

The image features a dark blue background with a faint, light blue world map. In the center, two hands are shaking, representing a business agreement. The hand on the left is wearing a dark suit jacket, and the hand on the right is wearing a light grey suit jacket. The text is overlaid on this scene.

Trade negotiations in an era of deep integration

Patricia Goff looks at the evolving role of provinces and territories in trade negotiations

Introduction

In October 2013, Stephen Harper and José Manuel Barroso, then respectively the prime minister of Canada and the commission president of the European Union (EU), announced that they had reached agreement in principle on the Canada-EU Comprehensive Economic and Trade Agreement (CETA). Ten months later, in August 2014, their governments released in English the complete text of the agreement. In the months that followed, CETA underwent a “*legal scrubbing*” and translation into 22 languages.

Following the October 2015 federal election, newly elected Canadian prime minister Justin Trudeau identified the implementation of CETA as a top priority for his minister of international trade. Ratification of CETA on the European side might be delayed until European concerns about investor-state dispute settlement provisions can be allayed but is also likely to proceed in 2016.

One of the distinctive features of CETA is the role that subnational actors played in the negotiations. In particular, the Canadian provincial and territorial governments were involved to an unprecedented degree (Paquin 2013; De-Beer 2012, 51). Why is this so? I argue that a unique combination of political and technical factors explain this outcome.

Provinces and territories in trade negotiations: their evolving role

The provinces and territories have long been privy to trade negotiations, but in the case of CETA, they were at the negotiating table alongside their federal colleagues. The EU reportedly asked for the provinces to be present, recognizing that negotiations would touch on many issues with direct or indirect consequences for areas of provincial jurisdiction (Fafard and Leblond 2012, 10; Finbow 2013, 2) including financial services; government procurement; patent term extensions for pharmaceutical products, which could affect provincial and territorial health care provision costs; and greater access to the Canadian dairy market, especially for cheese.

“The worst that could happen for the EU is to devote time and energy to negotiating CETA with Canada only to find out that many of the provisions are not being applied or implemented by some or all of the provinces” (Fafard and Leblond 2012, 10).

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

To what can one attribute this latitude? Christopher J Kukucha explains (2011, 132) that *“unlike other federal states, Canada does not have clearly defined constitutional guidelines regarding the international activity of non-central governments.”* Further, a series of court decisions and constitutional provisions create *“a level of constitutional ambiguity that grants Canadian provinces a degree of international legitimacy absent in many other federal states”* (133).

Is Canada a distinctive example of multi-level politics with regard to trade negotiations? Can we expect to see greater participation by sub-federal actors in other multi-level contexts?

These various provisions establish roles for both the federal and provincial governments in international trade treaty-making — for the federal government, in setting the mandate, conducting negotiations and ratifying the agreement; for the provinces, in implementation. If provincial legislation must be enacted to give a trade agreement full force, the provinces can exercise genuine control by threatening not to implement required legislation (Delagran 1992, 18).

Canadian provinces and territories certainly do not function as a monolithic bloc against the federal government (Fafard and Leblond 2013). Furthermore, a number of issues on the table in trade negotiations are ‘new’ issues in the sense that they pertain to sectors that did not exist when provincial and federal jurisdictions were first delineated (DeBeer 2012). These include aspects of intellectual property and internet regulation.

The federal government’s need for sub-federal support and buy-in has led to various mechanisms of consultation and intergovernmental communication. This has evolved through work in a series of committees, the nature and degree of participation depending on the trade negotiations in focus at the time. CETA marks the first time provinces and territories were ‘at the table.’

One could argue that municipalities are as implicated in procurement decisions as the provinces. Indeed, several municipalities across Canada sought exemptions from CETA on this basis. Efforts by municipalities are noteworthy partly because they drive home the degree to which trade agreements have ramifications across multiple levels of governance. However, they also show that not all levels exercise the same influence. While it is clear that the provinces played a crucial role in CETA, there is not much evidence to suggest that the municipalities’ views were weighed heavily in negotiations, although they had flagged the agreement’s relevance for them.

What changed? the evolving trading system

In the last several decades, the trading system has changed significantly. The shift from the treaty-based negotiating rounds of the GATT system to the brick-and-mortar institution of the WTO; the rise of China as a big trader; and the increasing importance of global value chains are just some of the noteworthy occurrences.

In addition, two developments have had profound consequences for the role that Canadian provinces and territories might be asked to play in trade negotiations. First, governments have shifted their focus from the multilateral trading system toward preferential agreements. Second, the substantive focus of trade agreements is evolving from the removal of tariffs and related border measures to non-tariff, behind-the-border measures, including regulatory harmonization.

