

Means of Influence, the Joint-Decision Trap and Multilevel Trade Negotiations: Ontario and Québec and the Renegotiation of NAFTA Compared

Stéphane PAQUIN^{*}

Trade negotiations address issues that are increasingly pertinent to substate governments, leading many to insist on being included in trade negotiations. The increasingly multilevel nature of trade negotiations and the influence of substate governments in the negotiation process is beginning to attract theoretical attention. The Canadian case is interesting here as it allows us to test two recent theories about the role of substate governments in trade negotiations. Canadian provinces are increasingly included in trade negotiations despite the fact that they do not have veto power and the Senate of Canada does not represent their interests. The Canadian case demonstrates that, contrary to the means-of-influence theory, inclusion in the negotiation process is more important than formal constitutional powers. Moreover, contrary to a recent theory that questions the joint-decision trap perspective, in the case of the NAFTA renegotiation, granting veto power to the provinces would likely have been a major problem for Canadian negotiators. This article compares the role Ontario and Québec played in the NAFTA renegotiations with their role in CETA and Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) negotiations.

Keywords: Trade negotiation, federalism, means of influence, joint-decision trap, Canadian provinces, Ontario, Québec, NAFTA renegotiations, CETA, CPTPP

1 INTRODUCTION

The role of substate governments in international trade negotiations is beginning to attract theoretical attention. Substate governments are becoming more involved in trade policy. Jörg Brochek calls it ‘an increasingly widespread phenomenon’,¹ despite the fact that the literature on international economic law tends to downplay

^{*} Full professor, École nationale d’administration publique, université du Québec, Canada. This work was supported by the Social Science and Humanities Research Council of Canada. I would like to thank Laurence Marquis for her help in conducting this research. Email: stephane.paquin@enap.ca.

¹ Jörg Broschek, *The Federalization of Trade Politics in Switzerland, Germany and Austria*, *Regional & Federal Studies*, 1 (1 Jun. 2021).

Paquin, Stéphane. ‘Means of Influence, the Joint-Decision Trap and Multilevel Trade Negotiations: Ontario and Québec and the Renegotiation of NAFTA Compared’. *Journal of World Trade* 56, no. 5 (2022): 853–878.

the role of substate governments in international trade negotiations because treaty making is a classic function of sovereign states. In federal regimes, substate governments like Canadian provinces cannot speak on behalf of the sovereign state unless they are granted full powers.² Since trade negotiations are typically conducted by sovereign states, specialists in international economic law tend to ignore this set of actors and focus instead on sovereign states or actors such as the European Union (EU).

Federalism does not sit well with the principles of international law, as it assumes that sovereign political authority can be exercised in a same territory, over a same people, by more than one order of government.³ One problem arises from the fact that federal states are considered under international law as unitary actors, while in reality a federal government must contend with the constitutional division of powers when it negotiates with other countries to ensure that it is able to respect the international obligations it takes on.⁴ The crucial element is the sharing of powers between two orders of government. Depending on the federal constitution, some powers will be assigned as the exclusive competence of the central government, while other powers will be assigned to substate governments. Some areas of competence – concurrent powers – will be shared by both levels of government. This division of powers will determine, in large part, the nature and form of the participation of substate government in international trade negotiation, and thus the relations between the two orders of government in this sphere.

A few decades ago, it was commonplace for substate governments to be excluded from trade negotiations because these addressed issues of tariffs and quotas that are typically central government responsibilities. Nowadays, however, trade negotiations address issues that are increasingly in the fields of jurisdiction of substate government.⁵ The multilevel nature of trade negotiations means that sovereign states, or the EU in the case of Europe, no longer have a ‘monopoly’ on international negotiation. The role of substate government is more important

² Tom Grant, *Who Can Make Treaties? Other Subjects of International Law*, in *The Oxford Guide to Treaties* 151 (Duncan B. Hollis ed., Oxford University Press 2020).

³ Malcolm Shaw, *International Law* (8th ed., Cambridge University Press 2017).

⁴ Christian Lequesne & Stéphane Paquin, *Federalism, Paradiplomacy and Foreign Policy: A Case of Mutual Neglect*, 22 *Int'l Negot.* 183 (2017); Chris Kukucha, *Federalism and Liberalization: Evaluating the Impact of Governments on Negotiation of International Trade Agreements*, 22 *Int'l Negot.* (2017); Hugo Cyr & Armand de Mestral, *International Treaty-Making and the Treaty Implementation*, in *The Oxford Handbook of the Canadian Constitution* (Peter Oliver, Patrick Macklem & Nathalie Des Rosiers eds, Oxford University Press 2017).

⁵ Patricia Goff, *Canadian Trade Negotiations in an Era of Deep Integration*, CIGI Papers No. 88, 5–7 (2016); Yelter Bollem, Ferdi de Ville & Niels Gheyle, *From Nada to Namur: Sub-federal Parliaments' Involvement in European Union Trade Politics, and the Case of Belgium*, in *The Multilevel Politics of Trade* 256–280 (Jörg Broschek & Patricia Goff eds, University of Toronto Press 2020); Chris Kukucha, *Provincial/Territorial Governments and the Negotiations of International Trade Agreements*, IRPP Insight, No. 10 (2016).

than just the implementation of international trade agreements.⁶ And with the rise of regional authorities around the world, this phenomenon is likely to increase in the future.⁷

The Canadian case allows us to test two fundamental hypotheses from the recent theoretical literature on substate governments in trade negotiations. The first hypothesis, formulated by Kersschot, Kerremans and De Bièvre, stipulates that there is an asymmetry in substate government capacity to influence or control trade negotiations in the EU context: the more constitutional power a region has, the more it can influence the negotiation.⁸ The second hypothesis relates to Scharpf's theory of the joint-decision trap. Christian Freudlsperger argues that, contrary to the predictions of the joint-decision trap theory, the inclusion of Canadian provinces in the CETA negotiations did not lead to the suboptimal outcome of greater protectionism.⁹

The recent renegotiation of NAFTA, by far the most important trade agreement for Canadian provinces, provides an opportunity to consider these two theories. In this article, we compare the role of Ontario and Quebec in the NAFTA renegotiation with the role they played in the negotiation of CETA and the negotiation of the Trans-Pacific Partnership, now known as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).¹⁰ CETA negotiations between Canada and the EU marked the gold standard of federal-provincial cooperation. The CETA model was not replicated during the CPTPP and NAFTA negotiations, and the federal government seemed

⁶ Enrico Borghetto & Fabio Franchino, *The Role of Subnational Authorities in the Implementation of EU Directives*, 17(6) *J. Eur. Pub. Pol'y* 759–780 (2010); Michaël Tatham, *Shaping But Also Blocking – The Rise of Regional Influence in the EU, from Soft Policy Lobbying to Hard Vetoing*, 56 *J. Com. Mkt. Stud.* 3 (2018).

⁷ Liesbet Hooghe, Gary Marks & Arjan Schakel, *The Rise of Regional Authority. A Comparative Study of 42 Democracies* (Routledge 2010); Michaël Tatham, Liesbet Hooghe & Arjan Marks, *The Territorial Architecture of Government*, 1 *Governance* 1–14 (2021).

⁸ Margaux Kersschot, Bart Kerremans & Dirk De Bièvre, *Principals and Transceivers: Regional Authorities in EU Trade Negotiations*, 2(1) *Pol. Res. Ex.* (2020).

⁹ Christian Freudlsperger, *Trade Policy in Multilevel Government. Organizing Openness* 24 (Oxford University Press 2020); Christian Freudlsperger, *More Voice, Less Exit: Sub-federal Resistance to International Procurement Liberalization in the European Union, the United States and Canada*, 25(11) *J. Eur. Pub. Pol'y* 1686–1705 (2018).

