour, and the environment. The Canada-U.S. Free Trade Agreement was the first bilateral free trade deal to put dispute settlement at the centre of the negotiations. Since then, most bilateral and multilateral trade liberalizing agreements have included such mechanisms in order to render the agreements more effective. As for competition policy, there is a growing recognition that state aid and other forms of government intervention in the economy (e.g., regulating monopolies) can distort the competitive nature of markets and, as a result, create barriers to trade and investment. CETA also plans to include measures to facilitate the temporary movement of labour for trade and investment purposes, which could mean the creation of special visas or working permits for Canadians (Europeans) working in the EU

9. There are sharp divisions between the supporters and opponents of extending patent protection in Canada as part of a CETA. Support comes from the research-based pharmaceutical companies and large business lobbies and, interestingly enough, from former Prime Minister Brian Mulroney (Mulroney 2012). For an overview, see Crowley and Lybecker (2012). Opposition comes from the generic drug companies, the Council of Canadians, and in a more muted way, provincial governments. For an overview, see Picard (2011) and Diebel (2011). .

(Canada) for, let's say, less than one year. Finally, as with most bilateral trade agreements involving rich countries these days, CETA negotiators will set up cooperation mechanisms whereby Canadian and European labour and environmental laws and standards do not give one side or the other unfair trade or investment advantages;[10] the NAFTA side agreements on the environment and labour have now become a staple of bilateral trade deals.

2.2 CETA and the Provinces

Owing to its comprehensive nature, CETA would affect several matters of provincial jurisdiction (shared or not shared with the federal government). For example, CETA covers fields such as energy, the environment, education, transportation, science and technology, etc. It also aims, among other things, to encourage workforce mobility between Canada and the EU, which entails the recognition of professional skills obtained on either side of the Atlantic. It also aims to eliminate discrimination against foreign companies in favour of local ones in the awarding of contracts by provincial and, most especially, municipal governments.

Given that such negotiation issues fall under exclusive or shared provincial and territorial jurisdiction, the EU requested that the provinces and territories actively participate in the CETA negotiations and credibly commit to the agreement. This is because they will ultimately be responsible for implementing many of the agreement's provisions. If customs duties (i.e., tariffs) and intellectual property are clearly a federal competence, many issues such as agriculture, labour, health, the environment, energy, etc. are either shared or exclusive competencies of the provinces. So 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. Hence, the EU made the provinces' (and territories') active participation in the negotiations a conditio sine qua non to begin the negotiations, the assumption being that it will be difficult for them to renege on elements of an agreement in which they took active part in negotiating. To gain additional insurance against the provinces and territories not implementing CETA, the EU has also allegedly required that the provinces and territories sign a political agreement to that effect; however, what value such a document would have remains very much open for debate.

In addition to their traditional involvement through the C-Trade committee system, the Canadian provinces have been directly participating in many of the negotiating groups within the overall CETA negotiations. According to Kukucha (2011: 134), the provinces have been involved in six and often seven of the 12 groups that were set up at the beginning of the talks. They have also been present at all the negotiation rounds that have taken place up to now. This has led to the somewhat paradoxical situation where the Canadian delegation – led by the chief negotiator (Steve Verheul), who is from the federal Department of Foreign Affairs and International Trade – has numbered more than 100 persons while there have been less than a dozen people on the EU side, which is represented solely by the European Commission.

10. On regulatory cooperation, see Krstic (2012).

2.3 Current Status of CETA

At the time of writing (spring 2012), Canada and the EU have conducted nine formal negotiation rounds, the last one taking place in Ottawa in October 2011. Many more informal meetings and exchanges have also taken place in between those rounds as well as since the last meeting. According to both sides, the negotiations should be concluded by the end of 2012. There remain, however, a number of sensitive issues to be resolved. Agriculture is one such area. For example, Canadians want easier access to European beef and pork markets while Europeans would like to have a greater access to Canada's dairy markets by seeing the European quota increased (Shane 2012). Other major areas that still require further negotiations are: rules of origin (i.e., what determines whether a product or service is Canadian or European), protection of intellectual property rights (IPR) and public procurement. The latter issues have proved very sensitive in Canada. For instance, many municipalities oppose the opening of government contracts to European firms. Some municipal councils have even voted to refuse to abide by the terms of the CETA on public procurement and, therefore, continue discriminating against European firms. With respect to IPR, Although provincial governments are not involved in the negotiations around intellectual property issues because these are deemed to be an area of exclusive federal jurisdiction, they have nevertheless have been compelled to write letters to the Prime Minister expressing concerns and calling on the federal government to compensate them for any increase in costs, however unlikely that may prove to be (Scofield 2012).

3 COMPARATIVE ANALYSIS

3.1 Other Federations

Unlike the European Union and Canada, the federal or national government in many other federations has the authority to negotiate, ratify and implement international treaties, including trade and economic agreements like CETA. As a result, subnational governments are not, as a matter of course, included as part of the delegation negotiating treaties. In many federations, precisely because the federal government has the constitutional authority to do what is required to implement treaties, there is no need for subnational governments to ratify a treaty. In fact, in many federations this would make no sense: for matters of international relations the national government is deemed to be the legal embodiment of the state. In more general terms, in most federations the dominant view is that a coherent foreign affairs regime requires, as it is described in the United States, that "one voice" to speak for the nation (Ahdieh 2008). There are three reasons why the federal government in many federations is the predominant actor with respect to foreign policy.

