

# Provincial/Territorial Governments and the Negotiation of International Trade Agreements

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## Summary

- Canadian provincial governments developed over time a degree of legitimacy on international trade not often granted to subnational governments in other federations.
- For the first time, provincial and territorial government officials were “at the table” during negotiations with the European Union on the Comprehensive Economic and Trade Agreement.
- That model has not subsequently been replicated and probably will not be in future negotiations.

## Sommaire

- En matière de commerce international, les provinces canadiennes ont acquis au fil du temps une légitimité rarement accordée par d'autres fédérations à leurs gouvernements infranationaux.
- Pour la première fois, des représentants des gouvernements provinciaux et territoriaux se trouvaient « autour de la table » dans les négociations de l'Accord économique et commercial global avec l'Union européenne.
- Ce modèle n'a pas été repris et ne le sera probablement pas lors de futures négociations.

AS EARLY AS 2008, the Conservative government of Stephen Harper claimed that the anticipated Comprehensive Economic and Trade Agreement (CETA) would expand Canada's trade with the European Union by 20 percent and provide an annual increase of \$12 billion to the Canadian economy.<sup>1</sup> Unfortunately, after eight years, it remains difficult to be specific about CETA's potential impact, because the agreement has not yet been formally ratified. It is possible, however, to gain insight from how CETA was negotiated.

For the first time, representatives from the provincial and territorial governments were “at the table” with EU negotiators, leading some observers to suggest this was a significant transformation in the practice of Canadian federalism in the area of foreign trade policy.<sup>2</sup> I argue otherwise: the expanded participation of provincial/territorial representatives in the CETA negotiations was not institutionalized, extensive or permanent. Instead, it was an ad hoc,



incremental change to established patterns of federal-provincial relations. Previous international negotiations, for the North American Free Trade Agreement (NAFTA) and the creation of the World Trade Organization (WTO), included incursions into areas of provincial jurisdiction and led to increased provincial/territorial involvement in Canada's foreign trade policy. The result has been an uneven pattern of incremental intergovernmentalism, a trend that has continued with the Canada-Korea Free Trade Agreement (CKFTA), the Trans-Pacific Partnership (TPP) and ongoing bilateral negotiations with several states, including India.<sup>3</sup>

## International Trade and Domestic Policy Space in Canada

INTERNATIONAL TRADE OCCURS within an anarchic neoliberal global economy in which states struggle to respond to market pressures. Contrary to the common belief that international trade agreements are designed to liberalize markets to create expansive new export opportunities for domestic sectoral interests, these agreements are meant to manage market forces and promote incremental liberalization through a process that evolves slowly, with numerous country-specific exclusions and reservations. At times, however, the pace of liberalization can accelerate, creating “benchmark” international trade agreements that establish long-standing rules, norms and practices.

In the period immediately after the Second World War, Keynesian principles of state intervention were adopted to rebuild and manage the capitalist economy through multilateral trade and financial institutions known collectively as the Bretton Woods system. For several decades, the General Agreement on Tariffs and Trade (GATT) managed international trade. Under GATT, several rounds of negotiations led to a series of “first-generation” trade agreements focused almost exclusively on reducing tariffs between developed member states. Although the early GATT rounds modified Canada's tariff schedules, they had no impact on Canadian federalism, as the negotiation of international tariffs was, and remains, the sole responsibility of the federal government.

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The provinces nevertheless slowly developed a degree of legitimacy with respect to international trade matters that is not often granted to subnational governments in other federations. Powers associated with international relations are not specified in the *Constitution Act, 1867*, so clarification on this issue came from the Judicial Committee of the Privy Council and from the Supreme Court of Canada. Several rulings — related to treaty-making, trade and commerce, “Peace, Order and Good Government” and criminal law — reaffirmed federal control over the negotiation and implementation of foreign trade agreements, while recognizing the right of provinces to regulate international matters falling under provincial jurisdiction.<sup>4</sup>