¹⁰ During the CETA negotiations, the Government of Canada also reached an agreement with the United States on the issue of 'Buy America' or state government procurement, concluded a trade agreement with South Korea, initiated trade negotiations with India and Mercosur. In none of these cases the CETA model was replicated. In the case of Korea, the formal negotiations started before CETA in 2005, it was thus not relevant to add this case to the analysis. In the case of the negotiation with India and Mercosur, the negotiations started in 2010 for India and 2017 with Mercosur. We didn't include them because the negotiations are not over yet. On 9 Dec. 2020, Canada and the U.K. signed a Trade Continuity Agreement and for the moment no bilateral negotiation with the UK is on the agenda since the United Kingdom submitted a notification of intent to begin the CPTPP accession process. This case is thus irrelevant for this analysis.

to deliberately retreat from the inclusive CETA approach (see Table 2). During the renegotiation of NAFTA, the relationship between federal and provincial levels fell somewhere in between relationships established during CETA and CPTPP negotiations. How did this situation influence the dynamics of the NAFTA renegotiation? Did it make it easier or more difficult for the Canadian government to undertake the negotiation? Were final decisions facilitated, especially towards the end of the negotiation?

Overall, we find that inclusion in the negotiation process is more important than formal constitutional powers, which adds a new dimension to the first hypothesis. Indeed, although the Canadian provinces do not have veto power over trade negotiations and the Senate of Canada does not represent their interests, Canadian provinces have become more involved and have exerted greater influence in trade negotiations than regions with more formal power, such as Belgian communities and regions or German Länder. The influence of the Canadian provinces was such that they achieved far greater concessions than did regions with more formal constitutional powers, such as Belgian communities and regions or the German Länder in CETA negotiations.¹¹

Regarding the second hypothesis, the NAFTA renegotiation is more revelatory of the pathologies of the 'joint-decision trap'. If the provinces had had a veto, or if the federal government had demanded unanimous or near-unanimous agreement from the provinces like it was the case in the CETA negotiation, the NAFTA renegotiation would have brought on a political and possibly constitutional crisis. In the CETA negotiation, the federal government requested that the provinces confirm their support for CETA and describe measures they would take to implement the agreement. This was not a legal obligation, but was done specifically to avoid future issues with the provinces. No such commitment was requested from the provinces during NAFTA or CPTPP negotiations.¹² One lesson from the experience is that provinces react very negatively when they do not feel sufficiently included in negotiations, entailing significant political costs. Even in the CETA case when provinces were very involved, only federal negotiators remained at the table at the very end.

That said, Christian Freudsperger's hypothesis remains relevant. Since Canadian provinces lack veto power over trade negotiations, their inclusion in the negotiations is important in itself. In the case of the CPTPP and renegotiation of NAFTA, the provinces were not at the table and access to information was more difficult, the federal approach was less inclusive, and the provinces made no

¹¹ Stéphane Paquin, *Trade Paradiplomacy and the Politics of International Economic Law: The Inclusion of Quebec and the Exclusion of Wallonia in CETA Negotiations*, 26(6) *New Pol. Economy* (2021).

¹² Anonymous interview with Ontario and Quebec officials, Oct. and Nov. 2018.

major concessions. The end result was that the CPTPP and the new NAFTA had much less impact on areas under provincial jurisdiction than CETA; in NAFTA renegotiation, closing the deal was also much more difficult.

In sum, when Canadian provinces like Ontario and Québec are able to influence negotiations from within, they are more accepting of the outcome, though final decisions create their own share of challenges. Ontario and Québec representatives consider it easier to accept the results if they feel they are part of the negotiation process. It is thus also in the interest of the federal government to have substate governments 'buy into' commitments, particularly as these agreements involve areas under substate jurisdiction. Satisfying substate interests may slow negotiations, but strengthen the overall agreement for all parties: national and substate governments along with their trade partners. Substate governments also have greater expertise in certain areas covered by trade agreements (i.e., wine, softwood lumber, energy) because these industries reside in their territory. During the renegotiation of NAFTA, according to Frédéric Legendre and Laurie Durel, two public servants working on trade issues for the government of Québec, more than 300 civil servants within the Québec government were directly involved in preparing analysis or position papers on issues raised by the NAFTA renegotiations. According to them 'Québec's interventions with the Canadian federal government on the texts under negotiation led to changes in the text of several chapters of the agreement, including on issues that might not have been naturally associated with Québec, such as the side letter on energy or the chapter on digital trade'.¹³

We focus in this article on the role played by Ontario and Québec in the negotiations. As the largest provinces in Canada in terms of GDP and population, they provide similar cases. In addition, negotiations touch on areas under provincial jurisdiction that are highly sensitive in both provinces. We are interested in the extent to which their experience in the three trade negotiations is similar and in understanding differences that may appear. The article builds on an extensive analysis of primary documents and secondary literature, but fundamentally on findings from semi-structured interviews we conducted during and after the NAFTA renegotiations with officials, advisors and experts from Québec, Ontario and Canada who were closely involved in the process. In total, the interviews represent more than twenty-six hours of discussion with key players. We then compare these interviews with the many interviews we conducted during earlier CETA and CPTPP negotiations. The interview guide was approved by the ethics committee of École nationale d'administration publique in Canada.

¹³ My translation. Frédéric Legendre & Laurie Durel, *Le rôle du gouvernement du Québec dans les négociations d'accords de libre-échange: le cas de l'ACÉUM* (hors-série) RQDI, 41–58 (2022).

This article is divided into three main parts. In the first, we look at Kersschot's hypothesis on the importance of constitutional powers in substate government influence in trade negotiation, while in the second we examine our findings in light of the joint-decision trap theory. The final last section presents our analysis of the two theories in relation to Ontario and Québec's experience in the NAFTA renegotiations as compared with their experience in CETA and CPTPP trade agreements.

2 MEANS OF SUBSTATE GOVERNMENT INFLUENCE IN TRADE NEGOTIATIONS

The participation of substate government in trade is not limited to the implementation of trade agreements in areas under their jurisdiction. Substate governments are also very active in attracting foreign investment and promoting exports. These activities typically represent the core of their international trade activities. In 2021, the Québec government operates thirty-three mini-embassies in the world, while in Ontario, the *Ministry of Economic Development, Job Creation and Trade* has seventeen International Trade and Investment Offices in cities around the world, including Washington, Chicago, San Francisco, New York, Beijing, Mumbai, Seoul and Paris. Many of these offices are integrated into Canadian delegations. Substate governments also operate 'arms-length' public agencies like Investissement Québec or Invest Ontario.

Many substate governments also negotiate international 'ententes' or agreements. Some of these are related to trade. According to Tom Grant: 'Under some federal systems (e.g., the United States and Canada), sub-federal units have entered into many hundreds of international agreements'.¹⁴ In the case of Québec, approximately 45% of the 780 international agreements or 'ententes' concluded by the Québec government are directly or indirectly related to trade, touching on issues such as economic development, agriculture, culture, natural resources, labour and securities. Important agreements include the 2001 Intergovernmental Procurement Agreement with the State of New York, the 2008 Agreement between Québec and France on the Mutual Recognition of Professional Qualifications, and the 2013 Carbon Market Agreement with the State of California. All three agreements have a direct impact on trade.¹⁵ Even if Canada denies the 'treaty character' of some of these ententes, some countries like France 'views them as binding under international law'.¹⁶

¹⁴ See Grant, *supra* n. 2, at 170.

¹⁵ Richard Ouellet & Guillaume Beaumier, *L'activité du Québec en matière de commerce international: de l'énonciation de la doctrine Gérin-Lajoie à la négociation de l'AECC* (hors-série) RQDI, 71–73 (2016).

¹⁶ See Grant, *supra* n. 2, at 170.