As Michael Trebilcock, Robert Howse and Antonia Eliason (2013, 83) put it, *“proliferation’ is the word most often used to describe the rapidly rising number of Preferential Trade Agreements (PTAs) in the international community.”* Only 70 PTAs came into force between 1948 and 1990. That number had reached 300 by 2010 (ibid.). The average WTO member is party to 13 PTAs (WTO 2011, 47). Just as the number of PTAs has changed noticeably in recent years, so has the content of these agreements. Various terms have been used to capture this trend, including *“second-generation agreement”* (Hübner 2011, 1) and *“twenty-first century trade agreements”* (Fafard and Leblond 2012). Trebilcock, Howse and Eliason (2013) describe the phenomenon as *“deep integration.”* *“Deep integration’ PTAs include rules on ‘behind-the border’ domestic policies such as intellectual property, competition, investment, environment and labour standards. In contrast, ‘shallow integration’ is focused on the removal of border measures”* (Trebilcock, Howse and Eliason 2013, 86).

One measure of an agreement’s deep integration is the inclusion of ‘WTO+’ and ‘WTO-X’ provisions. WTO+ issues are ones already covered by WTO agreements, but PTAs go further than the WTO in these areas. WTO-X domains are

not yet covered by WTO agreements but find their way into PTAs (ibid., 87). The number of WTO+ and WTO-X areas in PTAs has increased substantially in recent decades (WTO 2011, 131).

These trends in the trade system suggest that we have entered a phase when liberalization of domains within provincial jurisdiction will be a focus. While they portend that provinces will be more fully implicated in future trade negotiations, they do not provide insight into how they will be involved. For example, these trends do not guarantee that the provinces will be given a seat at the negotiating table in all subsequent negotiations, as they had in CETA. There is no evidence to suggest that the provinces were 'at the table' in recent Trans-Pacific Partnership (TPP) talks.

What, then, determines the nature of the role that the provinces and territories will play in any negotiation? The answer will likely be a function of two factors. The first springs from the trends just described — trade agreements are increasingly, and frequently, encroaching on areas of provincial and territorial jurisdiction.

The second factor, however, acknowledges that the federal government still holds a leading position in determining trade negotiating strategy. If the federal government sees the political or strategic value of involving subnational actors directly in the negotiating process, it may choose to do so. If it does not, as appears to be the case in TPP, it might rely on provincial and territorial support at the implementation stage.

This analysis aligns with the approach of Christopher Alcantara, Jörg Broschek and Jen Nelles (2015) to multi-level politics. The starting point for these authors is the *"irrefutable (and somewhat trivial) fact that politics today is often conducted through at least two governmental tiers"* (ibid., 5). Alcantara, Broschek and Nelles (2015) usefully differentiate between a 'systems approach' and an 'instances' approach.

A systems approach understands multi-level politics in a holistic way, leaving less room to capture the movement and dynamism inherent in relations between multiple tiers of government.

An instances approach looks at *“distinct ‘instances’ or occurrences”* of multi-level politics (5). From an ‘instances’ perspective, *“each policy interaction should be evaluated on its characteristics and should not be assumed to be one type or another based solely or even primarily on the characteristics of the political system within which it occurs”* (6).

This conceptualization helps to explain why the Canadian provinces had a seat at the negotiating table in CETA, but did not enjoy the same direct involvement in TPP. Each trade negotiation constitutes a distinct instance or episode of federal-provincial relations. The role that the provinces will play is necessarily enhanced due to the changes in the trading system outlined above. But, the exact nature of the role — will they be directly involved in negotiations; will they exercise their influence at implementation? — is a function of the federal government’s own political and strategic assessment.

From this standpoint, CETA becomes a bellwether only of the increased relevance of the provinces and territories to trade negotiations generally, and not of their direct involvement in international trade talks.

Future research

This survey of the changes in Canadian trade-negotiating processes on display in CETA points to at least three avenues for future research.

If actors at the subnational levels are going to enjoy greater prominence in trade negotiations, at what stage(s) in the process will they exert their influence? During agenda-setting? While drafting a negotiating mandate? During

negotiations? Throughout the approval and ratification stages? At implementation? Will they merely be consulted or will they be active partners?

Is Canada a distinctive example of multi-level politics with regard to trade negotiations? Can we expect to see greater participation by sub-federal actors in other multi-level contexts? How does Canada compare with other federal and non-federal systems or with the European Union?

Is CETA a distinctive trade agreement? CETA is not the only significant trade agreement that Canada has negotiated in recent years. In January 2015, Canada's free trade agreement with the Republic of Korea was brought into force. Interestingly, the role of the provinces in this particular negotiation seems to be less prominent. Similar observations can be made about sub-federal involvement in TPP talks. In which sorts of trade agreement negotiations might sub-federal actors be more directly implicated and why? ■

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