First, in several federations, the constitution, either as written or as interpreted by the courts, gives the federal government the power to not only negotiate and ratify treaties but implement them as well. So, for example, in Australia successive rulings by the High Court have meant that the Commonwealth has the power not only to negotiate and ratify treaties but also to implement them, even in areas of state jurisdiction (Galligan 2003: 97; Emery 2005). Some have argued that the High Court rulings mean that any subject matter could fall within the powers of the Commonwealth Government on external affairs (Galligan 2003: 97). Indeed, as Anthony Mason, a former Chief Justice of the Australian High Court put it, the external affairs power "must be interpreted generously so that Australia is fully equipped to play its part on the international stage" (Galligan 2003: 97).

In Germany, the constitution (the Basic Law) provides that foreign policy is a responsibility of the federal government (Suszycka-Jasch and Jasch 2009). The process of European integration has led to the transfer of authority from governments, including state (Länder) governments, to the EU. This has been done, for the most part, under the sole authority of the German federal government. In some cases, Länder are given an opportunity to influence German foreign, trade and EU policy. Formally, this can occur in one of two ways. As a result of constitutional amendment and intergovernmental agreements, the main vehicle for state input into German foreign policy is via the Bundesrat, the German upper house where Länder government are represented. Successive political and constitutional agreements have led to the current situation where, the Bundesrat is empowered to provide at best quasi-binding advice on EU-related legislation (Panara 2010: 75). In a limited range of areas of exclusive Länder jurisdiction, state governments can engage directly in foreign policy and even speak for Germany within the EU Council of Ministers. However, even in this case, the federal government enjoys a dominant position (Panara 2010; Suszycka-Jasch and Jasch 2009).

The constitutional and legal basis of federal government authority over foreign policy is perhaps most evident in the United States where the federal government has supremacy in all treaty matters and the treaty making power of the federal government is not subject to federalism limits (Emery 2005). Thus, for example, the U.S. Constitution provides that Congress and the President have the power to conduct foreign policy and that federal actions have supremacy over state law (Robinson 2007). While recent court rulings have re-opened a scholarly debate on whether and to what extent states have a role in the formulation and conduct of U.S. foreign policy, the overriding power of the federal government has never really been put into question (Ahdieh 2008; Emery 2005; Robinson 2007).

A second reason why, in most federations, the federal government enjoys an almost unlimited power to conduct foreign and trade policy lies in the very nature of the federation. In Germany, Australia, and even to some extent the United States, we find what Alan Cairns (1978) and Donald Smiley (1971) have described as "intrastate federalism" a term they use to describe federations where state (or at least regional interests) are formally incorporated into national policy making by being represented in the upper house of the legislature: the Senate in the United States and Australia; the Bundesrat in Germany. Thus in most federations, the idea that subnational governments should have input into national policy, including foreign and trade policy, is given life by the structure of the legislative branch. It follows, then, that there is less or perhaps even no need to give subnational governments a direct role in the negotiation, ratification and implementation of trade and economic treaties because their interests are represented and protected by other means. Of course, as a result of the Seventeenth Amendment to the Constitution, state governments are no longer directly represented in Congress and in all federations, partisan considerations can and do trump state or regional concerns. Nevertheless, the very structure of national decision-making weakens the case for an explicit role in foreign policy making for US and Australian state governments or German Lander.

A third and final reason why, in most federations, the federal or national government is predominant in the conduct of foreign and trade policy builds on the two already mentioned. In most federations, all that is required is that subnational governments be "consulted" precisely because the federal government has the constitutional authority to negotiate, ratify and sign trade and economic agreements and/or state interests are deemed to be represented within the federal government decision-making structure. As the scope of international economic agreements extends evermore into areas of subnational jurisdiction it is prudent for the national government to consult. Thus, for example, in Australia, while there are a number of precedents of (limited) involvement of state governments in Australian delegations to international conferences (Burmester 1978), state involvement remains generally at the level of consultation. The Commonwealth government may and often does consult state governments when negotiating international treaties but is not, strictly speaking, obligated to do so. Nor is there any expectation that the views of state governments be binding. In fact, during the negotiation of the Australia-United States Free Trade Agreement, which came into force in 2005, the role of state governments was limited to one of consultation; their role in the actual negotiations was limited to being part of the Australian delegation as observers (Emery 2005). Similarly, in the United States and Germany there are established circumstances in which the federal government consults with subnational governments either directly or, in the German case, via the Bundesrat. In the United States, consultation with state governments is common in the making of trade policy. Indeed, as far back as 1994, Congress enacted legislation that required the Office of the United States Trade Representative (USTR) to "consider" state government advice when formulating U.S. positions that affects states on trade issues arising during the Uruguay Round of the GATT (Emery 2005). In Germany, the constitution requires that when an EU initiative addresses the legislative authority of the Länder, the federal government must give the position taken by the Bundesrat "the greatest possible respect" (Panara 2010: 76). However, in the final analysis, the role of subnational governments remains advisory and the federal government can, and routinely does, ignore the concerns or one or more subnational governments.