Finally, many substate governments are included in the multilevel dynamic of trade negotiations. While Wallonia attracted a lot of media attention with its opposition to CETA, it is not the only federated state or substate government to participate in trade negotiations. Recent literature includes analysis of many such cases, including the United Kingdom, Germany, Austria, Switzerland, Belgium, Spain, the United States, Mexico, etc.¹⁷

Some substate governments have more influence in negotiations by virtue of important constitutional limitations on the powers of federal regimes in foreign affairs and trade negotiations.¹⁸ Kersschot, Kerremans and De Bièvre find an asymmetry of influence, in the EU context, between regional authorities. The more constitutional power a region has, the more it can influence the negotiation.¹⁹ In Europe, the EU and not the Member States, has constitutional responsibility for trade negotiations. And yet, some regions have greater capacity than others to influence EU negotiations. This division of powers will determine, in large part, the nature and form of substate government participation in international trade negotiations, and thus relationships between the different orders of government in this sphere of activity.

Kersschot, Kerremans and De Bièvre look to the principal-agent chain of delegation to create three ideal-type roles a region can assume in trade negotiations. Some regions in Europe are ‘principal’ actor with ‘vetoes’, such as Flanders, while others represent a ‘collective principal’ actor that can influence decisions through a collective institution, such as the German Länder of Hesse through the Bundesrat, the German Senate. Finally, when a substate government does not have the constitutional power to veto or collectively mobilize, it can only act as a ‘transceiver’ with limited means of influence. Scotland was (before BREXIT) a typical example of this last role. According to Kersschot, Kerremans and De Bièvre ‘The different ideal typical roles we have thus distinguished are associated with different amounts of control (or influence) a region can exert over the EU negotiating agent’ (See Table 1 for a synthesis).²⁰

¹⁷ Broschek & Goff, *supra* n. 5; Julian Jaursch, *Regional Mobilization in International Trade Policy: The US States in Transatlantic Trade Negotiations*, Regional & Federal Studies (2021).

¹⁸ See Grant, *supra* n. 2, at 153–156.

¹⁹ See Kersschot, Kerremans & De Bièvre, *supra* n. 8, at 1–20.

²⁰ *Ibid.*, at 14.

Table 1 Regions and Influence Over Trade Policy According to Kersschot, Kerremans and De Bièvre 2020

<i>Roles a Region Can Assume in Trade Negotiations in EU Context</i>	<i>Principal</i>	<i>Collective Principal</i>	<i>Transceivers</i>
Ideal-type region	Flanders	German Länder of Hesse	Scotland
Key factor	Place in Belgian delegation gives them possibility to influence European Commission. Have veto power	Can influence negotiation through a collective institution like Bundesrat, German Senate. Mixed trade agreements have to be approved by Bundesrat when they affect Länder competencies	Transceivers of information from policy-makers to constituencies (and vice versa).
Means of influence	Important	Important but cannot do it alone	Limited

The substate governments with the most power to influence trade negotiations would, according to Kersschot, Kerremans and De Bièvre, be those in Belgium. In their article, they identify Flanders as the ideal-type case. Flanders' ability to participate in the Belgian delegation to the European Council means it can influence the European Commission and thus the negotiation mandate. It can also threaten to use its veto and block Belgium's approval process.

There is an important precedent. In the past, Wallonia used its constitutional power to influence the CETA negotiation. In the context of the EU, when a trade agreement is classified as mixed, as with CETA, some national procedures in federal states like Belgium, require that, for it to be fully implemented, regional parliaments must give their consent before the federal government can sign and ratify the agreement.²¹ This means that all twenty-eight EU Member States (that was before BREXIT), with their thirty-eight national and substate parliaments, had to support CETA before it could enter into force. In Belgium, both the federal

²¹ Guillaume Van Der Loo, *CETA's Signature: 38 Statements, a Joint Interpretative Instrument and an Uncertain Future*, CEPS Commentary, 1–6 (31 Oct. 2016).

parliament and the Flemish parliament approved the signature of CETA, however the Walloon Parliament, the Brussels-Capital Region and the French community of Belgium did not. In exchange for their support, Wallonia, who led the charge against CETA, was able to demand and obtain the inclusion of an interpretative legal instrument to clarify certain parts of the agreement. Concessions from the EU and Canada did not require reopening CETA *per se*, but rather including an interpretative legal instrument to clarify certain parts of the agreement, particularly in areas touching on labour and environmental law, but also regarding environmental protection mechanisms and investor-state dispute settlement (ISDS). Wallonia also required that the investment court system be submitted for review to the European Court of Justice to assure its compliance with EU law. On 30 April 2019, the European Court of Justice confirmed that CETA's ISDS mechanism was compatible with EU laws.²²

Some substate governments can also influence trade negotiations through a collective institution, such as the Bundesrat in Germany, whose members are appointed by the substate governments and can block the ratification of 'mixed' trade agreements. In Germany, trade is an exclusive jurisdiction of the EU and national government, but the Bundesrat have to approve a treaty when it affects the competencies of the Länder.²³ In Germany, there was varied support for CETA among the Länder, but not enough to block the ratification process.²⁴

The majority of substate governments are transceivers like Scotland before BREXIT. Scotland had no veto power, little access to trade policymakers of the EU through intergovernmental mechanisms or otherwise, and could not block international agreements in the House of Lords.²⁵ In the UK, trade is a reserve power of the central government. Scotland was active in trade policy, but only as a transceiver, suggesting topics for negotiation with 'no way of knowing whether the agent will act upon them and cannot refrain the agent from taking actions'. According to this typology substate governments in Mexico, the United States and Canada are typical transceivers. It would be a mistake, however, to conclude that 'transceivers' have no or little influence in trade negotiations.²⁶ According to Kersschot, Kerremans and De Bièvre 'despite not having any formal competencies,

²² European Court of Justice, *Opinion 1/17 of the Court* [online] (30 Apr. 2019), <http://curia.europa.eu/juris/document/document.jsf?docid=213502&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=929830>.

²³ Jörg Broschek, Peter Bussjäger & Christoph Schramek, *Parallel Pathways? The Emergence of Multilevel Trade Politics in Austria and Germany* 208–233, in Broschek & Goff, *supra* n. 5.

²⁴ See Kersschot, Kerremans, & De Bièvre, *supra* n. 8, at 10.

²⁵ Stéphane Paquin, Hubert Rioux, David Eiser, Graeme Roy & Ian Wooton, *Substate Governments Role in Canadian and British Trade Policy, as Seen from Québec and Scotland*, 76(3) Int'l J. (2021).

²⁶ *Ibid.*, at 15.

transceiver regions are still crucial interlocutors complementing member state control over EU external trade policy'.²⁷

Still, the Kersschot, Kerremans and De Bièvre typology underestimates the influence that transceivers, like the Canadian provinces, can have outside the EU context, because the key factor in our view is not formal constitutional power but inclusion in negotiations. While Canada's Constitution Act of 1867 confers sole responsibility for international trade (Article 91.2) on the Parliament of Canada, there is a growing consensus that Canadian provinces are increasingly involved and influential in trade negotiations.²⁸ The source of their influence is of particular interest here. Canadian provinces lack the ability to veto a Canadian-led trade negotiation, unanimity is not required, and the federal government has plenary power in matters relating to international trade and can negotiate in areas of exclusive provincial jurisdiction. Moreover, the Canadian Senate does not represent the provinces. However, unlike countries such as Mexico or the United States, in Canada treaties do not have a direct impact on provincial domestic law: they must be implemented at provincial level. This makes provincial buy-in essential when agreements touch on areas of provincial jurisdiction.

What kind of actors are the Canadian provinces in international trade negotiations? Is their role limited to receiving and transmitting relevant information to federal government negotiators? In practice, it is much more than that. The international status of Canadian provinces remains ambiguous because it is both 'sovereignty bound' and 'sovereignty free' according to James Rosenau's typology.²⁹ In consequence, Canadian provinces have developed two main approaches to influencing trade negotiations. Being sovereignty bound, or located in a sovereign state, gives substate governments access to federal government decision-makers – including trade negotiators – through intrastate channels.³⁰ Provincial officials have privileged access to diplomatic networks and international trade negotiations, with the ability to influence their outcomes.³¹ On the other hand, substate governments also enjoy a 'sovereignty-free' status in international

²⁷ *Ibid.*, at 14.

