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THE EVOLVING ROLE OF SUB-NATIONAL ACTORS IN INTERNATIONAL ECONOMIC REGULATIONS: LESSONS FROM THE CANADA-EU CETA.

Abstract

There are divergent opinions with regard to the new wave of mega-regional economic agreements sweeping across the world. In a positive sense, recent mega-regional agreements such as the Trans-Atlantic Trade Partnership (TTP) and the Canada-EU Comprehensive Economic Trade Agreement (CETA) are arguably trail-blazers in regional economic integration, such as NAFTA was more than two decades ago. Criticisms have however been levelled against these agreements. Notably, there is a perceived lack of accountability/transparency during the negotiation of these deals and uncertainty surrounding their potential economic benefits vis-à-vis problems.

More so, because of the broad scope and far reaching effect of these mega-regional economic agreements, sub-national and non-state actors (especially civil societies) around the world are becoming increasingly concerned about their impact on critical aspects of their respective home economies. These concerns are clearly more heightened from the perspective of sub-national actors in federal systems. This is mainly because federal systems by their very nature have a delicate power balance which is being tested by the ever increasing encroachment of international economic disciplines into the jurisdictional competence and interests of sub-national governments.

With respect to CETA, after over 7 years of painstaking negotiation, Wallonia, a sub-national region in Belgium almost unravelled the whole process when it opposed the national ratification process of the CETA. This recent development brings to the fore the growing significance of sub-national actors as involved actors in world economic governance.

Using the CETA as a case study, this paper aims to assess the nature, scope and implications of shifting forms of cooperation observable in the design of new styled Free Trade Agreements spring up in the world trade and investment system. This paper will critically evaluate how differences in the legal frameworks and institutional design for international economic relations within Canada and the EU respectively, has impacted on the eventual outcome of the CETA. The analysis will also focus on the different strategies adopted by

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Canada and the EU in order to engage their sub-national governments in the CETA negotiation process, and its implication for future mega-regional trade agreements.

1. Introduction

In 2009, Canada and the European Union (EU) commenced the negotiation process for a Comprehensive Economic Trade Agreement (hereinafter referred to as CETA).¹ After 7 years of negotiations, both parties finally signed the CETA in October 2016.² This was an eagerly anticipated deal between two important trade partners, which had been in the pipeline for a number of years.³ Some commentators describe the CETA as Canada's most ambitious trade agreement to date, because it is deeper in ambition and broader in scope than the historic North American Free Trade Agreement (NAFTA).⁴ The CETA aims to eliminate an estimated

¹ See European Commission (2009) EU and Canada Start Negotiations for Economic and Trade Agreement, 10 June 2009, http://trade.ec.europa.eu/doclib/docs/2009/june/tradoc_143427.pdf, accessed 30 March 2017.

² Formal negotiations were completed in October 2013 but ratification has taken a little longer than initially expected. see D'Erman 2016, at 92 and Reuters, (2016) EU, Canada sign free trade deal but battle not over, 31 October 2016, <http://uk.reuters.com/article/us-eu-canada-trade-idUKKBN12U0HU>, accessed 30 March 2017.

³ The EU has been a strategic partner for Canada since as far back as 1959, when both parties signed the Agreement for Cooperation in the Peaceful Uses of Atomic Energy. See Stanko2012, at 4. In terms of concluding a PTA, there had been several attempts in the past to bring both parties to the negotiating table. Notably, in 1976, the Framework Agreement for Commercial and Economic Cooperation was signed by both parties. Subsequently, other bilateral agreements such as the Transatlantic Declaration of 1990, which established how Canada and the EU consult with each other; The Joint Canada-EU Political Declaration and Action Plan of 1996, which outlined commitments to working together in many areas; and The Canada-EU Partnership Agenda of 2004, further strengthened the relationship between these two parties. For a detailed history of the journey to the negotiating table for Canada and the EU see D'Erman 2016, at 92-93. See also Woolcock 2011, at 21 and Deblock and Rioux, 2011, at 51-53.

⁴ See the official website of the Government of Canada (2017) http://www.canadainternational.gc.ca/eu-ue/policies-politiques/trade_agreements-accords_commerciaux.aspx?lang=eng, accessed 03 April 2017. In the words of De Mestral, 'CETA has much that is novel and that sets it apart from previous trade agreements signed by either party. CETA is, as the title suggests, comprehensive. The scope of CETA takes it beyond previous regional trade agreements (RTA). It covers all the ground of previous major trade agreements and then goes into areas never brought together in a single RTA.' See A De Mestral (2016) The Canada-European Union Comprehensive Economic and Trade Agreement (CETA): A Convergence of Canadian and EU Interests, Canada-Europe Transatlantic Dialogue, March 2016, <http://labs.carleton.ca/canadaeurope/wp-content/uploads/sites/9/De-Mestral-CETD-Policy-Brief-final.pdf>, accessed 03 April 2017.