In summary then, Canada is something of an outlier when it comes to the role of subnational governments in foreign and trade policy. There are many in Canada who would prefer that Canada "speak with one voice" in foreign affairs. However, precisely because the federal government does not have the authority to implement a treaty when it touches on areas of provincial jurisdiction, there is a minimal requirement to consult provinces. In some cases, including the CETA, provinces have to be given a role in the negotiations. In this sense, Canada is more similar to the EU than it is to other federations. In Germany, Australia and the United States, the federal government has the authority to negotiate, ratify and implement trade and economic agreements even when they encroach on areas of subnational jurisdiction. As a result of the structure of these federations (i.e., intrastate federalism) as well as the text and interpretation of their constitutions, the federal government has an interest in consulting with subnational governments when making trade policy but is not required to follow their advice even when the issue at hand lies within an area of subnational jurisdiction. Such is not the case in either the European Union or Canada.

3.2 The European Union

If other federal states may not be comparable to Canada in terms of the role given to subnational jurisdictions in trade policy-making, especially with respect to international trade agreements, the European Union might provide a useful institutional framework to help solve the intergovernmental relations issues identified in section 3 above. When the European Economic Community (now the EU) was created with the Treaty of Rome in 1957, the member states agreed that a common commercial policy was required because they now shared a customs union with common external tariffs. This meant that tariff rates and other duties were decided at the supranational level; the member states had delegated their authority over trade policy to EU institutions,[11] most especially the Commission, which speaks on their behalf in international trade negotiations. As we will see below, this does not mean that the member states could no longer have any say over trade policy in Europe. In fact, they set up institutional limits on what the European Commission could and could not do and say (Dür 2012). Over time, with new issues being put on the international trade agenda, namely non-tariff barriers, the EU's competences in matters of trade policy have been redefined by the member states (Meunier 2005: chap. 1).

3.2.1 Institutional Framework of the Common Commercial Policy in the EU

With the entry into force of the Lisbon Treaty in December 2009, European trade policy is now governed by Article 207 of the Treaty on the Functioning of the European Union (TFEU).[12] The EU now has "exclusive" competence over trade in goods and services, the commercial aspects of intellectual property as well as foreign direct investment, which in the latter case is a new power given by the Lisbon Treaty (see below for details).[13] In terms of process, international trade agreements have to go through the following four stages before they are ratified by the EU: mandate, negotiation, signing and ratification.

11. The three legislative EU institutions are: the Commission, the Council and the Parliament. The Commission is the EU's executive body. The Council represents the member states of the EU while the Parliament represents EU citizens directly.

12. Article 207 TFEU replaces Article 133 of the Treaty of the European Community.

13. There are also areas of "mixed" competence mentioned in Article 207 TFEU: cultural and audiovisual services; social, education and health services; and transportation. These are areas where, in certain cases, unanimity (as opposed to a qualified-majority) is required in the Council (of ministers) – the EU institution where the member states are represented – for the negotiation and conclusion of international trade agreements. For more details on areas of exclusive and mixed competence in trade policy, see Meunier and Nicolaïdis (1999).

At the mandate stage, the Commission makes a recommendation to the Council to begin negotiations with another country or group of countries. The Council then authorizes (or not) the Commission to conduct negotiations of a trade agreement. In giving its authorization, the Council also adopts a set of negotiating directives to guide the Commission. If the Commission negotiates outside these directives, which are not legally binding, then it runs the risk of the Council ultimately rejecting the agreement that has been negotiated (Meunier 2005: 35). Obviously, throughout the negotiations, the Commission can always go back to the Council to obtain a revised set of negotiating directives. During the negotiations, the Commission must keep two committees informed of the progress in the negotiations: (1) the Trade Policy Committee, which is composed of member state representatives and serves to advise the Council;[14] and (2) the Standing Committee for International Trade of the European Parliament. Negotiators for the Commission meet regularly with members of these two committees, sometimes on a daily basis. Any modification to the Commission's negotiating mandate from the Council would go through the Trade Policy Committee. Once the negotiations are concluded, the Commission proposes that the Council sign the trade agreement. Once the Council has signed the agreement, it is ratified by the Parliament, which must give its consent.[15] Once the Parliament has consented, the agreement then goes back to the Council for a second decision that formally ratifies the agreement for the EU.

Even though the EU has exclusive competence in most trade policy matters, the member states, through the Council, retain a fair degree of influence and control over the content of international trade agreements. Although the European Commission negotiates on behalf of the EU and its member states, it is not at liberty to do or say what it wants. It must remain within the Council's mandate,[16] as well as take into account the positions of the Parliament, which now has ratification power over international trade agreements. In fact, Dür (2012) goes further and argues that the member states still have a veto over many areas of modern-day trade agreements (through the use of unanimity in the Council):

> The entry into force of the Lisbon Treaty has not undermined member states' ability to closely control the Commission in the trade field. In fact, the breadth of modern trade agreements ensures that they will have to be negotiated as mixed agreements even under the new treaty provisions, for example because they include provisions on investment protection, cultural services, or tax policy. Each member state thus maintains an effective veto over broad trade agreements.