²⁸ See Cyr & de Mestral, *supra* n. 4, at 595–621; Joanna Harrington, *Redressing the Democratic Deficit in Treaty Law Making: (Re-)Establishing a Role for Parliament*, 5 McGill L.J. 467–508 (2005); Anthony VanDuzer, *Could an Intergovernmental Agreement Make Canadian Treaty Commitments in Areas Within Provincial Jurisdiction More Credible?*, 68 Int'l J. 536–544 (2013); Chris Kukucha, *The Provinces and Canadian Foreign Trade Policy* (UBC Press 2008).

²⁹ James Rosenau, *Turbulence in World Politics: A Theory of Change and Continuity* 36 (Princeton University Press, 1990).

³⁰ Michaël Tatham & Mads Thau, *The More the Merrier: Accounting for Regional Paradiplomats in Brussels*, 15 Eur. Union Pol. (2014). Michaël Tatham, *Regional Voices in the European Union: Subnational Influence in Multilevel Politics*, 59 Int'l Stud. Q. (2015).

³¹ Pierre Marc Johnson, Patrick Muzzi & Véronique Bastien, *Le Québec et l'AECC*, in *Un nouveau pont sur l'Atlantique: l'Accord économique et commercial global entre l'Union européenne et le Canada* 30 (Christian Deblock, Joel Lebulanger & Stéphane Paquin eds, Presses de l'Université du Québec 2015). See also

negotiations. Because they are not recognized as fully sovereign states by international law, substate governments can act more freely than sovereign countries, thus enjoying some of the advantages of global corporations, civil society actors or NGOs.

Canadian provinces have used extra-state channels to influence the outcome of negotiations. During the NAFTA renegotiations, the Trudeau government specifically asked provincial premiers to intervene with state governors and interest groups in the United States in order to build consensus to support continued free trade in North America. Ontario Premier Kathleen Wynne, for example, met with thirty-seven state governors to promote trade in the months after US President Trump was elected.³² Similar efforts were made by Québec officials. To ensure that Canada would 'speak with one voice' during the negotiations, the federal government coordinated closely with provinces and territories, including by sharing suggested 'talking points' with its provincial and territorial counterparts.³³

In the case of the CETA negotiations, provinces have tried in the past to influence European institutions before and during the CETA negotiation. Québec's delegate general in Brussels, Christos Siros, met with Peter Mandelson, the European Commissioner for Trade, at a reception organized by the Canadian ambassador to the EU, Jeremy Kinsman, and talked about the idea of relaunching trade negotiations with Canada. In their relations with the EU, Québec or Ontario, made joint-representations to European institutions and trade policy actors in 2017 to show the EU, the provincial interest in relaunching trade negotiation. Premier Jean Charest of Québec also talked with Angela Merkel at the World Summit at Davos in 2007 about free trade negotiations with Canada. Charest also convinced Nicolas Sarkozy, who held the rotating presidency of the EU Council in 2008, to support the idea of free trade negotiations between Canada and Europe. Sarkozy would become the agreement's biggest proponent in Europe.³⁴ According to a key federal source on this issue: 'Jean Charest has made a decisive contribution to restart trade negotiations with Europe'.³⁵ At the time 'Canadian officials were nervous because they saw this as a threat to their negotiating mandate monopoly. Jean Charest forced the issue by concluding an

Pierre Marc Johnson, Patrick Muzzi & Véronique Bastien, *The Voice of Quebec in the CETA Negotiations*, 68 *Int'l J.* 560–567 (2013).

³² Robert Benzie, *NAFTA Talks a Priority for Premier-Designate Doug Ford*, *The Star* (12 Jun. 2018), <https://www.thestar.com/news/queenspark/2018/06/12/nafta-talks-a-priority-for-ford.html>.

³³ Joanna Smith, *Ottawa Wanted All of Canada Speaking With One Voice on NAFTA: Emails*, *CBC News* (4 May 2019), <http://www.cbc.ca/news/politics/nafta-emails-verheul-1.4648786>.

³⁴ Alex Panetta, *The Inside Story of Canada's Trade Deal With the European Union. Jean Charest Reveals How Courtship Began With a Bluff*, *Maclean's* (18 Oct. 2013), <https://www.macleans.ca/news/canada/the-inside-story-of-canadas-trade-deal-with-the-european-union/>.

³⁵ Anonymous interview on Zoom with former Canadian ambassador, 17 Dec. 2021.

agreement with France on labour mobility in 2008 that anticipated the CETA negotiations. He made it necessary to involve the provinces in the negotiations.³⁶ Later, according to Paul Magonette, François Hollande was keen on CETA because it was born out of a Franco-québécois initiative.³⁷

Since the 1970s and 1980s, a number of intra-state mechanisms between federal and provincial governments in Canada have been created on issues of international law. In the area of international trade, the federal government put in place consultative mechanisms with the provinces, even though trade is clearly a federal responsibility. Beginning with the Tokyo Round of trade negotiations, from 1973 to 1979, the federal government consulted the provinces when negotiations touched upon matters that were within provincial jurisdiction. Since subsequent rounds also involved areas of provincial jurisdiction, the consultation mechanisms remained in place.³⁸

The impact of trade agreements on provincial economies impelled provincial governments to become actively involved in the Canada – United States free-trade debate in the 1980s and the North American free-trade debate in the early 1990s. Although the implementation of these agreements would affect provincial responsibilities, the federal government refused provincial requests for a place at the negotiating table. Instead, the provinces made their positions known through personal contact at First Ministers' Conferences – fourteen meetings between the premiers and the Prime Minister of Canada Brian Mulroney over the course of the negotiation – but also at the official level via representatives to the Continuing Committee on Trade Negotiations established by Canada's chief negotiator, Simon Reisman. A similar process was seen in NAFTA negotiations, with the federal government using mechanisms such as the federal – provincial Committee for North American Free Trade Negotiations (CNAFTN) to try and coordinate provincial involvement. The federal government maintained this consultative structure after the signing of the North American Free Trade Agreement. It is now called C-Trade. This institution is regularly convened by the federal government, together with civil servants from the provinces and territories, to review ongoing trade policy issues and exchange views.³⁹

For the moment, there is very little consistency and, for each new trade agreement, provinces must negotiate with Ottawa on their degree of inclusion in the negotiation. Canada has proposed to include the provinces in the Canadian

³⁶ Exchange of emails with a former Canadian ambassador, 8 Dec. 2021.

³⁷ Paul Magonette, *CETA – Quand l'Europe déraile* (Éditions Luc Pire 2017).

³⁸ Stéphane Paquin, *The Role of Canada's Provinces in Canadian Foreign Policy: Multi-Level Governance in the Making*, in *The Palgrave Handbook of Canada in International Affairs* (R. Murray & R. Gecelovsky eds, Palgrave Macmillan 2021).

³⁹ Kukucha, *supra* n. 28.

delegation with access to some negotiating table for negotiations for CETA, but refused similar provincial participation in the CPTPP and the renegotiation of NAFTA.⁴⁰ To ascertain whether provincial influence in CETA was the exception to the rule in terms of the transceivers typology or whether it represented a new model with lasting impact, we look to the role Québec and Ontario were able to play in NAFTA renegotiation and the CPTPP agreement.⁴¹

3 THE NAFTA RENEGOTIATION

The renegotiation of NAFTA was very important to the two Canadian provinces. Not only was the United States the main export market for Québec and Ontario, but the areas under negotiation directly and indirectly affected their constitutional jurisdictions. The Canadian government, with its progressive or inclusive trade agenda, hoped to strengthen existing labour and environmental provisions, and introduce new provisions on gender and indigenous peoples.⁴² On the list of defensive interests, Canada also wanted to preserve arbitration mechanisms, especially Chapter 19 of the original NAFTA, and protect cultural diversity. These were important economic and social interests for the provinces. Moreover, many American demands during the negotiation targeted areas of provincial or shared federal/provincial jurisdiction or policy, such as government procurement, alcoholic beverages, services and investment, e-commerce, rules of origins and automotive, chemicals, steel, aluminium, and agriculture sectors.