The Council of Canadians, a civil society coalition based in Canada however has a different perspective about the agreement. According to them, the CETA is a 'next generation' free trade and investment pact that is better understood as a corporate power grab. CETA is a way to further deregulate and privatize the Canadian economy

98% of custom tariffs between both parties, and more importantly tackle issues relating to non-tariff barriers such as special licensing, regulatory regimes, and anti-dumping measures between Canada and the EU.⁵

However, it has not been all smooth sailing to broker a deal. In fact, the CETA process has been an interesting case study of regional economic integration for a number of reasons. Notably, the CETA belongs to a genre of Preferential Trade Agreements (PTAs), which are cross continental and expansive in their scope.⁶ These PTAs popularly referred to as mega-regional agreements, have divided opinions across the world. In a positive sense, recent mega-regional agreements such as the Trans-Atlantic Trade Partnership (TTP) and the CETA are arguably trailblazers in regional economic integration, such as the North American Free Trade Agreement (NAFTA) was more than two decades ago.⁷ Criticisms have also been levelled against these agreements. Notably, there is a perceived lack of accountability/transparency during the negotiation of these deals and uncertainty surrounding

while increasing corporate power and undermining Canadian and European efforts to address the climate crisis.’ See The Council of Canadians (2017) Canada-EU (CETA), <https://canadians.org/ceta>, accessed 31 March 2017.

⁵ D’Erman describes the deal as: ‘the largest free trade agreement in the wealthy industrialized world to date. i.e. referring to the combined size of both markets as well as the scope of the areas under agreement. See D’Erman 2016, at 90. Also, the EU Commission announced at the commencement of negotiations in 2009 that the estimated value of combined international trade to be generated by the CETA deal for both economies could be up to 20 billion euros per year. See European Commission (2009) EU and Canada Start Negotiations for Economic and Trade Agreement.

⁶ Mega-regionals can be defined as: ‘...deep integration partnerships between countries or regions with a major share of world trade and foreign direct investment (FDI).’ See T Hirst (2014) What are mega-regional trade agreements?, World Economic Forum, 9 July 2014, <https://www.weforum.org/agenda/2014/07/trade-what-are-megaregionals/>, accessed 03 April 2017. See also. Trebilcock, Howse and Eliason 2013, at 87 who describe deep integration PTAs as agreements which are characterised by the inclusion of ‘WTO+’ and ‘WTO-X’ provisions (i.e. WTO+ issues are areas of international trade/services which are already covered by WTO agreements, but these PTAs go further than the WTO in these areas; whereas, WTO-X issues are areas not yet covered by WTO agreements which are covered by these 21st century PTAs).

⁷ De Mestral is of the opinion that: that these news styled PTAs ‘may well lead to the establishment of global trade patterns and ultimately make possible the adoption of the next set of universal trade rules.’ See De Mestral (2016) The Canada-European Union Comprehensive Economic and Trade Agreement (CETA): A Convergence of Canadian and EU Interests, at 2.

their potential economic benefits vis-à-vis problems.⁸ For instance, sub-national governments, civil societies and trade unions have persistently voiced concerns, stating that mega regional PTAs are not being negotiated transparently and that there is lack of clarity on the scope of powers that these agreements would give to international corporations at the expense of small and medium-sized businesses. It has also been argued by the Council of Canadians, that the CETA:

Will unfairly restrict how local governments spend money by banning ‘buy local’ policies, add hundreds of millions of dollars to the price of pharmaceutical drugs in our public health care system, create pressure to increase privatization of local water systems, transit and energy, and much more.⁹

⁸ McKenzie argues that contrary to popular belief that there is a positive correlation between free trade and job creation, ‘in fact, the relationship between trade and jobs is more complicated than the linear link between exports and employment suggests.’ see McKenzie 2014, at 237. He argues that ‘one problem with the claim that free trade creates jobs is that it looks at only half of the dynamic of trade-exports-while ignoring the impact of imports on employment. (ibid). Also, according to a report in the *Independent Newspaper*, even after scaling the hurdle presented by the Walloon stand-off within the EU, ‘Many MEPs are worried about CETA, reflecting the views of millions of European citizens who have been lobbying them to vote it down. They are concerned about the impact it will have on food standards, public services and financial regulation.’ See N Dearden (2017) ‘By signing CETA with Justin Trudeau, the EU isn’t undermining Donald Trump – they’re helping him, The Independent, 13 February 2017, <http://www.independent.co.uk/voices/ceta-canada-eu-trudeau-trump-trade-deal-ttip-helps-trump-a7577246.html>, accessed 03 April 2017.. In Canada, the sentiments are not much different, especially in relation to a perceived democratic deficit in the negotiation process. For instance, it has been pointed out by Attar and Clouthier 2015, at 467 that there was limited consultation by the government with the public. They argue that: ‘...CETAs negotiators and the Standing Committee spoke almost exclusively with industry stakeholders, keeping the text and their discussions closed and secretive...’ (ibid). They further argue that ‘Trade consultations thus appear impoverished-even undemocratic when compared with best practices from several other federal government departments, such as immigration, environmental protection, and Aboriginal affairs.’ (ibid) According to them, ‘The best explanation for the lamentable state of public consultations on trade is the government’s awareness of the outrage regarding its trade policy. Preferring to ask for forgiveness rather than permission, the government declines to consult before agreements are concluded.’ (ibid).