By the 1970s, this provincial right had become increasingly relevant for Canadian federalism, as GATT negotiations started to include several areas of provincial/territorial jurisdiction, such as liquor and marketing boards, technical standards, procurement, subsidies, financial services and farm-income stabilization and price-support programs. Initially, federal-provincial consultation on matters of foreign trade policy within GATT occurred as part of the Canadian Trade and Tariffs Committee, later supplemented by a Canadian Coordinator for Trade Negotiations. In this early phase, federal-provincial dialogue was driven by concerns in Ottawa — and internationally — related to the implementation of GATT commitments in areas of provincial jurisdiction. In the 1980s, for example, both the European Community and the United States objected to Ontario’s practices related to the sale and distribution of alcohol, notably beer, due to article XXIV:12 of the GATT, which called on signatories to take “reasonable measures” to ensure the compliance of all governments within a state’s territory.<sup>5</sup>

It was also during this time, however, that the legitimacy of Bretton Woods as a means of transferring Western capitalist rules and norms to the East and South declined. For trade, this meant challenges for multilateral trade negotiations within GATT reflective of conflicting priorities between North and South and developed and developing economies. For the United States, Canada and other developed capitalist economies, the lack of progress inspired the pursuit of bilateral and regional trade agreements and an ongoing attempt to transfer Western norms beyond GATT. These initiatives continued to focus on areas of provincial jurisdiction and created further pressure by the provinces and territories for an enhanced role in trade negotiations.

In evaluating this shifting landscape of Canadian federalism, it is crucial to identify markers of “change.” “Significant” change would include a transformational altering of existing relations between the federal and provincial/territorial governments on foreign trade policy. This alteration would be long-term, if not permanent, and hinge on institutional changes not only in existing patterns of interaction between the two levels of government, but also in the role of the provinces and territories in the negotiation and outcome of trade policy. Signs of such significant change would include an amendment to the Constitution or the division of powers in this policy area; a formal and institutionalized role for provincial/territorial governments in the negotiation, ratification and implementation of international trade agreements; and/or the regular, or permanent, direct participation of provinces and territories in all foreign trade negotiations and, potentially, in other non-trade-related international forums.

Under “incremental,” or less fundamental, change, however, the authority of the provinces and territories would not diverge from patterns of intergovernmental relations in other policy areas, but would reflect a consistency of interaction tied to ongoing institutional practices and established intergovernmental

relationships. One would also expect to see ongoing support for the merits of trade liberalization among federal and provincial officials who have formed long-term, nonpoliticized relationships due to the technical nature of this policy area. What would be the nature of such incremental changes?

## Evolving Incremental Intergovernmentalism

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INITIALLY, it appeared that the Canada-United States Free Trade Agreement (CUSFTA) marked a significant change in the participation of the provinces in the negotiation of international trade agreements. Provincial governments, but not territories at this point, were given unprecedented access to federal officials during the negotiations. To represent their concerns, some provinces even hired high-profile former federal officials, such as Jake Warren, Canada's chief negotiator during the Tokyo Round of GATT (by Quebec), and Robert Latimer, a senior official in both External Affairs and Industry, Trade and Commerce (by Ontario). Some premiers also became directly engaged in promoting provincial interests: Ontario's David Peterson, for example, had concerns about that province's manufacturing and automotive sectors and personally lobbied Washington in 1987 in an attempt to exclude the 1965 Auto Pact from negotiations.<sup>6</sup>

These developments, however, were not a radical departure from established Canadian federalism. Federal officials met monthly with representatives from all provinces to provide information on the negotiations, and there were regular conference calls and discussions with specific provinces on various issues. Ottawa nevertheless remained in full control of all negotiating groups covering issues ranging from dispute settlement to services, subsidies and competition policy.