To increase their leverage and facilitate communication in the negotiations, several Canadian provinces hired experienced advisors and appointed chief negotiators to engage with the federal government. These provincial negotiators also proved useful to federal officials, who sometimes needed quick responses from

⁴⁰ According to two Canadian negotiators who was involved in the CETA and NAFTA negotiations, Europe insisted that issues of provincial jurisdiction be put on the table in order to agree to negotiate CETA. Europe did not directly insist that the provinces be at the table. It was the federal government of Canada that proposed provincial participation and the European Commission was not keen on the idea at first. The Commission was somewhat afraid that this would lead to Member States demanding a seat at the table because it had enough trouble containing the demands of certain Member States in this sense, and it wanted even less to have substate governments in the way. In the end, it was the federal government of Canada that convinced Europe that provincial participation was the best way to get provincial commitments. This is exactly what happened, as the provinces made multiple concessions in public procurement, services and alcohol, among others. Exchange of emails with two Canadian negotiators, 26 Nov. 2021 and 14 Dec. 2022.

⁴¹ Jörg Broschek & Patricia Goff, *Federalism and International Trade Policy: The Canadian Provinces in Comparative Perspective* (Institute for Research on Public Policy 2018).

⁴² Meredith Lilly, *International Trade: the Rhetoric and Reality of the Trudeau Government's Progressive Trade Agenda*, in *Justin Trudeau Canadian Foreign Policy, Canada Among Nations* (Norman Hillmer & Philippe Lagassé, Palgrave Macmillan 2018).

provincial premiers during negotiations.⁴³ Ontario appointed a senior public servant, as chief negotiator, and John Gero, an international trade expert and former Canadian ambassador to the World Trade Organization, as special advisor. In Québec, the government followed the trend set by Premier Jean Charest and appointed a chief negotiator from outside government. Raymond Bachand, a strategic advisor at the Norton Rose Fulbright consulting firm and former finance minister under Jean Charest, was named chief negotiator in July 2017. The selection of well-known public figures was justified by the fact that dialogue and even political pressure would need be exerted on the federal Minister of International Trade and sometimes even on the Prime Minister of Canada and his advisors.

3.1 INTERGOVERNMENTAL COOPERATION AND INCLUSION IN TRADE NEGOTIATIONS

Cooperation between federal and provincial negotiators during NAFTA renegotiations did not replicate the procedures observed in CETA negotiations. In the renegotiation of NAFTA, the Government of Canada explicitly refused the Government of Québec's request for access to the negotiating tables. According to one federal negotiator: 'For the NAFTA renegotiation, the American [...] did not want to have the provinces at the table'.⁴⁴

For the CETA negotiations, the EU wanted the agreement to be modern, comprehensive and progressive and thus address provincial and territorial measures related to services, investment, labour mobility, public procurement, etc.⁴⁵ Because of that, the provinces played an important role at almost every stage of the negotiation. With CETA, the provinces contributed to the formulation of Canada's negotiating mandate and were consulted on their positive and defensive interests during preparation. In addition, they had secure access to the negotiating texts and were consulted extensively throughout the process. Because federal negotiators were reliant on provincial intervention, the level of information sharing, participation and discussion on every aspect of the CETA negotiation was unprecedented.

Whereas in CPTPP and new NAFTA, all existing measures of provinces and territories are grandfathered in Annex I without specifying which are non-conforming, CETA includes a detailed annex of non-conforming investment and service measures in provinces and territories. The creation of this negative list

⁴³ Anonymous interview in Montréal with former trade negotiator in 22 Aug. 2018 and with another trade negotiator involved in CETA and NAFTA negotiations, 8 Dec. 2021.

⁴⁴ Exchange of email with Canadian negotiator, 26 Nov. 2021.

⁴⁵ Anonymous interview with a former ambassador who was involved in the launching of the CETA negotiations, 17 Dec. 2021.

necessarily required deep involvement by the provinces and territories because they were the only ones who could put the list together. That imperative drove the interprovincial cooperation seen in CETA.

According to provincial and federal negotiators, a side effect of CETA negotiations was to strengthen the institutionalized intergovernmental trade negotiation process, which had been weak beforehand. Further, it significantly enhanced the knowledge of provincial and federal trade policy officials, and required provinces and territories to work together. As there was less time pressure during the CETA negotiation, the provinces were able to properly articulate their strategic interests and explain how proposed EU or Canadian language would impact these interests.

During the CETA negotiations, the Government of Canada also concluded the TPP, which later became the CPTPP after the withdrawal of the United States and the negotiation of a new agreement in early 2018. Canada was not part of these negotiations until 2012, almost four years after discussions began. This particular context influenced the scoping exercise and, more importantly, the drafting of the negotiation mandate. Canada joined negotiations in a defensive position to ensure that an agreement was not concluded without it. This contrasts with the offensive role Canada assumed in CETA. Unlike with CETA, the issue of provincial participation in negotiations was never raised by countries already participating in the TPP. Interestingly, according to a representative of the Government of Québec, no province designated an external chief negotiator for the TPP or CPTPP negotiations.⁴⁶

According to Ontario and Québec government officials, the CETA model of provincial inclusion and active participation was not carried over into the CPTPP negotiations.⁴⁷ Provinces were not consulted on their offensive and defensive interests prior to Canada's participation, and were denied access to the negotiating tables. Intergovernmental mechanisms for information on issues related to the negotiations were limited to e-commerce meetings and updates during and after CPTPP negotiating rounds.

The level of provincial participation in these meetings was not very high, according to Québec officials. In addition, in each round, negotiating texts were often presented to the provinces at the last minute; they were invited to comment, but there was often insufficient time for analysis and no real feedback was allowed. The same approach was observed in the briefings that followed the on-site rounds of negotiations and in the C-Trade meetings. One provincial official even compared the information-sharing system to a 'data dump'. The purpose of the

⁴⁶ Anonymous interview in Québec and Toronto in Oct. 2017 and Mar. 2018.

⁴⁷ Anonymous interview in Québec Oct. 2017, Apr. and Oct. 2018 and Toronto in Mar. and Oct. 2018.

operation was less to get feedback from the provinces than to allow federal officials to claim that they had consulted the provinces.

A representative of the Government of Québec noted, however, that provincial participation remained significant in the CPTPP negotiations, in part because of practices developed during the CETA negotiations. In sum, some of the work done by the provinces during the CETA negotiations was reused in the CPTPP negotiations, despite less direct provincial involvement. One federal government official even noted that the C-Trade meetings were much better organized than in the past.⁴⁸ The federal government thus seemed to consider that participation by the provinces was not necessarily reduced.

During the NAFTA renegotiation, the provinces were once again not invited to the negotiating tables. They did, however, receive frequent updates and were able to communicate their positions to federal negotiators. However, the provinces did not have access to the Canada-US-Mexico tripartite negotiations. That said, according to Ontario and Québec officials, the provinces were consulted on areas of significant interest, such as automotive rules of origin for Ontario, or on shared or specific jurisdictions such as alcoholic beverages, state-owned enterprises, labour and the environment.

Frequent consultations between the federal and provincial teams took place in special renegotiation-focused meetings, which were much more focused than the usual C-Trade meetings. During the negotiation rounds, provinces participated in a nightly briefing on the day's progress. Given the large amount of information required for NAFTA, C-Trade meetings were replaced by separate meetings specifically dedicated to the negotiations. Provinces were not only consulted, but were also asked for input, and their views were taken into account according to representatives from Ontario and Québec. Provinces were also able to participate in several strategy meetings prior to the negotiation rounds, as well as in monthly debriefing sessions. Provinces with specific interests had good access to chapter negotiating leads. According to an Ontario representative, at the NAFTA renegotiation round held in Montreal, for instance, approximately twelve such meetings with chapter leads were held.⁴⁹ According to Ontario officials, the federal-provincial-territorial engagement during the NAFTA renegotiations was seen as broader and more inclusive than during CPTPP.⁵⁰

Representatives from Québec, Ontario and several other Canadian provinces participated in the NAFTA renegotiation rounds. These were important

⁴⁸ Anonymous interview, Montreal, Aug. 2016.