Once the EU ratifies an international trade agreement, the Commission and the Council are responsible for its enforcement, unless new legislation is required, in which case the European Parliament is also be involved. Although the Commission is responsible for initiating investigations of alleged unfair trade practices, no retaliatory or sanctioning measures can be taken without the authorization of the Council by a qualified majority (consensus is the norm in practice).

14. The Trade Policy Committee was formerly known as the "Article 133 Committee".

15. The European Parliament's involvement in the ratification of international trade agreements is a new feature of the Lisbon Treaty. Before then, only the Council had the authority to ratify such agreements. This is also why the Commission negotiators must now also keep the Parliament's Standing Committee on International Trade abreast of the negotiations' progress.

16. In a study of the EU's participation in the Doha Round of trade negotiations at the World Trade Organization, Conceiçao-Heldt (2011) found that the Commission can have some discretion when the Council's directives are vague because the member states' preferences are not homogenous.

3.2.2 Selected Trade Policy Issues

3.2.2.1 Public Procurement

The above section on CETA makes clear that public procurement is a crucial component of the negotiations. It is a complex issue because it involves an area where Canadian provinces have sole competence, namely with respect to public contracts given by provincial and municipal governments as well as public utilities. In the EU, public procurement markets have been integrated (or deregulated) since the 1990s (Meunier 2005:126-127).[17] This means that any EU firm can compete for public contracts anywhere in the Union without facing the risk of being discriminated against on the basis of its nationality. Foreign firms, for their part, can only get the same kind of access to EU public procurement markets if their home country has negotiated a so-called reciprocity agreement with the EU. Otherwise, public utilities and governments can discriminate against foreign firms when awarding procurement contracts. This reciprocity provision in EU law is known as the "Buy European" clause (Meunier 2005: 129).

The EU used this provision to force the United States to provide to EU firms access to state-level public procurement markets during the negotiations of the plurilateral Agreement on Government Procurement (GPA). In the end, 39 American states (including large ones like California, Illinois, New York and Texas) agreed to sign on to the GPA (Meunier 2005: 141). In this case, the Commission was negotiating on behalf of the EU under a mandate from the Council, which had to resort to a qualified-majority vote when Germany opposed the use of what Meunier (2005) calls "offensive reciprocity". In the CETA negotiations, the EU is using a similar strategy to get provincial and municipal governments in Canada to open up their public procurement markets to European firms. For the time being, Canadian firms only have access to public procurement markets in the EU at the supranational and national levels but not at the subnational levels. And like in Canada, the biggest markets are at the subnational levels.

3.2.2.2 Investment

Before the Lisbon Treaty, EU member states were legally responsible for negotiating and concluding bilateral investment treaties (BITs), which aim to protect investors in host markets against unfair treatment like, for example, expropriation without adequate compensation. Nevertheless, according to Bungenberg (2011: 226), the European Commission was trying to include investment promotion and protection provisions in the bilateral preferential trade agreements that it was negotiating, even if it meant that the member states would have to sign onto these provisions individually and have them ratified in their national parliaments (known as "mixed" agreements).

17. In Canada, the 1995 Agreement on Internal Trade also requires open and non-discriminatory access to public procurement markets (including municipal ones) for Canadian firms (based on location, not ownership).

Since December 1, 2009, however, foreign direct investment (FDI) is an "exclusive" competence of the EU, covered by Article 207 TFEU. This is in recognition of the fact that there is a close relationship between trade and investment nowadays and that, increasingly, international economic agreements reflect this reality (Bungenberg 2011: 227). It is also meant to provide the EU with a stronger negotiating position in bilateral and multilateral economic negotiations (Bungenberg 2011: 231). For the EU, this new area of competence means that it must now replace the approximately 1,300 existing BITs concluded by individual member states with EU-wide BITs or as part of larger bilateral (or interregional) trade and economic agreements like CETA (Bungenberg 2011: 232-233).

Because the EU's recently-acquired competence over foreign direct investment does not extend to portfolio (i.e., short-term) investments and other forms of investment (e.g., intellectual property rights) (Bungenberg 2011: 232), investment – when defined in a broader sense than simply FDI – has thus become an area of "mixed" competence in the EU. This is because portfolio investments are usually also included in BITs and international investment agreements (Bungenberg 2011: 236). As a result, unless there is a further transfer of investment competences to the EU in the future, individual member states and their national parliaments will continue to be involved in the signing and ratification of international economic agreements when it concerns forms of investment other than FDI (Bungenberg 2011,: 236).[18]

18. Through a mandate from the Council (under unanimity rules) with respect to investment, the Commission can nevertheless negotiate on behalf of the member states in this area of mixed competence.

4 WHAT ROLE FOR PROVINCIAL AND TERRITORIAL GOVERNMENTS IN SECOND-GENERATION TRADE AND ECONOMIC AGREEMENTS IN CANADA?

4.1 Lessons from the Canadian and Comparative Analysis: Scenarios for Provincial Support for a CETA

Our survey of the Canadian experience with the NAFTA and more recent trade and economic agreements as well as the experience of other federations suggests that when it comes to the negotiation of international trade and economic agreements Canada is somewhat unique among the club of federations or quasi-federations (i.e., the EU). As indicated, in many federations the central government enjoys considerable latitude to both negotiate and implement trade agreements with little or no reference to subnational governments. This is true in the United States, Germany and Australia. In these federations, therefore, the question of how to integrate subnational governments in trade discussions does not arise, or if it does, a series of more or less formal arrangements are established to give the "subjects of the federation" (to borrow a phrase from the Russian federation) a role in negotiations.