This growth in the engagement of the provinces continued following the implementation of CUSFTA, when the Canadian Coordinator for Trade Negotiations became the Committee for the Free Trade Agreement, on which all ten provinces had representatives. Ottawa also established a series of consultative committees with various provincial departments to address sectoral concerns and ongoing trade irritants. In the early stages of the NAFTA negotiations, an additional forum was added, the Committee for North American Free Trade Negotiations, which represented a new level of cooperation between Ottawa and the provinces. Provincial governments received copies of draft proposals tabled by the United States and Mexico, as well as information on a number of specific sectoral issues. On several occasions, the provinces also had access to material not yet reviewed by Cabinet.<sup>7</sup>

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A similar trend is evident in the Federal/Provincial/Territorial Committee on Trade (C-Trade), which replaced the Committee for North American Free Trade Negotiations. Although some provincial/territorial governments initially expressed concerns about C-Trade, the committee is now accepted as a useful method of consultation, and the process has remained relatively unchanged since its inception in the mid-1990s. At the forum, which meets approximately four times a year, federal, provincial and territorial officials exchange information and concerns related to international trade and negotiations. Draft documents on issues touching areas of provincial/territorial jurisdiction are also exchanged and, for the most part, provinces and territories are encouraged to provide feedback on proposals. Federal officials are also typically sensitive to the economic interests of participating provincial and territorial governments.

In addition to C-Trade, ad hoc sectoral discussions are ongoing between Ottawa and the provinces and territories on numerous trade issues, such as regulatory reform, international trade disputes and the negotiation of Mutual Reciprocal Agreements.

CUSFTA and NAFTA thus served as benchmarks in terms of both content and the general acceptance of an expanded role for the provinces in trade negotiations. Following these initial accelerated changes in the relationship between the federal and provincial/territorial governments, however, developments continued at an incremental pace, creating what Grace Skogstad has referred to as a degree of “path dependency” regarding the role of the provinces and territories in international negotiations.<sup>8</sup> The provinces now received more information but still had no formalized role in the formulation of trade policy. Ottawa nevertheless allowed ad hoc advances in certain circumstances — most notably in the representation of provincial/territorial interests in the negotiation of less comprehensive agreements in specific sectors. At the urging of newly elected US President Bill Clinton, for example, NAFTA included “side deals” — the North American Agreement on Environmental Cooperation and the North American Agreement on Labour Cooperation — on issues within provincial jurisdiction. As part of their expanded participation, the provinces received all Mexican and US position papers and were involved in the drafting of Canadian proposals during the negotiations in these areas. Provincial representatives were also invited to Washington in August 1993 for the final phase of discussions. Six provinces attended various stages of the negotiations, and Alberta and Quebec were present for the entire period.<sup>9</sup>

Canada’s negotiation of the New World Wine Accord, which established the World Wine Trade Group in 2001, adopted a similar pattern of engagement. The pact, which deals with oenological (winemaking) practices, was designed to allow greater access to markets for wine exports produced with consistent practices. In the past, oenological methods were used to justify trade barriers for health and

safety reasons. Over a three-year period, Ottawa circulated drafts of the proposed agreement and ensured that any new international norms and standards reflected the interests of the provinces. Similarly, in 2003, the provinces were involved in the negotiation of an agreement between Canada and the EU to prevent Canadian producers from labelling products using the terms Sherry, Champagne, Port or Chianti, which the EU argued were exclusive geographic regions in Europe. The accord allowed domestic wineries in British Columbia and Ontario to sell Canadian wines exclusively in private retail stores, and provided for special labelling for Canadian products such as ice wine and whisky.<sup>10</sup>

## CETA

THE PROSPECT OF NEW BILATERAL TRADE NEGOTIATIONS between Canada and the EU was not initially greeted with enthusiasm by many EU observers, who remembered the failure of negotiations on a Canada-EU Trade and Investment Enhancement Agreement in 2006. In that case, Ottawa, not anticipating opposition from the provinces, failed to engage them until the late stages of negotiations, even though the agreement encompassed a wide range of services and procurement issues. From the EU's perspective, however, the agreement collapsed because of unreasonable demands by the provinces and concerns, based on previous trade disputes, about their eventual compliance with the terms of the agreement.