⁴⁹ Anonymous interview, *supra* n. 47.

⁵⁰ *Ibid.*

opportunities to meet with (1) federal negotiators on provincial interests; (2) stakeholders from various sectors (i.e., agriculture, automotive, pharmaceuticals, etc.); and (3) representatives from other provinces to work with them on specific issues. Although no formal negotiating rounds took place after March 2018, Québec and Ontario representatives remained in regular contact with the federal government at both official and political level. Throughout the renegotiations, each province also had a representative in Washington.⁵¹

During the NAFTA renegotiations, provinces also met among themselves to discuss specific issues and prepare for the rounds.⁵² These meetings took place somewhat organically and informally, most often in parallel with the negotiating rounds or at the initiative of the province chairing the Council of the Federation. Meetings on the renegotiation of NAFTA were held at the last Council of the Federation meeting in Alberta, as well as on the margins of the NAFTA round held in Montreal in January 2018. Most provinces and territories were well represented with experienced teams.

At the conclusion of each round, the federal government provided provincial representatives with updated versions of the negotiated agreement texts and all parties respected confidentiality protocols, according to an Ontario representative. These texts made it possible for Ontario and Québec to see the elements that were agreed upon between the Parties as well as the Parties' proposals on outstanding issues. Each new version of the texts were analysed in depth by the representatives of the governments of Ontario and Québec and were shared with the ministries and agencies concerned. These ministries and agencies had the opportunity to discuss the evolution of the negotiation with chief negotiators and their teams and transmit comments or analyses.

4 THE 'JOINT-DECISION TRAP' AND THE INCLUSION OF SUBSTATE GOVERNMENTS IN TRADE NEGOTIATIONS

According to Fritz Scharpf a joint-decision trap exists when 'two simple and powerful conditions' are met: '1) that central government decisions are directly dependent upon the agreement of constituent governments; and 2) that the agreement of constituent governments must be unanimous or nearly unanimous'.⁵³ According to Scharpf, the joint-decision trap or 'compulsory negotiation system' as he calls it elsewhere, resembles the 'veto players systems' described by George Tsebelis, where players make significant policy change difficult or even impossible

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ Fritz W. Scharpf, *The Joint-Decision Trap: Lessons from the German Federalism and European Integration*, 66(3) *Pub. Admin.* 254 (1988).

because they have a veto.⁵⁴ Applied to the situation of provincial participation in Canada's trade negotiations, this theory suggests that a de facto requirement for unanimous or nearly unanimous decisions would systematically generate suboptimal policy outcomes. Accordingly, granting substate governments veto power in treaty making would harm the state's ability to negotiate international trade agreements, and would risk paralysing international trade negotiations.⁵⁵

Recently, Christian Freudlsperger claimed that the inclusion of the Canadian provinces in the CETA negotiation did not lead to greater protectionism. In fact, when provinces were most integrated in the CETA negotiations they made the most important concessions in their history. Indeed, during CETA negotiations Canadian provinces proposed the most important concessions ever in the area of public procurement. According to Freudlsperger, state and municipal procurement accounts for about two thirds of public procurement in OECD countries. In Canada, these markets represent approximately USD 224 billion or nearly 14% of Canada's GDP.⁵⁶ In contrast, during the TTIP negotiation between the EU and the United States between 2013 and 2017, the United States government rejected EU demands for the states to have a seat at the table. According to Freudlsperger, negotiations – which in the end did not succeed – did not enable the EU to achieve any important concession in state procurement.⁵⁷

Freudlsperger thus considers that: 'the systematic production of suboptimal policy outcomes can be overcome through meaningful collaboration along the entirety of the policy cycle'.⁵⁸ According to Freudlsperger: 'Provinces make more concession when they play a meaningful role in the negotiations'.⁵⁹ His work challenges the idea that 'foreign and commercial policy ought to be highly centralized affairs in order to achieve uniformity and reliability in a multilevel system's external behavior'.⁶⁰

If Freudlsperger is right about the inclusion of substate governments in trade negotiations, we can anticipate that with less inclusion the provinces would respond by refusing to make significant concessions in negotiations. With respect to the negotiation process, authors such as Fafard and Leblond also consider that the lack of provincial access to the final stages of the CETA negotiations delayed

⁵⁴ Fritz W. Scharpf, *The Joint-Decision Trap Revisited*, 44(4) J. Com. Mkt. S. (2006); George Tsebelis, *Veto Players: How Political Institutions Work* (Princeton University Press 2002) and George Tsebelis, *Decision-Making of the European Parliament as a Conditional Agenda Setter*, 88(1) Am. Pol. Sci. Rev. (1994).

⁵⁵ Scharpf, *supra* n. 53.

⁵⁶ Freudlsperger (2020), *supra* n. 9, at 7–8 & 53–54.

⁵⁷ Christian Freudlsperger, *The Conditions and Potentials of Federalizing Trade Policy: Comparing Canada and the United States*, 2 Regional & Fed. Stud. (2021).

⁵⁸ Freudlsperger (2020), *supra* n. 9, at 34.

⁵⁹ *Ibid.*, at 155.

⁶⁰ *Ibid.*, at 34.

the process of concluding the agreement.⁶¹ In their view, the provinces' limited role and the fact that they were not expected to 'ratify' the final treaty made final decisions more difficult for the Canadian government. The CETA experience raises questions around what might have happened if the NAFTA renegotiation had required unanimous or nearly unanimous approval from the provinces?

4.1 CHALLENGES REGARDING THE CLOSING STAGES OF NEGOTIATIONS

The level of trust between federal and provincial teams was high during the NAFTA renegotiations, at least initially according to Ontario officials. As time went on, Ontario and Québec officials developed somewhat different views on the overall process. Ontario, under the Liberal Wynne government followed by the Conservative Ford government, generally favoured a 'Team Canada' approach to the NAFTA renegotiations. Ontario negotiators consider that federal-provincial cooperation was closer to the CETA dynamic than to the CPTPP. Indeed, the provinces were consulted early and often on key issues affecting their economic and social interests. For their part, Québec government officials see the NAFTA renegotiation process as being closer to their experience in the CPTPP negotiations. Federal-provincial cooperation was excellent on issues such as government procurement, but the overall quality of the relationship depended more, according to one Québec official, on the personality of the individual civil servant than on the intergovernmental relations process.⁶²

In the final weeks of the NAFTA renegotiation, there were fewer opportunities for federal-provincial-territorial officials to meet. After the seventh round, in April 2018, negotiations were held primarily among ministers and chief negotiators from the three NAFTA countries. On 27 August 2018, The United States and Mexico reached a bilateral agreement. The US Government then put maximum pressure on Canada to joint the deal. Between August and September 2018, all meetings were held in Washington, primarily at the political level. With the looming 30 September deadline to deposit the text in Congress and be sure it would be approved in time to be signed by the outgoing Mexican president, the pace of negotiations between Canada and the United States intensified, leaving little time for the provinces to provide comments and receive updates.

Elections were held in Ontario and Québec during the NAFTA renegotiations. Both provinces brought in new governments: Doug Ford's Progressive

⁶¹ Patrick Fafard & Patrick Leblond, *Closing the Deal: What Role for the Provinces in the Final Stages of the CETA Negotiations?*, 68 *Int'l J.* 553–559 (2013).

⁶² Anonymous interview in Québec, Oct. 2018.