At first glance, the EU represents a more promising point of comparison insofar as the EU as such cannot negotiate trade agreements without extensive involvement of the member states. However, the form of member-state involvement and agreement is hard to replicate in Canada. The EU is in effect an example of extensive intrastate federalism where the member states are represented inside the decision-making bodies of the EU (i.e., the Council of Ministers). Canada operates, for the most part, with a form of interstate federalism. As a result, the EU offers few lessons for Canada as to how to manage the federalism dimension of international trade negotiations, except for the merits of institutionalizing and codifying the conduct of such negotiations, a theme that we address further below.

Precisely because Canada is unique, it is difficult to predict with any certainty what role provinces will ultimately play in the Canada-EU negotiations beyond the current innovation of having them "at the table", at least for some issues. However, the analysis presented here suggests a number of possible scenarios for the extent to which provincial and territorial governments (and by extension municipal governments) will be integrated into a possible economic agreement between Canada and the European Union.

Table 1
Five Scenarios for Provincial Integration into a CETA

Provincial governments:	In effect an agreement between provinces and:	Degree of provincial buy-in:	Responsibility for political or municipal non-compliance:	Comments:
1. Do nothing	No one	Low	Canada	Similar to NAFTA
2. Agree to be "listed"	Canada	Low - Medium	Canada	Similar to the WTO Agreement on Government Procurement
3. Implementing legislation / regulations	Canada	Medium	Canada	A possible scenario in Quebec
4. Parties to the Agreement	Canada and European Union	High	Province	Major change to Canadian foreign policy
5. Sign an international governmental agreement following an FMC	Canada	Medium	Canada	Recommended

As indicated in Table One, the simplest (and therefore likely) scenario is one where once an agreement has been concluded between Canada and the European Union, provincial governments in effect do nothing, leaving approval and ratification to the Government of Canada. This approach is largely the one used for the NAFTA and preserves the authority of the federal government for the making and approval of treaties. However, this approach would in effect mean that there is little or no formal "buy-in" by provinces to an eventual agreement. This would leave the Government of Canada responsible for the implementation or lack thereof. In the event that a provincial or municipal government were to be unwilling to take the steps necessary to implement the agreement (e.g., amend rules restricting foreign investment; change procurement rules), responsibility would remain with the federal government. This would mean a possible repeat of the controversy over AbitibiBowater and more recently Exxon where the federal government is left with the responsibility to defend a decision by a provincial government and/or bear the costs of any litigation that follows.

A second scenario would mirror the one used to respond to concerns about Buy America pressures in the United States. Just as the outcome of that dispute saw provincial governments quietly agree to be listed in the WTO General Agreement on Procurement, it is possible to imagine an economic agreement between the European Union and Canada where, in an annex, the commitments by provincial governments are listed. For example, the list could be of areas where provinces agree to lower the price thresholds for limiting access by EU firms to government and agency contracts for goods and services. In effect, a version of the provincial "offers" that were made during the course of the negotiations[19] would be incorporated into the text of an agreement without making provinces a party to the agreement. Given the precedent, this is arguably also a likely scenario for how and to what extent provinces would participate in the ratification and implementation of an eventual CETA. This would represent a limited form of provincial buy-in with some degree of transparency. In effect, there would be an informal agreement between the federal and provincial governments. However, precisely because the agreement is informal and low-key, the political costs of abrogating the agreement are relatively small. Moreover, the financial costs of any subsequent non-implementation or non-compliance would remain the responsibility of the federal government. So, for example, following the conclusion of the CETA, despite the terms of the agreement one might imagine the city of Montreal (or Toronto or Ottawa) agreeing to limit access to contracts to purchase mass transit equipment in order to give an advantage to Canadian suppliers. While there would be pressure by Ottawa on the city and the province not to do so, there is little the Government of Canada can do to force compliance. In this example, one might well envisage litigation by European firms and fines that would, in the end, have to be paid by the federal government.

A third scenario is one where provincial governments agree to enact implementing legislation (or perhaps regulations) to implement the terms of the CETA. The legislation might, for example, remove government policies deemed to be barriers to investment or change the thresholds for open procurement of goods and services. This would represent a moderate degree of provincial buy-in to an eventual CETA. This would also make it more difficult for the province (or cities within the province) to deliberately flout the terms of the agreement between Canada and the EU. This would arguably reassure potential European firms that wish to invest in Canada or sell to Canadian governments and agencies, reassurance that would increase the chances of realising the economic gains promised as a result of a comprehensive economic agreement between the EU and Canada. However, provincial implementing legislation or regulations does not completely eliminate the possibility of later non-compliance.

19. During the course of the negotiations between Canada and the European Union provinces tabled detailed lists of things they were and were not willing to do to secure an agreement. Much of this had to do with procurement. This is where, for example, Québec indicated that it did not want to include procurement by Hydro-Québec in the agreement. A version of the provincial positions were leaked as part of the broader initial services and investment offer to the EU a copy of which is available here: http://tradejustice.ca/en/section/3.