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Despite these concerns, the EU did not request the direct participation of the provinces and territories in any potential CETA negotiations. In practical terms, it would have been hard to explain why they, but not individual EU member states, should have been allowed “in the room.” In fact, one Canadian representative made it clear that the “EU never asked the provinces and territories to participate in negotiations, they only sought commitments, which is not the same thing.”<sup>11</sup> Regardless, Quebec Premier Jean Charest worked closely with a number of provinces and with French President Nicolas Sarkozy to ease European concerns.<sup>12</sup> An enhanced role for provincial/territorial governments was also consistent with Prime Minister Harper's support for “open federalism.” Ultimately, the EU decided that potential economic gains and guarantees of compliance were more important than the format of negotiations. In 2009, the formal confirmation of provincial and territorial involvement in the CETA negotiations came from the Council of the Federation, which pledged to “ensure the implementation of any commitments” applicable to the provinces.<sup>13</sup>

It is important to note, however, that not all provincial/territorial governments welcomed a direct role in the negotiations. Some officials suggested that a general malaise had set in between Ottawa and the provinces on the international trade

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file, and that C-Trade had grown a bit “stale.” Although Alberta and Quebec were pushing for a greater role in NAFTA chapter 11 disputes in areas of provincial jurisdiction, both provinces were also satisfied with their dominant role within the federation in this policy area. For other provinces, the prospect of contributing bureaucratic expertise and resources to CETA was daunting.<sup>14</sup> Accordingly, provincial involvement was not significant in the early stages of discussions.

The provinces and territories did not request a role in selecting the Canadian Chief Trade Negotiator, Steve Verheul, but they did participate in the drafting of the negotiation mandate. A number of skeptics also questioned Ottawa’s capacity to guarantee provincial compliance, and Newfoundland and Labrador decided to engage only as an observer, due in part to this concern. The province ultimately became a full participant in the negotiations in March 2011 and made it clear it would not support any agreement that did not fully reflect provincial interests.<sup>15</sup>

Initially, the CETA negotiations consisted of 12 issue areas, later expanded to more than 20, with several sub-areas identified as talks progressed. Provincial/territorial representatives, however, participated only in discussions relevant to specific issues of concern, including services, procurement, monopolies, technical barriers to trade, investment, labour and environmental issues, and state-owned enterprises.<sup>16</sup> All the provinces and territories did what they could to develop expertise and capacity in specific policy areas from the outset. In many ways, having the provinces and territories in the room also made it easier for Canadian negotiators. For the first time, provincial and territorial officials could see first-hand the challenges of trying to negotiate complex issues involving numerous interests. It also facilitated consensus within the Canadian delegation, as federal officials did not have to spend additional time briefing their provincial/territorial counterparts. When needed, the Canadian team would also call for a “time out” in the talks, walk down the hall and come back with a “pan-Canadian” position.<sup>17</sup>

Nonetheless, “direct” provincial/territorial participation was limited in formal sessions. Their representatives would talk only if asked to do so by the Canadian negotiator at the table — not a frequent occurrence.<sup>18</sup> Ultimately, the provinces and territories were there in a consultative, policy-advising capacity, not a negotiating role. Although provincial/territorial representatives were at certain tables, federal officials ultimately were the ones who negotiated for Canada. What the process did create was a level of awkwardness that did not exist in previous negotiations. It was common for two to three European representatives to be sitting across from 20 to 30 “Team Canada” members. Even finding a meeting room to facilitate discussions was often problematic and expensive. As one delegation member noted, “it was a difficult negotiating dynamic, especially when issues got tough.”<sup>19</sup>

In response, a pattern began to emerge during formal negotiations. At a preliminary meeting, which one Canadian official referred to as “the show,” all