⁹ The Council of Canadians also argues that: ‘The secret negotiating process and the overall corporate agenda behind these next generation deals are an affront to democracy on both sides of the Atlantic.’ See Council of Canadians (2017). See also Trew 2013, at 568, who examines the impact of non-governmental (civil societies) actors during the EU-Canada CETA negotiations. He argues that the critical views of these actors show an inherent democratic deficit that privileges corporate insiders at the expense of civil society, the public, and even elected officials (at 569). He however points out that these actors (civil societies) recorded considerable success

More so, because of the broad scope and far reaching effect of these mega-regional economic agreements, sub-national and non-state actors (most notably civil societies) around the world are becoming increasingly concerned about their impact on critical aspects of their respective home economies.¹⁰ These concerns are clearly more heightened from the perspective of sub-national actors in federal systems. This is mainly because federal systems by their very nature have a delicate power balance, which is being tested by the ever increasing encroachment of international economic disciplines into the jurisdictional competence and interests of sub-national governments.¹¹

The propensity for sub-national governments in federal systems to impact on the design and ratification of international norms was a prominent feature during the CETA process, where sub-national governments in Canada and the EU played pivotal roles during the negotiations and ratification process; albeit for different reasons. For Canada, the major headline was the fact that for the first time in Canada's history of international trade interactions, the provinces were allowed to participate directly in the negotiation process of the CETA.¹² For the EU sub-national governments, this was not the case. They did however, have their say on the final outcome of the deal. Notably, Wallonia, a sub-national region in Belgium with a

by forging new linkages with provincial governments, municipalities, European decision makers, and other non-governmental groups in Canada and Europe, which may thrive even after the competition of the Canada–EU CETA process (at 574-575). See generally, Namur (2016) Good news! The war on TTIP and CETA can be won, Pour Écrire la Liberté, 10 May 2016, <http://www.pour.press/good-news-the-war-on-ttip-and-ceta-can-be-won/>, accessed 21 September 2016. H Spongenberg (2016) European cities and regions rally to stop TTIP, Euro Observer. 25 April 2016, <https://euobserver.com/regions/133173>, accessed 15 September 2017; and Canadian Union of Public Employees (2013) CETA: Corporations in the Loop: Canadians in the Dark, 29 October 2013, <https://cupe.ca/ceta-corporations-loop-canadians-dark>, accessed 29 March 2017.

¹⁰ For a summary of some key concerns raised by various stakeholders in Canada see McKenzie 2014 at 234. See also, Canadian Union of Public Employees (2013) CETA: Corporations in the Loop: Canadians in the Dark, 29 October 2013, <http://cupe.ca/trade/ceta-corporations-loop-canadians-dark> (accessed 23 March 2017); Dairy Farmers of Canada (2013) Support Our Canadian Cheese Makers and Farmers, 28 October 2013, <https://www.dairyfarmers.ca/farmers-voice/farm-policy/support-our-canadian-cheese-makers-and-farmers>, accessed 23 March 2017.

¹¹ See P Goff (2016) Canadian Trade Negotiations in an era of deep integration, CIGI Papers No. 88, February 2016, https://www.cigionline.org/sites/default/files/cigi_paper_no.88_web_0.pdf at 3, accessed 03 April 2017; Delagran 1992, at 15; Hayes 2004, at 9-10 and Kukucha 2008a, at 3.

¹² See Kukucha 2013b, at 534; Paquin 2013, at 551 and Goff (2016) Canadian Trade Negotiations in an era of deep integration, at 8.

population of just over 3.5 million almost unravelled the whole process when it opposed the national ratification process of the CETA in Belgium.¹³ These recent developments associated with the CETA bring to the fore a growing significance of sub-national actors as involved actors in world economic governance. Specifically, it exemplifies growing realities that forms and levels of cooperation in international economic law are shifting rapidly away from the long established Westphalian status quo on whom the legitimate involved actors in international relations are.

Using the CETA as a case study, this paper aims to assess the nature, scope and implications of shifting forms of cooperation observable in the design of new styled PTAs springing up in the world trade and investment system. This paper will critically evaluate how differences in the legal frameworks and institutional design for international economic relations within Canada and the EU respectively, has impacted on the eventual outcome of the CETA. The analysis will also focus on the different strategies adopted by Canada and the EU in order to engage their sub-national governments in the CETA negotiation/implementation process, and the possible implications for future mega-regional trade agreements. To put the discussions in context of the overarching theme of the publication series, the analyses in this paper will be framed within two distinct forms of interaction observable from the CETA negotiation. They are:

- a. Shifting forms of cooperation between central and sub-national actors in international economic relations as evidenced by the collaboration strategies adopted during the CETA negotiations. Here, the analysis will focus on the different methods adopted by Canada and the EU in order to engage their sub-national governments in the CETA negotiation process; and

¹³ Also, there have been constitutional challenges to the CETA among other EU Member States operating federal systems such as Germany. In what was described by activists (Compact, Food watch and More Democracy) as ‘the biggest constitutional complaint in German history...’, a petition with more than 125,000 signatures from concerned German citizens led to a constitutional challenge against the validity of the CETA and the TTIP before The Constitutional Court in the south-western city of Karlsruhe . However, the outcome of the courts was in favour of Germany ratifying the CETA deal. See BBC (2016) Thousands challenge EU-Canada trade deal in German court, 12 October 2016, <http://www.bbc.co.uk/news/world-europe-37629383>, accessed 03 April 2017 and BBC (2016) German top court backs EU-Canada trade deal CETA, 13 October 2016 <http://www.bbc.co.uk/news/world-europe-37642261>, accessed 03 April 2017.

- b. Shifting forms of cooperation between sub-national governments and non-state actors in international economic relations. The analysis in this regard will emphasize on the evidence from the CETA negotiations which indicate an unlikely alignment between sub-national governments and non-state actors in the ‘activism’ made against these new styled mega-regional economic agreements.