Nor is it clear how provinces would indicate their commitment to enact such legislation or make the necessary regulatory changes. This scenario still leaves the Government of Canada to pay any associated fines should a province or municipality choose to ignore provisions of an agreement.

A fourth and rather unlikely scenario is one that would see provincial governments become formal parties to an agreement with the European Union. In this scenario, provinces would in effect "sign" the agreement, thereby indicating significant buy-in to the agreement. Provinces would be entering into an agreement with both Canada and the EU making its implementation that much more certain. Moreover, it might even make provinces subject to any litigation arising from the agreement. This would considerably lower the risk of non-compliance. This is easily the least likely scenario, however, since it would represent a major shift in Canadian foreign policy and significantly expand the international profile of provincial governments. Moreover, in return for becoming formally bound by an agreement, it would be reasonable to expect provinces to insist on considerable influence on the final terms and conditions, something that the Government of Canada has not allowed for to date and would wish to avoid if only because it would make finalizing an agreement that much more difficult.

4.2 Implications of Canada's uniqueness as a federal system with respect to provincial involvement in international trade and economics agreements

Assuming that the fourth scenario identified above, whereby the provinces sign onto the CETA and other international economic and trade agreements negotiated by Canada, is improbable in the foreseeable future, it leaves three scenarios where, as mentioned above, the Government of Canada is on the hook for any situation where a provincial government fails to implement or ultimately enforce (directly or indirectly [e.g., by not overriding a municipal decision]) a part of the international economic and trade agreement. This means that the Government of Canada bears all the risk of non-compliance by a province, while the latter get the political (and possibly economic) benefits of protecting certain firms or sectors from the agreement's provisions. For a provincial government that wants to make political gains at home by defending certain constituencies while at the same time punishing the federal government (for the latter's actions on other intergovernmental files), this is a dream situation. Hence, in terms of incentives, the absence of provincial ratification of international economic and trade agreements does create a bias against implementing or enforcing the parts of such agreements that a provincial government does not like, either now or in the future.

Leaving aside for the moment the issue of why the Government of Canada, the EU and other trading partners should wish to negotiate such agreements given the above-mentioned bias for provincial governments not to implement or enforce certain elements of international economic and trade agreements, the biggest likely consequence associated with a low to medium buy-in by the provinces is the uncertainty that it creates for firms wanting to invest and do business in and with Canada. Taking CETA as an example, European firms might wait to see how CETA is working practice and how well it is implemented and enforced by the provinces before deciding to look into investing, doing deals with Canadian firms and bidding for provincial and municipal government contracts. Such a wait-and-see attitude would mean that the economic benefits for Canada identified in the joint study will take longer to happen, meaning of loss of wealth and jobs for the Canadian economy in the short and medium term.

Even if foreign firms can ultimately get compensation from the Government of Canada for provinces reneging on some commitment to an international economic and trade agreement,[20] they may nonetheless decide that doing business in and with Canada is not worth it because they may not be able or willing to afford the high legal costs involved in such disputes.

The uncertainty associated with provincial implementation and enforcement of international economic and trade agreements could also make Canada's trading and investment partners reluctant to sign onto such agreements until they have seen how the CETA operates in practice. Again, the Canadian economy could suffer as a result of the risk created by Canada's unique federal arrangement when it comes to the provinces' role in international economic and trade agreements.

Two related questions here are why the EU would accept to sign onto the CETA if there is such uncertainty and why would the Government of Canada accept to bear the risk of having to pay compensation to European firms in case of provincial non-compliance? The answer to these questions is that the risk of significant non-compliance by the provinces is probably relatively low given that they have been actively involved in the negotiations and that they will have had a chance to voice their concerns about elements of the agreement that they find problematic. So in the case of NAFTA, for example, both the number of times and the amounts that the Government of Canada has had to pay in compensation to firms for actions taken by provincial (or municipal) governments have been relatively small.[21] Canadian provinces also have a good record in implementing intergovernmental agreements with the federal government that in practice have little legal or constitutional basis (Poirier 2002).

In addition, the CETA will contain a dispute-settlement mechanism that the EU can use in case where the provinces do not comply with the parts of the agreement that concerns them. Hence, after an independent panel would have ascertained that there is indeed non-compliance on the part of Canada (i.e., through provincial non-implementation or non-enforcement), the EU would have the right to impose retaliatory sanctions against Canada. Such sanctions would likely be directed to the province(s) at fault in order to get it (them) to change its (their) behaviour.

In effect, the EU appears ready to sign onto the CETA even if the provinces do not actually sign the agreement themselves because the Europeans feels the benefits outweigh the costs and risks associated with provincial non-compliance. There is a relatively low risk of non-compliance of CETA provisions by the provinces. The EU retains the ability to retaliate if necessary and European firms will almost certainly have the right to seek compensation from the Government of Canada in case where they face harmful actions on the part of provinces. As such, a deal may be better than no deal at all. This does not mean, however, that the EU would not like the highest degree of commitment on the part of the provinces, within the constitutional and political limits imposed by the Canadian federal system.

20. Compensation for firms is available only in a limited number of circumstances (e.g., investor protection provisions); it is usually not available for such things as not harmonizing rules and regulations (e.g., recognizing foreign professional credentials).

