

Federalism and the governance of international trade negotiations in Canada: Comparing CUSFTA with CETA

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Abstract

When the European Union (EU) and the Canadian government announced the launching of negotiations to create a “new generation” free trade agreement, the EU insisted that provincial representatives be included on the Canadian negotiating team. The goal of this article is to explain why the provinces have gradually become key, indeed indispensable, actors in international trade negotiations. I examine how international trade negotiations are conducted in Canada, noting the enhanced role for provincial governments, and I focus on a comparison between the Canada–US free trade negotiations and the discussions for a Comprehensive Economic and Trade Agreement (CETA) with Europe.

Keywords

International trade negotiations, Canada, European Union, federalism, governance, provinces, CETA, CUSFTA

In May 2009, when the European Union (EU) and the Canadian government of Stephen Harper announced the launching of negotiations to create a “new generation” free trade agreement, the EU insisted that provincial representatives be included on the Canadian negotiating team. This requirement came as a surprise to many. According to the constitution and court rulings, the federal government has plenary power in matters relating to international treaties. Moreover, the

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federal government has exclusive legislative authority over international trade and commerce. Why did the EU insist on the inclusion of representatives from the Canadian provinces? Why have the provinces become key players where international trade negotiations are concerned?

There are two major reasons. First, the negotiation and implementation of international trade agreements now include the jurisdiction of federated states and even municipal governments. The EU insisted on the inclusion of provincial representatives in the Canadian delegation because the Europeans are particularly interested in accessing Canadian municipal and provincial public procurement contracts. This “new generation” free trade agreement is going to focus on provincial public procurements but also on other aspects such as labour, another provincial responsibility.

The second reason is constitutional. As noted by Anthony VanDuzer in his contribution to this issue, the EU judged that if the talks were to have any chance of success, provincial representatives had to be at some of the tables since the provinces are not obliged, as per the 1937 Labour Conventions decision, to implement accords concluded by the federal government in provincial fields of jurisdiction. For this reason, the EU wanted to ensure that Ottawa had provincial representatives on the negotiating team (prompting Jean Charest, the Quebec premier at the time, to quip that the EU had a better understanding of Canadian federalism than Ottawa).

The goal of this article is to explain why the provinces have gradually become key, indeed indispensable, actors in international trade negotiations, to the point that they have been actively involved in the Canadian government’s negotiation team in the Canada–EU free trade talks. To illustrate, I examine how international trade negotiations are conducted in Canada, noting the enhanced role for provincial governments, and I compare the free-trade negotiations between Canada and the United States with discussions for a Comprehensive Economic and Trade Agreement (CETA) with Europe.

Treaty making in Canada

Treaty making in Canada is a two-stage process: 1) conclusion of a treaty, that is, negotiation, signature, and ratification;¹ and 2) implementation. The first stage is the prerogative of the federal executive (a monopoly which has nonetheless been contested by the government of Quebec since the 1965 Gérin-Lajoie Doctrine).² The second stage, the adoption of the necessary legislation to apply the treaty, is the prerogative of the legislative branch, federal and/or provincial. Treaties must

1. In his introductory article to this special issue, Christopher J. Kukucha differentiates more formally between negotiation and ratification.
2. Stéphane Paquin, “Le fédéralisme et les relations internationales du Canada depuis le jugement de 1937 sur les conventions de travail,” in Stéphane Paquin, ed., *Le prolongement externe des compétences internes. Les relations internationales du Québec depuis la Doctrine Gérin-Lajoie (1965–2005)* (Ste-Foy: Presses de l’Université Laval, 2006), 7–25.

thus be incorporated into domestic law by legislative action at the appropriate level. Indeed, Armand de Mestral and Evan Fox-Decent have cited more than 13 different ways treaties may be incorporated into domestic law at the federal level alone. In Canada, a treaty does not apply automatically over existing laws. Judges base their rulings on Canadian laws, not treaties. The issue is of fundamental significance in Canada for, as de Mestral and Fox-Decent point out, “roughly 40 per cent of federal statutes implement international rules in whole or in part.”³

In Canada, trade negotiations are typically led by the federal government. This is, in fact, generally so, even when negotiations deal with areas of exclusive provincial jurisdiction: “provincial, territorial, and First Nations governments are not part of this process. They can be invited to participate, but the invitation is entirely subject to the discretion of the federal government and public service.”⁴ The government of Canada here faces significant problems, since provincial collaboration is unavoidable when negotiations deal with the provinces’ fields of jurisdiction. Thus, there are many precedents for provincial government involvement. Intergovernmental negotiations between senior bureaucrats and even sometimes ministers almost always take place. As VanDuzer notes, however, there is no general framework agreement providing for federal–provincial consultations, and there is very little consistency in the approach taken.

Since multilateral and bilateral treaties on international trade increasingly affect provincial fields of jurisdiction, provinces are increasingly consulted and involved in the negotiations even though international trade is the sole responsibility of the federal government. In addition, because of the constitutional ambiguity and the intrusiveness of international trade negotiations, the Canadian provinces have gained and will continue to gain access to international trade negotiations. Since 1980, previous ad hoc arrangements have come to be institutionalized through periodic federal–provincial consultations on trade policy.