2. Contextualising the analysis: Sub-national governments in international economic law

For a better part of the 19th and 20th centuries, the activities of sub-national governments especially in federal systems, were perceived to be unpredictable and in some instances disruptive of the existing status quo in international law. More so, foreign relations has conventionally been regarded as an area which necessitates singleness of purpose, while federalism as a system of government is premised on the concept of shared and/or divided competences among multiple levels of government.¹⁴ For instance, Wheare in his classic work on federalism argued that 'federalism and a spirited foreign policy go ill together' and 'happy is the federation which has no diplomatic history.'¹⁵ Bernier also points out that international law had initially failed to recognise the peculiar challenges presented by federal systems when designing international law instruments.¹⁶ As such, federal systems have always been at the centre of controversies surrounding sub-national participation in international relations.¹⁷ This is because historically, international law responded to the appearance of federal states by ignoring their constitutional peculiarities and sought to treat them like other sovereign states.¹⁸ In line with this approach, the general rule which has existed in international law for the better part of the Westphalian era of statehood is that federal systems have a responsibility to ensure that the acts or omissions of their sub-national

¹⁴ Bernier 1973, at 1-6; Wheare, 1963, at 10-11; Nwabueze 1982, at 37; and Mingus 2006, at 578.

¹⁵ Wheare 1963, at 183.

¹⁶ See Bernier 1973, at 1-6 ff 10-11. See also, the dictum of Justice Taney in the US case of *Holmes v. Jennison* who stated that: ‘to allow the states concurrent powers in the area of international relations would not be well calculated to preserve respect abroad or union at home.’ See *Holmes v. Jennison*, US Supreme Court, 39 US 570, 1840 at para 577.

¹⁷ Bernier aptly describes the nature of this relationship as one of ‘attraction-repulsion.’ Bernier 1973, at 1. See also Karagiannis 2011, at 745-746.

¹⁸ Bernier 1973, at 1.

governments do not infringe on international law obligations which the State is subject to.¹⁹ This obligation applies as the default rule unless a contrary intention is evidenced in the text of an international treaty.²⁰ In some instances, international treaties have ‘opt out’ clauses negotiated into them.²¹ This can operate by way of federal state clauses,²² which make it possible for federal systems to expressly escape liability if their sub-national units do not comply with the requirements of a treaty in areas where they have constitutional competence to act.²³

Despite the status quo described above, the role of sub-national governments (both within federal and unitary states) in international economic system has not remained static at any point in the evolution of international law.²⁴ If anything, it has been contentious because sub-national actors are becoming increasingly active on the international economic scene, despite the international and/or domestic restrictions to their participation in this sphere.²⁵ However, due to question marks about their legitimacy, some commentators perceive the actions of sub-national governments as disruptive of the status quo. For instance, Blatter et al argue that the activities of sub-national governments on the international scene perforate the boundary between domestic and international politics, and undermine the gatekeeper position of national governments between these two spheres, but might also contribute to a restructuring of the Westphalian system of sovereign nation states.²⁶

¹⁹ Bernier 1973, at 6. See also Meyer 2017, at 10-11 and Hayes 2004, at 20. See also Articles 27 – 29, 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331 (‘VCLT’).

²⁰ See Meyer 2017, at 13-14 ff 17. See also Hayes 2004, at 20.

²¹ Meyer defines this position as ‘immunity’, which he describes as a local liability rule used by States in international law ‘...under which neither the national nor local government can be held responsible for otherwise unlawful discriminatory acts.’ See Meyer 2017, at 7. See also Bernier 1973, at 171.

²² Bernier 1973, at 171.

²³ Hayes opines that the first question to ask when examining international regulation of federal nation/states is whether the treaty language evidences an intention to ‘opt out’ of the default rule of nation/state responsibility for sub-national governments. See Hayes 2004, at 20.

²⁴ Habegger, argues that contrary to the traditional notion of foreign policy, today’s political realities do not correspond any longer with the conventional wisdom of a clear division between a domestic and a foreign policy sphere of governance. See Habegger 2003, at 244.

²⁵ Hocking 1996a, at 40, Oner 2004, at 34, and Blatter et al 2008, 171.

²⁶ A Slaughter (1997) The Real New World Order, Foreign Affairs, <https://www.foreignaffairs.com/articles/1997-09-01/real-new-world-order>, accessed 03 April 2017.

With this background context in mind, it is understandable why the CETA was a difficult deal to broker. As we would see in the subsequent sections of this paper, both parties operate contrasting federal systems of governments which have varying conceptions of foreign affairs federalism²⁷ i.e. sub-national governments in these two federal styled entities are presented with differing points of entry into an international trade process. With specific reference to the CETA, Canadian provinces played a pivotal role during the negotiation process, while EU regions played a pivotal role during the ratification process.²⁸ The aim in the next section of the paper is to identify how sub-national governments gained access to the CETA negotiation/ratification process and the impact of their participation on the process and outcome of the CETA. More importantly the analysis would highlight the significance of these developments as they relate to our understanding of cooperation in international economic law.

3. Shifting forms of Cooperation: Sub-national Governments and National Governments

3.1 Sub-national Participation in CETA: The Canada perspective

For Canada, the signing of a trade agreement with the EU was important for strategic geo-political reasons aside from just trade. Most notably, it has been argued severally that aligning with the EU was informed by the need for Canada to: ‘counterbalance US influence and reduce its dependence on its powerful southern neighbour.’²⁹With this strategic geo-political consideration in mind, it is understandable why Canada persisted in signing a trade deal with the EU, even in the face of mounting opposition from some stakeholders in Canada.³⁰

However, a major challenge for Canada when approaching international negotiations which have high stakes and economic ramifications domestically, is not usually the business and/or

²⁷ Wood and Verdun 2011, at 9.