EU representatives and Canada’s federal/provincial/territorial representatives would engage in dialogue and note-taking. Later, a smaller meeting would occur at which more explicit negotiations would take place. It became clear that EU officials preferred the smaller forums. Provinces were still invited to attend, but usually only one or two with a specific interest or expertise in an area being discussed. The provinces and territories were not in the room at all in the late stages of talks but instead would be briefed daily.<sup>20</sup> In the words of one official, “the provinces were eventually phased out of face-to-face meetings with the EU negotiators. In the end, it was similar to typical federal-provincial consultation that occurred prior to CETA.”<sup>21</sup>

CETA’s broad scope also created some early tensions between Ottawa and a few provincial/territorial governments. All the provinces and territories had a history of engagement on international trade through C-Trade or previous negotiations, but most had focused on only a small range of relevant issues. CETA required an unprecedented level of expertise, which combined with internal political pressures, occasionally resulted in provincial/territorial negotiators calling for “exorbitant asks.” At various times, they also had to be reminded of existing international and domestic considerations, especially when they entered into areas of limited policy capacity, although this was relatively rare. For the most part, however, there was a high level of cooperation between federal and provincial/territorial representatives and Canada’s Chief Negotiator.<sup>22</sup>

Consultation between federal and provincial/territorial officials was also good, with some exceptions. They collectively decided from the outset that each level of government would share information in a number of formats and forums, including with as many relevant departments as possible. Consultation was further prioritized during formal negotiations. Federal trade officials, including the Chief Negotiator, met with as many as 60 provincial/territorial officials on the eve of and at the end of formal negotiations each day. Extensive consultation also took place before and after rounds of face-to-face talks both in C-Trade and on an ad hoc basis.<sup>23</sup>

Some provinces and territories, however, had difficulty processing and analyzing the volume of information provided by the federal government. The term “information dump” was commonly heard, as were concerns about how to filter out what was actually important. The cost of travelling to Brussels to sit in the room and be briefed was also raised as a concern, with the feeling that similar insight could be gained through a conference call. Issues of economic security and espionage were also cited due to the high number of trade officials from numerous jurisdictions being briefed daily.<sup>24</sup> As well, officials from both levels of government were often frustrated with information they saw as provided only for political purposes. Members of the Harper government,

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especially the Prime Minister's Office, would cite gains and economic projections designed solely to build support for the agreement, but with little basis in the reality of the negotiations. As one observer noted, "the political capital invested in CETA was enormous, which did not always coincide with the goals and objectives of federal or provincial negotiators."<sup>25</sup>

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Another interesting element of the CETA negotiations was the manner in which provinces and territories attempted to initiate partnerships with other participants, sometimes to gain support for specific concerns or to build capacity in various technical areas of discussions. The easiest linkages were horizontal, with other provincial/territorial governments. For the first time, provincial and territorial trade officials were physically in the same location during negotiations, often with extended breaks that allowed for an unprecedented level of direct interaction. There were, however, limitations to provincial/territorial cooperation. The lack of convergence among the provinces on all aspects of CETA meant that Ottawa never faced internal pressure from a pan-Canadian provincial/territorial negotiating front. There were horizontal attempts to facilitate dialogue between provincial and territorial negotiators in some areas, such as labour mobility, but these tended to be general discussions that did not focus on technical language. Ultimately, where provincial/territorial cooperation did occur was on specific sectoral negotiations, where commonalities were easier to identify.<sup>26</sup>

Some provinces, especially Quebec, also pursued transnational linkages outside the formal negotiations. Quebec's Chief Negotiator, Pierre-Marc Johnson, arranged a number of one-on-one meetings with Mauro Petriccione, the EU's Chief Negotiator.<sup>27</sup> Other provinces, however, questioned this strategy, choosing instead to invest time and effort into building close ties to Canadian negotiators. According to one representative, this was based on the simple reality that, since federal officials would be presenting Canada's final position on these issues, any potential influence by the provinces would be important for protecting their self-interest. This strategy was often implemented in conjunction with developing selective horizontal linkages with other provinces.<sup>28</sup>