21. Unfortunately, there are no studies that have looked at such cases; however, if the AbitibiBowater case became so mediatized, it is because it was such an extraordinary event. Although the amount paid by the Government of Canada was nominally significant ($130 million), it is a relatively small amount in the government's budget, which runs in the hundreds of billions of dollars. One could argue that this is actually a small price to pay for the Government of Canada in order to maintain its sole jurisdiction over international agreements.

In spite of the above risk mitigation measures, it remains that there is a direct correlation between the economic benefits of the CETA (and similar agreements in the future) for Canada and the uncertainty created around the level of buy-in on the part of the provinces. So, if Canada wants to maximize the benefits it derives from the CETA and be able to credibly convince other trading partners to negotiate and sign similar agreements, then how could Canada's unique federal system allow for the highest degree of commitment from the provinces, short of the latter signing the agreement itself?

4.3 Recommendations

What, if anything, can be done to reduce the risk and uncertainty faced by European firms and, in future, firms from other countries negotiating trade and economic agreements with Canada? In other words, what can be done to make it more likely that provincial, territorial and municipal governments in Canada will willingly agree to implement and respect the terms of an eventual CETA or a similar agreement between Canada and other countries?

The simplest and most direct reform would be to follow the example of Australia, the United States and Germany and simply expand the treaty-making authority of the Government of Canada. Whether by constitutional amendment (unlikely in the short to medium-term) or a reference case to the Supreme Court, it might be possible to override the existing constitutional principle that the treaty-making power of the Government of Canada does not extend into areas of provincial jurisdiction (Strom and Finkle 1993; Howse 1989). While theoretically possible, it is by no means clear that the Supreme Court of Canada would rule in such a way so as to expand the federal government's treaty-making powers. More importantly, any effort to extend federal treaty-making powers that would encroach on provincial jurisdiction would upset the balance of Canadian federalism with unknown consequences. However, such a dramatic shift in constitutional powers is unnecessary. There are other and better ways to manage the implications of second- generation trade agreements.

In this context, the experience of the European Union and Australia as well as the Canadian experience with the NAFTA are instructive. Absent any mechanisms of intrastate federalism (e.g., a German- or Australian-style Senate where provinces are represented), we need to rely on mechanisms of interstate federalism. Structures are required to allow the federal, provincial and territorial governments to discuss mandate, negotiations, and the final text of second-generation trade agreements. The more provincial governments are involved, the more likely it is that they will willingly agree to the inevitable trade- offs that are required. In the case of the EU, the structure is the Council of Ministers and the myriad of committees that have been created to assist the Council in managing the EU. In Australia, the structure is the Council of Australian Governments and, with respect to trade and other international negotiations that affect state governments, a formal statement of principles.[22] In Canada, while we have nothing resembling the highly institutionalized intrastate federalism of the EU or even Australia, we do have a tradition of inter-governmental negotiations, be they at the level of officials, of ministers or of first ministers. The NAFTA experience of regular meetings between the prime minister and the provincial premiers may well be a model for how to manage the challenges associated with second-generation trade agreements. In effect, what may be required is a degree of "summit federalism" where meetings between the prime minister and the provincial premiers are at the apex of a structured process of consultation and negotiations between orders of government so as to allow Canada to maximize the benefits and manage the costs of negotiating and implementing second-generation trade agreements, be they with the European Union, India or, as was recently announced, Japan.

22. In 1992 and again in 1996 Australian governments agreed to a shared set of "Principles and Procedures for Commonwealth-State Consultation on Treaties". A copy is available here: http://www.coag.gov.au/coag_meeting_outcomes/1996-06-14/docs/attachment_c.cfm. For a critical evaluation of this innovation, see Emery (2005) and Galligan (2003).

However, increasing and formalizing the provincial and territorial role in international trade negotiations may not be sufficient to increase the likelihood of provincial implementation and compliance. As the scope of international economic agreements expands to deal with areas of exclusive or shared jurisdiction, countries who are negotiating with Canada may want a stronger assurance that Canadian governments will, in fact, do what is necessary to implement an eventual agreement. In order to provide assurances to firms who are planning to invest in Canada or wish to sell goods and services to Canadian governments, it may be necessary for provinces to more formally signal their approval of any new trade agreement. At a minimum, this could be a simple communiqué insofar as this appears to be the most common format for provinces and the federal government to indicate their shared commitment to move in the same direction. Somewhat more formally, one might imagine political agreements where provincial premiers actually sign a document indicating their willingness to take the measures necessary to implement any new trade agreements. As mentioned earlier, this was a scenario envisaged by the EU at the outset of the CETA negotiations.

There are at least two downsides to "summit federalism" leading to a political agreement. One is procedural while the other is legal. First, there has been a secular decline in the frequency of intergovernmental meetings over the last fifteen years (Fafard et. al. 2011). Ministers are meeting less often and first ministers' meetings are increasingly rare and the few meetings that do occur are very informal and not meant to be about negotiating much of anything. However, the ambitious trade agenda of the Government of Canada may require a reversal of this trend in order to provide a process whereby Canada demonstrates its willingness and ability to fully implement second-generation trade agreements.