²⁸ The role played by sub-national actors in these two countries has no doubt brought to the fore the practical implications of including and/or excluding sub-national actors from the design and implementation of international economic agreements.

²⁹ Deblock and Rioux, 2011, at 40. See also McKenzie 2014, at 234 and 242; and Wood and Verdun 2011, at 12-13.

³⁰ Geo-political justifications for trade do not guarantee the viability of the CETA. Rather it only explains one of the reasons that informed the signing of the agreement.

political case for making a deal, but rather, the challenge of how to garner the support of the provinces and/or how to accommodate the opinions, and oppositions from some or all of the provinces.³¹ This is because the Canadian constitution did not give the federal government explicit control over foreign policy at the time of Confederation.³²

The central-provincial relationship with regards to international economic relations has been steadily evolving to accommodate changing realities posed by globalisation and other geo-political changes especially as they relate to the erosion of the traditional dichotomy between domestic and international policy spaces.³³

In the run up to the CETA negotiations, the key talking point in relation to Canadian central-provincial cooperation was the request by EU for the Canadian provinces to be involved in negotiations. The EU insisted on the Canadian provinces being part of the negotiation process and it was no secret that they insisted on their involvement because a number of important sectors covered by the Canada-EU CETA such as government procurement and agriculture fall within the jurisdiction of the provinces.³⁴ There are also suggestions that the EU was keen on provincial involvement during the CETA negotiations in a bid to avoid a repeat of the problems, which arose during the Trade and Investment Enhancement Agreement (TIEA) negotiations between Canada and the EU in 2006. Specifically, Woollock argues that during the TIEA negotiations, which was a precursor to the CETA, talks were derailed precisely because the EU required broad reciprocity from Canada on deep liberalization measures which the Canadian federal government could not deliver

³¹ Generally, the constitutional configuration of the federal system in Canada gives the provinces considerable autonomy to act in certain designated spheres. See Anderson and Lecours 2006, at 21; Goff (2016) 'Canadian Trade Negotiations in an era of deep integration, at 3; Kukucha 2009c, at 21; Elgie 2007, at 67.

³² In fact, the only reference to the central government's role in international relations under the BNA is found in *s 132*, which grants the Dominion the authority to implement treaties negotiated by Great Britain. Kukucha 2008a, at 44; Kukucha 2009c, at 27. See also Bernier 1973, at 51 and De Mestral 2010, at 51.

³³ Globalisation has played a pivotal role in re-shaping the dynamics of international relations, especially as it pertains to the concept of sovereignty and accepted practices of international law in the 21st century. Slaughter argues that globalisation has challenged the sovereignty status quo of Westphalian statehood by disaggregating traditional governance structures and encouraging the emergence of new ones (global and sub-national). See Slaughter (1997) *A New World Order*. See also, Keating 1999, at 1.

³⁴ See Goff (2016) *Canadian Trade Negotiations in an era of deep integration*, 2.

without provincial support.³⁵ Paquin supports this view, also adding that the EU was keen on provincial involvement in negotiations because:

the negotiation and implementation of international trade agreements now include the jurisdiction of federated states and even municipal governments. The EU insisted on the inclusion of provincial representatives in the Canadian delegation because the Europeans are particularly interested in accessing Canadian municipal and provincial public procurement contracts.³⁶

Aside from the politics behind the provinces invitation to the negotiating table, their very presence at this stage in the negotiation of an international trade agreement of this magnitude has been celebrated as a unique milestone of central-provincial cooperation in Canada. Kukucha commenting during the negotiation stage of Canada-EU CETA stated that:

‘In the current Canada-EU negotiations, however, Canadian provinces enjoy an expanded level of engagement. In the early phase of talks, approximately 12 negotiating groups were established, with provinces actively involved in six, and often seven, of these forums. According to provincial officials, this is a significant departure from previous practices and is directly tied to EU demands for a ‘meaningful’ provincial role in negotiations.’³⁷

However, Kukucha goes on to down play the significance of this development stating that they ‘...do not represent a change in the ‘culture’ of federal-provincial engagement in matters of trade policy’.³⁸ He argued that the EU did not actually call for direct provincial participation in all areas of negotiations and that in some cases, the demands by the EU exacerbated federal-provincial tensions when Ottawa’s administrative procedures were not consistent with those of the provinces.³⁹

³⁵ Woolcock 2011, at 27. See also, D’Erman 2016, at 94.

³⁶ Paquin 2013, at 546, and 550. Van Duzer 2013, at 536 also postulates that the EU took cognisance of the fact that the Canadian provinces are not obliged to implement treaty provisions falling under their jurisdiction due to the ‘Labour Convention case principle, as such their presence was crucial for CETA to have any chance of success.

³⁷ See C Kukucha (2011) Provincial Pitfalls: Canadian Provinces and the Canada-EU Trade Negotiations, <https://www.cpsa-acsp.ca/papers-2010/Kukucha.pdf>, at 5, accessed 03 April 2017; Kukucha 2013b, at 534; Goff (2016) Canadian Trade Negotiations in an era of deep integration, at 8.

³⁸ C Kukucha (2011) Provincial Pitfalls: Canadian Provinces and the Canada-EU Trade Negotiations, <https://www.cpsa-acsp.ca/papers-2010/Kukucha.pdf>, at 5.