CETA's legal text, as currently available, also suggests direct provincial/territorial influence on the agreement's formal technical language, especially as related to "defensive" priorities. "Offensive" interests are always key, because they involve access to markets in which subnational industries and producers can gain economic benefits. Defensive concerns, however, are often more important, as they can affect the provinces' ability to regulate in areas such as health, safety and environmental standards. Ultimately, defensive success is identified when provincial/territorial priorities are noted in specific exclusions, reservations and annexes. For the most part, Ottawa is sensitive to defensive concerns. As one observer noted, the provinces are "not driving

trade policy” in negotiations, but it is very difficult for Ottawa to say no when specific provincial concerns are identified. The key then becomes the ability of federal negotiators to convince their EU counterparts of the importance of these sensitivities.<sup>29</sup>

## “Buy American,” India, the TPP and South Korea

POST-CETA DEVELOPMENTS can also shine light on the evolving role of the provinces and territories in international trade negotiations. In the aftermath of CETA, Canada signed the “Buy American” Agreement on Government Procurement with the US, initiated bilateral discussions with India, participated in the Trans-Pacific Partnership negotiations and concluded a trade agreement with South Korea. Interestingly, the provinces and territories had no consistent participatory role in any of these cases, and none reflects an established commitment to the CETA model.

The first evidence of CETA’s potentially becoming the “new normal” for provincial/territorial participation in negotiations was the “Buy American” procurement agreement, negotiated in response to the *American Recovery and Reinvestment Act*, the 2009 economic stimulus legislation. Much of this federal funding was designed to give preferred access to US iron, steel and related materials for construction contracts controlled by state and municipal governments. Canadian bidders could gain access only in the unlikely event that local governments waived the act’s “Buy American” provisions. Canada also had no means of challenging these provisions using existing dispute mechanisms due to provincial procurement exclusions in NAFTA and the General Procurement Agreement of the WTO. As a result, Canada’s only option was to pursue a negotiated settlement that offered greater US access to Canadian provincial and municipal contracts. Initially, some provinces pressed to be directly involved in negotiations; however, US federal officials were strongly opposed since US states would then have to be consulted as well, which, due to the highly politicized nature of US subfederal procurement, would have delayed the agreement significantly. A final agreement was reached between the two countries in 2010 with only minimal consultation with the provinces and territories.<sup>30</sup>

In contrast, the Indian government rejected any direct role for the provinces from the outset of bilateral trade negotiations in 2010. As one federal official noted, India ensured this “was a short conversation.” This is not to suggest that the provinces and territories are completely excluded from the Canada-India talks — information is being provided in much the same manner as in other negotiations — but there is virtually no provincial/territorial presence at actual meetings or negotiating sessions. The first and most obvious reason is that the majority of issues currently being negotiated, such as tariffs, fall

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primarily under federal jurisdiction. Another contributing factor is the small size of the Indian delegation — typically three people — which narrows the range of topics negotiators can engage at any given time. Indeed, one provincial official has questioned the “optics” of having provincial delegations that would outnumber that of the Indian government. The expense of getting a large number of provincial/territorial officials to Delhi, the site of some negotiations, is a further deterrent.<sup>31</sup>

The TPP, in contrast, was considerably more ambitious than the “Buy American” or India negotiations, but its technical language did not significantly intrude into areas of subfederal jurisdiction beyond already established CETA benchmarks. As such, the provinces and territories were not direct participants in the TPP negotiations; in some cases provincial/territorial officials attended sessions in Singapore and Hawaii, but they were never directly “in the room.” Instead, the federal negotiators briefed provincial/territorial representatives after each meeting. For the most part, the latter were satisfied with the consultative process and felt they were receiving information in “real time.”<sup>32</sup> For Canadian officials, a complicating factor in the negotiations was the number of participating parties, many with large delegations, although Ottawa made no effort to discourage the attendance of provinces and territories at negotiating sessions or ministerial meetings. Ultimately, however, the logistics and cost of getting representatives of all ten provincial and three territorial governments overseas at the same time made their full participation unlikely. Provincial/territorial engagement occurred, therefore, on an ad hoc basis, depending on the issues under negotiation.