Conservative Party and François Legault's Coalition Avenir Québec (CAQ). While there was a consensus in Ontario to sustain the 'Team Canada' approach to negotiations during the election campaign, in Québec the NAFTA renegotiations, and especially dairy concessions, became a hot election issue. Leaders of all political parties expressed opposition to any concession and party leaders participated together in a press conference organized with the *Union des producteurs agricoles* (Agricultural Producers' Union). Philippe Couillard of the Liberal Party, Jean-François Lisée of the Parti Québécois and Manon Massé of Québec Solidaire were present. François Legault of the CAQ was campaigning elsewhere at the time and did not participate, but voiced his support for supply management and opposition to any dairy concessions.⁶³

Philippe Couillard, now former Premier of Québec, told reporters many times during the campaign that 'there will be serious political consequences' if Ottawa makes concessions on dairy and supply management. When a journalist asked, 'how far are you ready to go?' the Premier responded 'Just watch me', a phrase famously used by Pierre Elliott Trudeau during the 1970 October Crisis in Québec.⁶⁴ Philippe Couillard even went so far as to say he would impose Québec's 'veto' on NAFTA and that no compromise was possible.

While Québec does not, in fact, have a veto over trade negotiations, the province's ability to refuse to implement the deal in its field of jurisdiction is real. Mechanisms to implement international trade agreements are different in every province in Canada. Most legislative modifications resulting from new provisions in the new NAFTA would have to be made at the federal level, such as dismantling Class 7 products under supply management, or increasing the term in patent laws to comply with new obligations.

At one point, the issue became so heated that the *Financial Times* reported that Canada was thinking of waiting until after the Québec election on 1st October to conclude the deal with the United States.⁶⁵ The new NAFTA agreement was announced on 30th September, the night before the vote. After the election, François Legault, the new Premier of Québec, stated that they would 'look at every option with specialists to see what can be done [to oppose the deal]'. The Québec Parliament could refuse to 'approve

⁶³ François Messier, *Les chefs font front commun sur la gestion de l'offre, puis s'attaquent mutuellement*, Radio-Canada (31 Aug. 2018), <https://ici.radio-canada.ca/nouvelle/1121063/alena-upa-gestion-offre-jean-francois-lisee-pq-philippe-couillard-plq-manon-masse-qs>.

⁶⁴ Tommy Chouinard, *Gestion de l'offre: « Just watch me! » Lance Couillard*, La Presse (29 Aug. 2018), <https://www.lapresse.ca/actualites/elections-quebec-2018/201808/29/01-5194596-gestion-de-loffre-just-watch-me-lance-couillard.php>.

⁶⁵ Tom Blackwell, *Canada May Hold Off Until After eElection as U.S.-Mexico Drafting Two-Way Trade Deal*, *Financial Times* (20 Sep. 2018), <https://business.financialpost.com/news/u-s-mexico-drafting-final-text-of-two-way-trade-deal-but-canada-may-wait-until-after-election-on-oct-1>.

the deal' and make the changes to Québec laws and regulations needed for its implementation.⁶⁶

Ontario and Québec reacted strongly to the conclusion of the new NAFTA deal, publicly protesting the final content of the agreement. The principal elements they denounced were concessions in supply management, including opening 3.6% of Canada's dairy market to the United States and cancelling Class 7 milk products, as well as the maintenance of tariffs on steel and aluminium that went against American promises to remove them.⁶⁷

According to a senior Québec official, the last few weeks of the negotiations were, to use a euphemism, 'problematic'.⁶⁸ The final decisions were made in the middle of Québec's elections, where the issue of supply management in agriculture was a red line none of the parties would cross.⁶⁹ By the end of negotiations, Québec representatives were more critical of the federal approach. 'The strategy didn't work. At some point, we should ask ourselves why', said one high-level Québec representative.⁷⁰ Some government officials felt that Québec was paying a steep price in the new trade deal: major concessions on supply management affected Québec deeply, as did tariffs on aluminum.⁷¹

In Ontario, Doug Ford, whose party had defeated Premier Kathleen Wynne's Liberals in June, also expressed his displeasure. Ford's views were similar to the Québec Premier's, but instead of threatening to block the deal, he called for compensation to farmers.⁷² Although Federal Minister of International Trade, Chrystia Freeland, promised compensation to the agricultural sector, no specific numbers were provided, and negotiations are currently ongoing. During the NAFTA renegotiation, provinces were still waiting for the compensation promised by the Canadian government after the CPTPP negotiations. This compensation for the CPTPP was included in the March 2019 federal budget, which proposed up to USD 3.9 billion in support for farmers hurt by supply management concessions.⁷³

⁶⁶ Patrick-Vincent Foisy, *Le Québec peut-il bloquer le nouvel ALENA ?*, Radio-Canada (6 Oct. 2018), <https://ici.radio-canada.ca/nouvelle/1128175/alena-bloquer-nouvel-accord-aeumc-libre-echange-canada-etats-unis>.

⁶⁷ Anonymous interviews in Québec and Oct. 2018 and Toronto in Oct. 2018.

⁶⁸ Anonymous interview of Québec officials in Oct. 2018.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² Kate McGillivray, *Ford Gets His Wish for the Federal Compensation of Farmers Affected by USMCA*, CBC news (1 Oct. 2018), <https://www.cbc.ca/news/canada/toronto/usmca-ford-1.4845481>.

⁷³ Government of Canada, *Investing in the Middle Class. Budget 2019*, Department of Finance, 190 (2019), <https://www.budget.gc.ca/2019/docs/plan/budget-2019-en.pdf>.

Regarding trade negotiations with the United States, the Ontario Premier's attitude changed over time.⁷⁴ In June 2018, Ford publicly stated that 'We stand shoulder to shoulder with the Prime Minister and our federal counterparts' and 'We are going to stand united. I know all provinces should be standing united with our federal counterparts.'⁷⁵ In October 2018, Ford changed his mind. He said: 'The new deal leaves too many Ontario families and businesses out in the cold. The Trudeau Liberals left out Ontario farmers, they left out Ontario's steelworkers and aluminum workers'.⁷⁶ The Ontario government also expressed concern about Canada's ability to negotiate future free trade agreements.⁷⁷ Intergovernmental Affairs Minister in Ottawa, Dominic LeBlanc, responded to the comment, stating that Premier Ford had fully supported Canada's negotiating position in public and in private. According to one federal negotiator, the Ontario government's attitude was a bluff. According to him:

You never get everything you want in a negotiation, and the fact that the federal government makes the deal leaves some political room for the provinces to criticize certain aspects, and thus try to get something from the federal government in return (or blame the federal government, which is a common behaviour of the provinces).⁷⁸

It was clear that the agreement reached was the best in the circumstances.

5 ASSESING THE CANADIAN CASE

Several important lessons can be drawn from the experience of Ontario and Québec in the NAFTA renegotiations compared to CETA and CPTPP. As we noted before, Canadian provinces are transceivers according to the typology of Kersschot, Kerremans and De Bièvre. The role of transceivers is typically limited to receiving and transmitting politically relevant information to national negotiators. In the Canadian case, inclusion in trade negotiations has meant they have more access and more impact on the negotiations than regions with more formal constitutional powers, such as Belgian communities and regions or the German Länder (*see* Table 2).

⁷⁴ Susan Delacourt, *Ottawa Worried Ford's Washington Visit Could Impact NAFTA Talks*, The Star (18 Sep. 2018), <https://www.thestar.com/opinion/star-columnists/2018/09/18/ottawa-worried-fords-washington-visit-could-impact-nafta-talks.html>.

⁷⁵ *See* Benzie, *supra* n. 32.

⁷⁶ *Ibid.*

⁷⁷ Robert Benzie, *Ottawa Fired Back at Ford Over USMCA Grousing*, The Star (12 Jun. 2018), <https://www.thestar.com/news/queenspark/2018/10/11/ottawa-fires-backat-ford-over-usmca-grousing.html>.

⁷⁸ Exchange of email, *supra* n. 44.