³⁹ *ibid.*

Other commentators such as Goff and Paquin are as sceptical as Kukucha about the CETA model ever becoming the norm for sub-national participation in future trade negotiations involving Canada.⁴⁰ Paquin commenting in 2013 stated that:

As of November 2013, Canada has participated in trade negotiations with a total of 64 countries, about one-third of the countries in the world! In none of these negotiations, however, except those with Europe, do the provinces have a seat at any table. That the CETA experience will set a precedent is therefore unlikely.⁴¹

Also, Goff concludes that ‘at the end of the day, perhaps the CETA proceedings are more a demonstration of the changing nature of the trade agenda than a revelation of governance innovations in trade negotiations.’⁴² However, the view of this paper is that the relationship between the changing trade agenda and the innovations in trade strategy evidenced in the CETA are correlated and not a one off occurrence. Looking at the evolution of provincial-federal relations prior to the CETA, this is a unique milestone in provincial-federal cooperation in Canada, which these commentators may be underestimating. Considering that previously, provinces had attempted to join Canada’s negotiating team and were refused,⁴³ having the provinces at the negotiating table for the Canada- EU CETA demonstrates the strides that have been made over the past 2 decades in federal-provincial cooperation in Canada.

Also, it is important to note that provincial presence at the negotiating table made a significant difference in the final outcome, in that their input is reflected in substance of the agreement reached between Canada and the EU. In previous consultation processes, the

⁴⁰ Goff (2016) Canadian Trade Negotiations in an era of deep integration, at 8 and Paquin 2013, at 551.

⁴¹ Paquin 2013, at 551.

⁴² Goff (2016) Canadian Trade Negotiations in an era of deep integration, at 8.

⁴³ See Anderson and Lecours 2006, at 22. For instance, when the provinces sought input into the definition of Canada’s negotiating position during the negotiations over the Free Trade Agreement with the United States in 1th 1980s, Ottawa refused and insisted on maintaining only ‘close consultation, but nor ultimate right of refusal for the provinces.’ Eventually the compromise reached was the establishment of the CCTN.

impact of the provinces was limited.⁴⁴ For instance, the EU highlighting the significance of CETA reported that:

The clear and comprehensive listing of the reservations [by the provinces] provides unprecedented transparency on existing measures, in particular at provincial level. Canada for the first time includes explicit provincial and territorial reservations, guaranteeing to EU service providers the benefit of the current market access, without risk of future restrictions different or additional to those listed, as well as the benefit of any future liberalisation that Canada may undertake.⁴⁵

Elsewhere, the Canada- EU CETA has been described as: ‘... a game changer in that for the first time, Canada agreed to provide a negative list of specific existing non-conforming measures or provinces and territories that are grandfathered, instead of a blanket reservation.’⁴⁶ In line with this, on the 8th of July, 2016 provincial trade ministers decided to revise their internal-trade agreement wherein the erstwhile existing ‘positive list’ of deregulated sectors will now be replaced by a ‘negative list, with only a limited number of sectors being exempt from free trade.’⁴⁷ Also, a new mechanism will be created to harmonise provincial regulations whereby provinces are to offer each other the same access Canada does

⁴⁴ The most notable achievement by the provinces in this era of negotiation was during the Doha multilateral negotiation and the NAFTA negotiation processes. During these negotiations, the provinces’ objection to certain issues was reflected in the final negotiation position adopted by Canada. Specifically, Kukucha identifies that the original US proposal for art 2.2 of the WTO Agreement on Subsidies and Countervailing Measures (SCM), which Washington intended to use as a limitation on the competitive state subsidies in Canada, was opposed by Canada because the provinces- specifically Ontario and Quebec- opposed it during the negotiation process. See Kukucha 2009c, at 37.

⁴⁵ European Union (2014) EU- CETA – Summary of the final negotiating results, December 2014, http://trade.ec.europa.eu/doclib/docs/2014/december/tradoc_152982.pdf, accessed 03 April 2017.

⁴⁶ Côté, (2016) From Sea to Sea: Regulatory Space of Federal and Provincial Governments in Canada under CETA and TPP Investment Chapters, 18 July 2016, *Cote,-A-Mari-Usque-Ad-Mare.pdf*, at 23, accessed 03 April 2017. See also, De Mestral who points out that the CETA takes a negative list approach to exceptions, something the EU had been reluctant to adopt until this point. See A De Mestral (2016) The Canada-European Union Comprehensive Economic and Trade Agreement (CETA): A Convergence of Canadian and EU Interests, at 3.

⁴⁷ The Economist (2016) Canada's internal trade: The great provincial obstacle course, 23 January 2016, <http://www.economist.com/news/americas/21702495-country-far-being-single-market-may-be-about-change-gre-at-provincial>, accessed 03 April 2017.

to countries with which it has trade deals. Brad Duguid, Ontario's minister responsible for trade, has described the agreement as 'unprecedented.'⁴⁸

It is safe to say that these comments about the uniqueness of the CETA Agreement have a lot to do with the negotiation strategy adopted. A caveat here is that this paper does not suppose that the use of comprehensive listing of reservations as against blanket provisions in the CETA is more effective, as only time will tell. However, it is interesting to point out that these reserved provincial and territorial measures reflected in CETA are evidence that federal principles such as cooperative federalism are being exported from Canada into the global constitutional discourse in international economic governance. This is an important step for all involved actors, if we take into consideration that sub-national actors and non-state actors have hitherto been side-lined as legitimate involved actors in international relations. The very presence of provincial negotiators during the CETA negotiations situates sub-nationals within a transnational regime, which is in a process of evolution. To put this in context, Kukucha had written during the negotiations that:

There is a perception among some Canadian officials that European negotiators are attempting to transfer EU standards and practices to the North American market. This has created an atmosphere of extreme caution within provincial negotiating teams, which further limits the possibility of a comprehensive, ground breaking, accord.⁴⁹

However in retrospect, that turned out not to be the case, with the deal being concluded despite the stiff oppositions faced. This shows a resilience and strength in the cooperative mechanism/intergovernmental linkages within Canada, which should not be underestimated.