Canada's trade agreement with South Korea, which entered into force in 2015, also had very little provincial or territorial involvement. Indeed, most of the “heavy lifting” had taken place several years earlier, with the final legal text of the agreement largely in place after Round 13 of the negotiations in 2008. The agreement remained unratified, however, due to a number of concerns, including a South Korean ban on Canadian beef exports and a subsequent Canadian WTO dispute, both related to the “mad cow” disease crisis in Canada. The end of that dispute in 2011 provided an opportunity to revisit the earlier bilateral agreement, and the provinces and territories were provided with draft texts of potential changes. At no time, however, was there any contact between provincial/territorial and South Korean officials.

Perhaps most interesting about the post-CETA negotiations is the apparent willingness of most provinces and territories to accept pre-existing forms of intergovernmental relations related to Canada's international trade negotiations. For some governments, this is a practical matter stemming from overstretched bureaucratic resources and budgets; for others, it is a simple lack of interest in becoming involved in negotiating trade agreements with certain foreign countries.

The norm that emerged from CETA was not direct provincial/territorial participation, but improved communication, transparency and cooperation, which have reduced the incentive for provincial and territorial governments to push for a greater role.

More significantly, however, the CETA experience appears to have created a new level of trust between federal and provincial negotiators.<sup>33</sup> For the most part, federal negotiators were responsive to provincial/territorial arguments and concerns, which were reflected in specific changes in CETA's legal text.<sup>34</sup> According to one federal official, the norm that emerged from CETA was not direct provincial/territorial participation, but improved communication, transparency and cooperation, which have reduced the incentive for provincial and territorial governments to push for a greater role.<sup>35</sup> This trend raises the larger issue of whether the provinces and territories need to be “in the room” to pursue their specific trade interests and the broader importance of informal contacts and interpersonal relations in this and other areas of intergovernmental relations.<sup>36</sup>

Related to this is an increasing understanding by the provinces and territories of the negotiation of formal legal texts in international trade agreements. In many cases, the agreements add very limited “new” language; most comes directly from previous “benchmark” accords. In fact, a close look at the technical language of Canadian bilateral and regional agreements indicates a heavy reliance on already-existing rules and norms established in CUSFTA, NAFTA and the WTO.<sup>37</sup> “There is no copyright on trade agreements,” said one federal official, and it is always best to choose language that has “already been interpreted, especially in the context of international disputes.”<sup>38</sup> The provinces and territories know that changes to existing language likely would be minimal and that they would be consulted along the way, which also limits the need of those with limited staff and budgets to push for a more inclusive role in trade negotiations.

Revisiting the CETA model of direct provincial/territorial participation thus seems unlikely except, perhaps, in the event of new negotiations with a major trading partner, most likely China — although this is not currently on the horizon. There is little interest, either in Ottawa or among most provincial/territorial governments, in making dramatic changes to existing best practices related to international trade negotiations.<sup>39</sup> The ad hoc, incremental evolution of federal-provincial relations in this policy area nevertheless raises the question of whether a more formal institutional role for provincial/territorial governments would be beneficial for future negotiations. Some analysts, such as Anthony VanDuzer and Melanie Mallet, have called for formal agreements to promote provincial/territorial compliance in implementing trade deals that touch on their areas of jurisdiction.<sup>40</sup> On a similar note, Patrick Fafard and Patrick Leblond have called for greater institutionalization of the negotiation and implementation of trade agreements, including a role for nongovernmental commercial interests to ensure coordinated trade-offs during bargaining.<sup>41</sup> It is difficult to dispute the potential benefits of the institutionalization of provincial/territorial actors in the negotiation, ratification and implementation of international trade commitments, but such a move is unlikely in the current climate of Canadian federalism.