Table 2 Summary of Provincial Inclusion in Trade Negotiations

<i>Inclusion</i>	<i>CETA</i>	<i>CPTPP</i>	<i>USMCA (New NAFTA)</i>
Definition of the mandate	in consultation with provinces	federal only	federal only
Provincial presence at the negotiating table	yes, but with limitations and not all subject	no	no
Access to the negotiating texts during negotiation	Yes	Limited access No time for comment	Yes
Mechanisms for federal-provincial consultation	C-Trade Forum Informal discussions	C-Trade Meeting	C-Trade Meeting Specific meetings for USMCA Presence during rounds Informal discussions
Implementation or effect on provincial jurisdiction	Very important	Minor	Minor
Federal government requested that the provinces confirm their support and describe measures they would take to implement the agreement.	Yes (but no legal obligation)	No	No

In the case of Ontario and Québec, inclusion meant that their chief negotiator as well as civil servants were on site. This presence allowed Ontario and Québec representatives, even if they were not present inside negotiating rooms, to have ongoing exchanges with federal government officials and private sector members who were also on site. Attendance at rounds of negotiations also allowed provincial representatives to meet bilaterally with negotiating table leaders on specific issues. The situation

was similar in the case of the CETA negotiations except that provinces had access to the negotiating table. On the whole, provinces and territories were more significantly involved in NAFTA renegotiation than they had been in the CPTPP.

Regardless of the negotiation, because of their inclusion, the influence of the Canadian provinces is greater than Wallonia, Flanders or any other region in Europe despite the fact that the provinces do not hold a veto or the ability to block a negotiation through the Canadian senate. Canadian provinces had better access and influence than Flanders or Wallonia in the NAFTA renegotiation. In the context of the EU, the exclusion of Wallonia and difficulties accessing European Commission negotiators, particularly to better understand the effects of trade agreements on fields under substate government jurisdiction, explains why the federated states of Belgium decided to block Belgium's signature.⁷⁹ The substate parliaments felt they had no other option.

In line with the joint-decision trap theory, concluding a trade negotiation is always a major challenge for a government. In the logic of negotiations, countries quickly agree on what is possible and save the difficult decisions for last. This situation is bound to produce discontent. Of the three negotiations, the negative reaction of the provinces was strongest during the NAFTA renegotiation, whereas CETA negotiations had the most profound effects on areas of provincial jurisdiction and called for the most changes to existing legislation to bring it into compliance with the agreement. Thus, it would seem that the impact of the agreement on constitutional jurisdictions is a less important factor than inclusion of the provinces in the final decision of the negotiations.

The federal government's less transparent and cooperative approach during the CPTPP and NAFTA renegotiations caught Québec and Ontario off guard as they had expected to build on the model developed during CETA. This was a source of contention between provinces and the federal government, even though according to provincial and federal negotiators, the CETA negotiations left them with improved flexible intergovernmental trade negotiation processes.

Changing levels of involvement were also seen during the CETA negotiations. Despite the regular inclusion of provinces at the negotiating tables, by the end of CETA discussions, only federal negotiators remained at the table. The federal executive made all the final decisions, even when these were important to the provinces. According to one federal negotiator:

It's true that the provinces were not at the table in the later stages of the CETA process. But I believe that for the most part, there were no outstanding issues of provincial jurisdiction. Market access for beef, pork and cheese, intellectual property and the investor-state mechanism are all under federal jurisdiction.

⁷⁹ Magonette, *supra* n. 37.

According to him: 'It is also normal in a negotiation to have limited participation in the final stage of conclusion. Having a province at the table would give it a virtual veto, which would be unmanageable and could jeopardize an agreement 'for the greater good of Canada'.⁸⁰ During the endgame of the NAFTA renegotiation, the situation was the same, with the federal level remaining in charge of all final decisions.⁸¹ Thus, all decisions on sensitive issues were decided at the federal Ministerial level or higher, without direct input from the provinces.

In the case of the renegotiation of NAFTA, we should note that Ontario and Québec had somewhat different experiences. For Ontario, the NAFTA process more closely resembled the experience with CETA. For the Québec team, the NAFTA renegotiation appeared as a 'CPTPP plus' approach, in which provinces were engaged primarily via regular updates, with relatively little consultation.

Ontario focused its concerns less on the process and more on the outcome of negotiations, particularly regarding supply management and tariffs on steel and aluminium. The lack of concern around the process may be attributed, in part, to the high level of provincial involvement fostered by Canada's NAFTA chief negotiator, Steve Verheul, who was also chief negotiator for the CETA negotiations. Verheul was therefore familiar with the federal-provincial relationship established during CETA. In addition, differences between federal-provincial relations during CETA and NAFTA on the one hand, and the CPTPP on the other, could be explained by the fact that the EU insisted to specifically address issues of provincial and territorial jurisdiction.

The Québec government found relations with Ottawa more difficult, especially near the end of negotiations, when it was not involved in or informed of final decisions, and had little input into the federal government's strategy. Many of the opinions expressed by Québec government representatives can be explained by the specific impact of NAFTA renegotiations on Québec. During negotiations, Bombardier, which was heavily funded by the governments of Québec and Canada, sold the C-series to Airbus after punitive tariffs were announced by the Trump administration. Tariffs on steel and aluminium, as well as dairy concessions, particularly affected Québec. The fact that the Canadian government agreed to concessions on dairy products that clearly went against the will expressed during an election campaign by all party leaders represented in the National Assembly of Québec is an element that has to be taken into consideration.

The views of Québec actors on the NAFTA renegotiation may also reflect public opinion in the province. According to an Angus Reid Institute survey of Canadians conducted two weeks after the agreement was announced, Québec

⁸⁰ Exchange of email, *supra* n. 44.

⁸¹ Anonymous interviews of Québec and Toronto officials in Oct. 2018.

respondents had the least favourable assessment of the new NAFTA. Indeed, 58% were 'disappointed/very disappointed' with the new deal, compared to 40% of respondents in Ontario. Approval of the agreement was higher in Ontario (39% of respondents approved) than anywhere else in Canada; only 27% of respondents in Québec said they approved.⁸²

6 CONCLUSION

In the end, the NAFTA renegotiations were imposed on Canada and because of time constraints, it was impossible to replicate the CETA negotiation, which lasted around eight years compared to NAFTA's thirteen months. In addition, the United States and Mexico's bilateral negotiation and the exclusion of Canada during summer 2018 resulted in a 'take it or leave it' style negotiation for Canada. There is thus no relationship between the level of federal consultation with Québec and Ontario and the result of negotiations. More consultation and more inclusion would probably not have changed the outcome of the renegotiation of NAFTA. In its final decisions, the federal government was faced with a limited set of options that were all bad for the Québec and Ontario.

In sum, greater inclusion in the negotiation would probably not have fundamentally changed the final outcome, but it would have allowed the provinces to raise flags during the process, which in turn would have made it easier to accept the final outcome, since the final decision would not have come as a surprise in the middle of an election in the case of Québec. The general idea is that when the provinces are informed of the decisions and progress of negotiations, they can submit their comments and these are taken seriously.

That did not happen with the NAFTA renegotiation, which explains why the reaction in Ontario and Québec was so strong. Moreover, the result of the negotiation was announced on the eve of the Québec election, where the issue of supply management was at the heart of the election campaign. Despite all the drama, in the end Ontario and Québec preferred the resulting agreement to no agreement at all. Which is why Ontario and Québec quickly turned to talking about compensation rather than renegotiation or legal contestation. What is clear, however, is that granting veto power to the provinces would have made the negotiations much more difficult if not impossible. However, this situation would have forced the federal government to agree on compensation with the provinces before the agreement was announced. The joint decision trap is still a very present phenomenon.

⁸² Angus Reid Institute, *USMCA: Canadians Ambivalent About 'New Nafta', Feeling Bruised by the U.S.* (23 Oct. 2018), <http://angusreid.org/usmca-new-nafta/>.