More so, in a world, which is rapidly morphing into mega-regional clusters, the rules of engagement for this new phase of international economic relations are still relatively undefined and as such are open to new theories and practices from the participating countries. Thus, where there was previously limited engagement of sub-nationals in negotiation of international economic deals; the CETA is setting a precedent worthy of note.

⁴⁸ *ibid.*

⁴⁹ C Kukucha (2011) Provincial Pitfalls: Canadian Provinces and the Canada-EU Trade Negotiations, <https://www.cpsa-acsp.ca/papers-2010/Kukucha.pdf>, at 1.

3.2 Sub-national Participation in CETA: The EU Perspective

Although the EU project is currently facing its toughest test in the wake of rising nationalist sentiments sweeping across Europe, it no doubt remains a unique and ambitious model of regional integration which may never be replicated again. Among the distinguishing features of the EU as an intergovernmental organization is the fact that it retains ‘exclusive competence’ to act in some areas while excluding parallel competence for the Member States to operate in those specified areas.⁵⁰ More so, the EU also enjoys exclusive competence regarding external relations with third states.⁵¹

However as Rosas explains, although the EU has ‘so-called exclusive competence’ for external relations, the governance structure for the EU’s external relations is far more complicated than that. For instance, in relation to subject areas where the EU does not have internal competence, its ability to act externally in such areas is in most cases *shared* with the Member States. As such, agreements concluded under areas of shared competence usually become ‘*mixed agreements*’ which means that they will be open for conclusion by not only the EU but also its Member States.⁵² In addition, EU Member States continue to conclude international agreements in their own names without the participation of the European Union

⁵⁰ See Article 2 Treaty on the Functioning of the EU (‘TFEU’). Rosas argues that ‘the question of exclusive competence should be seen in the broader context of the competence and powers of the European Union in external relations and its treaty relations with third states in particular.’ See Rosas 2015, at 1073.

⁵¹ See TFEU, Articles 3, 207 and 218. The management of external relations with third countries is one of the longest standing competences of the EU, which evolved as a necessary corollary of the Common Commercial Policy of the EU. This was reflected in The 1957 Treaty of Rome which provided that an internal customs union required a uniform external tariff and single trade arrangements with third countries. Accordingly, the EC members at the time, delegated authority for external relations to the European institutions on matters connected to the attainment of the customs union; effectively empowering the European Commission with the responsibility of speaking with one voice in international economic negotiations with third countries, and setting the expectation that enlargement to future members would mandate the criterion of pooling sovereignty in the same way. See Woll 2011, at 42 and Morrissette 2012, at 602.

⁵² Schütze 2009, at 308. See also See Morrissette 2012, at 603-604 who points out that ‘In the case of a mixed agreement, no rules exist for how the negotiations should be conducted. Sometimes the member states will mandate the Commission itself or the Presidency of the Council to negotiate and initial the draft mixed agreement on their behalf. At other times these processes are taken on by a negotiating team consisting of the Commission, acting for the EU according to Article 218 TFEU, and representatives of the Council, acting for the member states.’

as a contracting party, sometimes including matters which belong to an EU exclusive or shared competence.⁵³

With regards to the engagement of sub-national governments in external relations, the EU structure is remarkably different from what is obtainable in Canada.⁵⁴ Notably, sub-national governments within the EU are not formally incorporated into the negotiation process for treaties and other trade agreements between the EU and third parties.⁵⁵ Although EU regional governments have a recognised voice in EU policies making, via the instrumentality of the Committee of Regions (CoR) and the application of the subsidiarity principle, their contributions are mainly consultative.⁵⁶ However, as we progress into an era where mega-regional PTAs are raising more suspicions than optimism about the effect of globalisation on local communities and economies across Europe, regional governments are coming under increased pressure to stand up in Brussels for their constituents. For example, after the conclusion of the CETA, it was stated in a communiqué issued by the European People's Party Group (EPP Group) of the CoR that for future EU trade agreements, there is need for: 'increased transparency; consultation with regional parliaments; clear distinctions on what trade agreements cover; unlimited rights for regional and local authorities to regulate and decide how public services should be provided; regional impact assessments before trade agreements are concluded.'⁵⁷ It is argued that the tone of this statement issued by the EPP Group of the CoR captures displeasure on the part of the CoR towards being excluded during the PTA negotiation process by the EU and is reflective of a rising disquiet among the CoR about the trajectory of mega-regional agreements. This view is supported by the diplomatic

⁵³ Rosas 2015, at 1074

⁵⁴ For an in-depth comparison of both systems, see Morrissette 2012, at 577-616.

⁵⁵ See D'Erman 2016, at 91.