More specifically, after the free trade negotiations with the United States, the federal government systematized the consultative process with the provinces, putting in place methods for developing negotiating positions. The Federal/Provincial/Territorial Committee on Trade (C-Trade) meets approximately four times per year to review the general trade agenda and exchange views on the positions and strategies that the federal negotiators should put forward in global and bilateral negotiations. These intergovernmental negotiations are pursued in a number of fora that include federal, provincial, and territorial officials. Over time, the consultative basis has been widened to include the Federation of Canadian Municipalities, non-governmental organizations, and citizen input. However, as Kukucha has noted, Quebec has pressed for a more formal process that would see provincial representatives as direct participants in the negotiating process.⁵

3. Armand de Mestral and Evan Fox-Decent, “Rethinking the relationship between international and domestic law,” *McGill Law Journal* 53, no. 4 (2008): 578.

4. *Ibid.*, 592.

5. Christopher J. Kukucha, *The Provinces and Canadian Foreign Trade Policy* (Vancouver: UBC Press, 2008).

Difficulties can also emerge in the implementation of international treaties. For instance, since the North American Free Trade Agreement (NAFTA) does not focus exclusively on Canada, legislators had to amend Canadian law to conform to the treaty. Difficulties may also emerge with respect to dispute settlement mechanisms since judgments may again require the offending state to amend its legislation or even revoke previous administrative decisions. The question that then arises is whether the federal and provincial governments that implemented NAFTA committed themselves only with regard to the treaty or to future rulings by panels as well.

The Canadian government contends that ratification of international treaties is the sole prerogative of the federal executive. It may commit Canada internationally with no form of consent from federal or provincial legislatures, even if a treaty should require substantial changes to laws and regulations. To avoid foreseeable problems, however, Ottawa usually does not ratify international treaties that necessitate legislative changes by the provinces without prior provincial approval.

In fact, a detailed examination of the legislative steps involved in concluding a treaty reveals a relatively long process that is often not completed before ratification by Ottawa.⁶ Take, for example, the two NAFTA side agreements on the environment and labour, which in Canada are exclusive (labour) or shared (environment) provincial fields of jurisdiction. Most of the provinces sought involvement in the negotiations, but the federal government wanted to act alone. The negotiations resulted in a clause that would permit provinces to withdraw from the side agreements. Only three provinces have since signed the environment agreement (Alberta in 1995, Quebec in 1996, and Manitoba in 1997) and only four have signed the labour agreement (Alberta in 1995, Quebec and Manitoba in 1996, and Prince Edward Island in 1998). The NAFTA side agreements are not exceptional in this regard.

Free trade negotiations with the United States

Because of the impact of trade agreements on provincial jurisdiction, the provincial governments were included in the Canada–United States free trade negotiations in the 1980s and the North American free trade negotiations in the early 1990s. One significant change in Canadian politics during this period was that Ottawa actively sought the support of the provinces for these negotiations. The federal government wanted a “big deal,” a deep comprehensive agreement, and acknowledged that many of the trade measures on the table were under provincial jurisdiction. Politically, in contrast to the previous Liberal prime minister, Pierre Trudeau, Brian Mulroney, a Progressive Conservative, believed in collaborative federalism. He also maintained that the Canadian provinces could play a more important role in international affairs.

6. Stéphane Paquin, “Federalism and compliance with international agreements: Belgium and Canada compared,” *The Hague Journal of Diplomacy* 5, no. 1–2 (2010):173–197.

That did not mean that the provinces were at the bargaining table with the American and Canadian negotiators, but they were informed and consulted extensively. The government of Canada maintained control over the appointment of the chief negotiator, Simon Reisman, as well as the definition of the mandate for the Canadian government. The free trade agreement was negotiated from 1984 to 1987 by federal officials who were in charge of all aspects of the negotiations. The FTA negotiations included 10 negotiation groups: 1) dispute settlement on institutional issues, 2) antidumping and countervailing duties, 3) subsidies, 4) competition policy, 5) intellectual property rights, 6) government procurement, 7) services, 8) investments, 9) agriculture, and 10) market access.

Although the provinces were not at the table, 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, which had been established by Reisman. Mulroney himself met with the premiers 14 times over a period of approximately 18 months. The wealthier provinces also hired high-profile consultants to represent their free trade views in Ottawa: Bob Latimer, a former federal official with both the Department of Industry, Trade and Commerce and the Department of External Affairs worked for Ontario; and Quebec hired Jake Warren, who was Canada's negotiator in the Tokyo Round of the General Agreement on Tariffs and Trade negotiations. The smaller provinces sent officials drawn from their own bureaucracies. During the process, provincial ministers and senior officials met with the federal negotiating team at least once a month. And throughout, the premiers were active in pressing their concerns. Ontario premier David Peterson, for example, alarmed at rumours that the Auto Pact of 1965 was going to be put on the negotiating table, flew to Washington in January 1987 to urge American officials to keep it out.