Second, even if the provinces were willing to sign a political document, the legal value of the document, and of the guarantees to the EU and its firms, would remain limited. In such a case, the federal government would continue to act as the guarantor regarding any infringement of CETA. This means that it would be legally responsible to the Europeans for the non-respect of the agreement by the provinces, and consequently would pay any compensation judged necessary by a panel of experts set up under the agreement, as is currently the case with NAFTA.

CONCLUSION

The purpose of the present study is to examine the role of the provinces in the negotiation and implementation of so-called "second-generation" international economic and trade agreements, whether bilateral or multilateral, in which Canada is involved. This is because the scope of such agreements is much beyond that of tariffs, which have formed the basis of bilateral (or regional) trade agreements signed by Canada until now, including the North American Free Trade Agreement. A major portion of these 21st-century agreements' focus is on non-tariff barriers such as, inter alia, labour mobility, regulations and standards, investment, public procurement, intellectual property rights as well as scientific and administrative cooperation between both private and public entities (private-private, public-public, and public-private).

The point of departure for the analysis is the Comprehensive Economic and Trade Agreement that Canada and the European Union are about to conclude. For perhaps the first time[23] the Canadian provinces have been actively involved in the negotiations of an international trade agreement, not just consulted or informed as any other stakeholder. However, the ratification, implementation and ultimately enforcement of the CETA raise a number of questions about the true degree of provincial commitment or buy-in with respect to the elements of the agreement that concern the provinces. In other words, how certain can Canada's trading partners (both countries and firms) be that the provinces (and the municipalities that they oversee) will effectively implement and enforce second-generation trade agreements such as the CETA?

Such a question is fundamental. As we have argued here, there is a negative correlation between agreement uncertainty, as produced by the degree of provincial buy-in, and the economic benefits that Canada will derive from international economic and trade agreements. The greater the uncertainty, the lower the benefits. Therefore, if Canada wants to maximize the economic benefits associated with such agreements, then it needs to maximize the degree of provincial buy-in.

This presumed desire to maximize the economic benefits that Canada derives from second-generation trade agreements leads the study to consider the possible mechanisms for provincial buy-in. Following a comparative analysis of other federal arrangements with respect to the role of subnational entities in the negotiation and implementation of international trade agreements (Australia, EU, Germany and US), we conclude that Canada's federal system is quite unique when it comes to the relative powers of the federal and provincial governments when it comes to implementing and enforcing such agreements. This conclusion led us to initially consider four scenarios for provincial buy-in.

The first scenario involves the status quo, whereby the provinces make no written commitment of any sort to the agreement. The second scenario involves the provinces agreeing that their commitments be specified or listed in the agreement itself by the federal government, which is ultimately the only Canadian party to the agreement. This model follows the one that is currently being applied to the plurilateral Agreement on Government Procurement. The third scenario involves provinces agreeing to pass implementing legislation, although the way in which they "agree" is unclear and remains a soft "political" agreement. Moreover, in the second and third scenarios, the provinces are not legally bound in any way to implement and enforce the parts of the agreement that concern them; only the Government of Canada is on the hook in case of provincial non-compliance.

23. In the 1980s the EU raised concerns about provincial liquor board practices. The EU initiated a complaint against Canada under the dispute resolution processes of the General Agreement on Tariffs and Trade. Resolution of this disagreement required extensive bilateral negotiations that, of necessity, included provincial government representatives (Kukucha 2008).

The fourth scenario is the one where the provinces actually sign the agreement and become party to it and, therefore, make their commitment legally binding. Arguably, this scenario is the one that would provide the highest level of certainty when it comes to provincial compliance, both in the present and the future. However, it is improbable in the Canadian context because it would involve such a drastic change to the way the Canadian federation functions. Although (some) provinces may actually prefer such a scenario, it seems almost certain that the federal government, regardless of the party in power, would refuse to share it exclusive power to sign and ratify international economic and trade agreements.

We therefore recommend what one might consider as a fifth scenario involving a high-level intergovernmental summit for First Ministers Conference (FMC) between the provinces and the Government of Canada. This approach is inspired by the one used by the Mulroney government during the negotiations of the first free trade agreement with the United States. However, unlike that case, we also recommend, as part of the process of establishing new, second-generation trade and economic agreements, that the federal and provincial governments negotiate a political agreement reflecting the simple reality that both orders of government are responsible for areas that are affected by the trade deal. Such an agreement would be a somewhat more formal indication of the provinces' commitment to implement and enforce a given second-generation trade agreement, like the CETA for example. Although this would not give the guarantees that Canada's trade partners may ultimately wish for, it would represent the best way for the provinces to make clear their commitment. It would form the highest level of provincial buy-in, short of signing the agreement itself.

Unfortunately, we believe that the current federal government may be unwilling to consider this last scenario because the benefits for itself are probably not sufficient when compared to the cost of having more complex dealings with the provinces. While Paul Martin as Prime Minister was willing to engage with premiers on key issues (e.g., the health care and Kelowna accords), Stephen Harper has refused to participate in intergovernmental negotiations. In fact, his government has avoided multilateral negotiations preferring bilateral discussions (e.g., infrastructure) or simply ignoring provinces altogether and proceeding unilaterally on priority issues (e.g., criminal justice, immigration). In short, the status quo will likely prevail when it comes to the role of the provinces in international economic and trade agreements. As a result, Canadians will end up paying the cost of lower economic benefits associated with such agreements.

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