On the role of the provinces and territories in the negotiation of international trade agreements, Canada has adopted a pattern of incremental change, with sporadic bursts of more active consultation in specific benchmark agreements.

## Conclusion

ON THE ROLE OF THE PROVINCES AND TERRITORIES in the negotiation of international trade agreements, Canada has adopted a pattern of incremental change, with sporadic bursts of more active consultation in specific benchmark agreements such as CUSFTA, NAFTA and CETA. These developments, however, do not represent an enduring change: although provincial/territorial governments were directly involved in the CETA negotiations, no permanent institutional change resulted. Indeed, by the end of the CETA process, the provinces and territories had been relegated to a “traditional” consultative and participatory role. There is nothing to suggest that this will change in the TPP, India or South Korea negotiations now under way. As one participant made clear, Canada will continue to adopt an “evolutionary process that builds slowly on already existing practices.”<sup>42</sup>

In the aftermath of CETA, most federal and even many provincial officials felt strongly that the direct participation of the provinces and territories in foreign trade negotiations “would never happen again.”<sup>43</sup> It is possible, however, that the CETA model of negotiations could be revisited, most likely in the event of another benchmark trade agreement that would expand negotiations and new technical language beyond existing provincial/territorial commitments. Such a move would be consistent with previous incremental intergovernmentalism in this policy area. It is important, however, to note the positive aspects of such an incremental approach. Provincial and territorial governments can clearly affect Canada’s position in negotiations, and even the actual final legal text of agreements, across a wide range of sectors. At the same time, cooperation, information-sharing and ties of trust among all levels of government have continued to improve. Finally, any future institutionalization of the role of nonfederal actors in trade negotiations should also make room for business and social interests, to ensure the ongoing legitimacy of Canada’s international trade commitments.

## Notes

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9. C.J. Kukucha, *The Provinces and Canadian Foreign Trade Policy* (Vancouver: UBC Press, 2008), 182-4.
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12. France and Quebec also announced the successful negotiation of a bilateral labour mobility agreement in 2008.
13. Skogstad, "International Trade Policy," 209. See also G. Skogstad, "Global Governance and Canadian Federalism: Reconciling External Accountability Obligations through Internal Accountability Practices," in *Overpromising and Underperforming? Understanding and Evaluating New Intergovernmental Accountability Regimes*, ed. P. Graefe, J.M. Simmons, and L.A. White (Toronto: University of Toronto Press, 2013), 190-210.
14. Information provided on background only; telephone interview, April 14, 2016.
15. Skogstad, "International Trade Policy," 209; see also D. Lysenko and S. Schwartz, *Does Canada Need Trade Adjustment Assistance?* IRPP Study 57 (Montreal: Institute for Research on Public Policy, 2015), 19-20.
16. Discussions regarding customs procedures, phytosanitary measures, geographic indicators and dispute settlement did not involve the provinces and territories; see Paquin, "Federalism and the Governance of International Trade Negotiations."

17. Telephone interview, April 14, 2016.
18. Skogstad, “International Trade Policy,” 210.
19. Personal interview, May 14, 2013.
20. Personal interview, May 14, 2013.
21. Personal interview, March 24, 2014. Interestingly, there was not a great deal of opposition to these changes from provincial and territorial governments. Provinces with a history of international engagement understood this was how negotiations unfolded; other governments struggled with budget and staffing as the negotiations lengthened.
22. Personal interview, May 14, 2013.
23. S. Verheul, as cited in Skogstad, “International Trade Policy,” 210.
24. Personal interview, May 9, 2013.
25. Personal interview, May 14, 2013.
26. Personal interview, March 24, 2014.
27. Paquin, “Federalism and the Governance of International Trade Negotiations,” 551.
28. Personal interview, May 9, 2013.
29. Personal interview, March 24, 2014.
30. Personal interview, March 24, 2014.
31. Personal interview, March 24, 2014.
32. Personal interview, March 24, 2014.
33. An exception might be Newfoundland and Labrador; telephone interview, April 14, 2016.
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