The decision to conclude negotiations and sign the Canada-US Free Trade Agreement (CUSFTA) was taken by the federal executive despite the opposition of some provinces, notably Ontario, and of the official opposition and the Senate (where the Liberals formed a majority). The ratification of CUSFTA was not debated in Parliament but the Senate refused to pass the implementing legislation in 1988. Faced with this difficult situation, Mulroney decided to call a general election on the issue even though there was no legal requirement to do so. Shortly after Mulroney's re-election, the government rapidly adopted the legislation implementing CUSFTA in the House of Commons.

A similar process was followed in the NAFTA negotiations, with the provinces once again seeking to make their views known, and the federal government trying to coordinate provincial concerns via such mechanisms as the federal-provincial Committee for North American Free Trade Negotiations.

In the end, neither the free trade agreement with the United States nor NAFTA had a major impact on provincial jurisdiction, largely because so many of the provisions concerned future legislation. Indeed, CUSFTA and NAFTA act like an economic constitution that prohibits federal and provincial governments from

intervening in provincial economies in many areas. CUSFTA and NAFTA also did not liberalize government procurement policies at the provincial level.

CETA

When Canada launched trade negotiations with the European Union, the provinces' role in the process was expanded. To start the negotiations for a "new generation" free trade deal, the EU insisted on the inclusion of the provinces in the Canadian delegation, reflecting its members' interest in accessing Canadian municipal and provincial public procurement contracts. Because of its past experience negotiating with Ottawa, the EU judged that if the talks were to have any chance of success, provincial representatives had to be at the table. In other words, EU representatives recognized the implications of the provinces not being obliged to implement accords concluded by the federal government in provincial fields of jurisdiction.

As a result, 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—CETA. 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.

These consultations allowed the provinces and territories to influence what was on the table in regard to issues under their jurisdiction. What was then the Department of Foreign Affairs and International Trade and the provinces agreed to "share information" with regard to the negotiations mandate. Provincial views were also sought through the *Canada Gazette* process.

At first, the negotiations were divided into 12 issue areas, and the provinces and territories were formally invited to be involved in seven. With the passage of time, the number of issues was increased to approximately 20, with some of the larger topics being divided into sub-areas. The provinces and territories have been involved directly in negotiation sessions focusing on services, technical barriers to trade, labour (recognition of professional qualification), sustainable development, investment, government procurement, monopolies, and state-owned enterprises. The federal government has negotiated without formal provincial presence over issues such as agriculture, phytosanitary measures, customs procedures and trade facilitation, intellectual property rights and geographical indications, the creation of a dispute settlement committee, and institutional matters.

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.

The provincial representatives also maintained informal relations among themselves, and with both the Canadian and European envoys. The government of Quebec's chief negotiator, Pierre Marc Johnson, for example, has had several bilateral meetings with the chief European negotiator, Mauro Petriccione. The provinces have accordingly played an increasingly important role. More specifically, provincial representatives accounted for 28 of the 50 members of the Canadian delegation at a January 2010 session of the talks in Brussels. In the opinion of the European negotiators interviewed by the author, the provinces will play a decisive role in determining the outcome of the talks.⁷ Without a clear commitment on the part of the largest provinces, the path from agreement in principle to ratification and implementation stands only a slim chance of succeeding.

Conclusion

At the time of writing, the CETA negotiations have progressed to discussions of what both sides claim to be the final details. Nevertheless, questions regarding the involvement of the Canadian provinces and territories in the ratification of any final agreement remain. For example, do all the provinces and territories need to agree before a deal is reached? Does Alberta have a veto? Or Quebec? And what about the territories? There are precedents with human rights treaties where a treaty has been signed and ratified by the federal government even when only a small number of provinces have agreed to comply. Can such a process apply to such an important trade treaty?

One other question arises from the involvement of the provinces and territories in these negotiations: Will the CETA experience change the way Ottawa negotiates free trade agreements in the future? It is probably too early to tell, although there are some indications. Since 2006, Canada has engaged in trade negotiations with the 27 countries of the European Union, the 15 Caribbean Community and Common Market countries, as well as Japan, India, Morocco, Thailand, and Turkey. In February 2012, Canada and China concluded an agreement on the promotion and protection of foreign investment. Canada has also agreed to join the discussions on the Trans-Pacific Partnership, which includes 11 countries, including the United States, Mexico, Malaysia, Vietnam, and Australia. 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.

Author Biography

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7. Confidential interviews with the author, Brussels, January 2011.

Political Economy. His research is focused on paradiplomacy and the international relations of non-central governments. He is the author of *International Policy and Politics in Canada* (with Kim Richard Nossal and Stéphane Roussel) and *Théories de l'économie politique internationale*. His journal articles have appeared in *The Hague Journal of Diplomacy*, *Nationalism & Ethnic Politics*, *Canadian Journal of Political Science*, *Revue canadienne d'administration publique*, *Revue internationale de politique comparée*, and *Études internationales*.