⁵⁶ See TFEU. Article 5. Generally, the EU has recognised the need for differentiation in its harmonisation technique by encouraging experimentation in policy formulation at local levels under the guidance of the subsidiarity principle. However, in the area of international trade which falls under the Commission's express external competence to act on commercial policy, the regions only have an advisory role on these matters. See Schütze 2009, at 347; Kresl 1994, at 309; Morrissette 2012, at 602; and Panara 2010, at 60-61

⁵⁷ See European People's Party Group (2016) Trade for All: from the Heart of Europe to its Outermost Regions, 1 March 2016, <http://epp.cor.europa.eu/press-releases/trade-for-all-from-the-heart-of-europe-to-its-outermost-regions/>, accessed 03 April 2017.

efforts being channelled towards assuaging the CoR by the EC. For instance, the EU Trade Minister Cecilia Malmström visited the CoR in February 2015, to reassure them that the voices of the regions will be heard in the negotiations of the TTIP.⁵⁸ Excerpts from the meeting included what could be considered a ‘thinly veiled threat’ from the regions that:

Given that TTIP may require the approval of regional parliaments, and in the light of its substantial regional and local dimension, the CoR urges the European Commission to include the Committee in the advisory group as is the case for civil society representatives.⁵⁹

Mr. Töns, speaking on behalf of the CoR stressed that, ‘Local and regional representatives should therefore be involved in all the next steps of the negotiation and the Committee of the Regions will be a key partner in this process.’⁶⁰ The response of Cecilia Malmström was that:

What you, in the Committee of the Regions, say here in Brussels is based on a deep understanding of people in your region. And when you speak about European policy at home, you can connect our work to their lives like no other part of the EU system. That’s why your role in the public discussion about this negotiation is so important.⁶¹

This however is not a view supported by D’Erman who argues that the CETA was more frictional in Canada than within the EU and that this was due in part to the fact that the EU had more leverage through which to conduct negotiations unlike in Canada.⁶² According to her, ‘the delineation of competences within the EU with regard to international trade made for a more streamlined process, in contrast to the Canadian form of provincial-federal involvement in negotiations.’⁶³ She further argues that this is testament to the efficacy of intergovernmentalism within the EU—which she believes ‘...has more integration between regional and central levels with regard to trade negotiations than does Canada, which instead

⁵⁸ See Committee of Regions (2015) EU regions eager to exploit TTIP potential but urge for guarantees on public services and protection standards, 13 February 2015, <http://cor.europa.eu/en/news/Pages/ttip-potential.aspx>, accessed 03 April 2017.

⁵⁹ *ibid.*

⁶⁰ *ibid.*

⁶¹ *ibid.*

⁶² D’Erman 2016, at 91.

⁶³ *ibid.*

provides an example of sharper debates between the provincial and federal levels.⁶⁴ D'Erman is correct that sub-national governments within the EU have little opportunity to dictate the negotiation process formally as their Canadian counterparts have been able to. However, this paper differs on the point that the formal exclusion of sub-national governments in the EU from the negotiation process of international trade agreements such as the CETA is a model of intergovernmentalism, which leads to less friction. Importantly, the EU system just like Canada has had to contend with challenges by some sub-national governments in Belgium and Germany which had a significant say in the outcome of the recent CETA. This occurred in relation to the 'Walloon stand-off' during the CETA, where there was uncertainty within the EU as to whether the CETA was an EU only agreement or a mixed agreement. This uncertainty created a loophole, which was exploited by Wallonia to hold off the ratification of the CETA.⁶⁵ Considering that unlike the Canadian situation, sub-national governments within the EU were not party to the negotiation process, and therefore their intervention during the ratification process became even more dramatic when it occurred. There is an argument that the choice of a mixed agreement for the CETA was a wrong strategy by the EU, which made it possible for Wallonia to influence the ratification process.⁶⁶ However, the options of agreements which the EU can adopt in this day and age are not a straightforward choice anymore. With the content and scope of economic agreements going into erstwhile uncharted areas, there is no guarantee that the EU can adopt agreements of such magnitude and complexity without involving sub-national actors and civil societies in some capacity. Another viewpoint held by some commentators is that Belgium

⁶⁴ *ibid.*

⁶⁵ There is still uncertainty as to whether the CETA will eventually be classified as a 'mixed agreement' or an 'EU Agreement'. According to a European Parliament Press release in July 2016, the Commission was faced with a dilemma because although it favoured presenting CETA as an 'EU-only' agreement, in contrast, many Member States argued for the agreement to be a mixed agreement. Specially, in a letter to the European Commission signed in June 2014 by 21 chairs of relevant committees in national parliaments, there was a demand for CETA, and even the future Transatlantic Trade and Investment Partnership (TTIP), to be considered as mixed agreements, since both agreements contain provisions that concern policy areas which are within the competences of the Member States. See European Parliament Research Service (2016) Is CETA a mixed agreement?, 1 July 2016, [http://www.europarl.europa.eu/RegData/etudes/ATAG/2016/586597/EPRS_ATA\(2016\)586597_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2016/586597/EPRS_ATA(2016)586597_EN.pdf), accessed 03 April 2017.

⁶⁶ Rosa argues that in the EU's relations with third states, third states '...will normally prefer EU agreements to mixed agreements, wishing to avoid the complexities and uncertainties stemming from mixed agreements who, on the EU side, is responsible for what?' see Rosa 2015, at 1075.

and its complicated system of federalism is to blame for the CETA debacle. However, it is argued in this paper that Wallonia's action during the CETA is a reaction to a system, which unlike Canada is not used to robust dialogue usually associated with traditional federal systems. This may be due to the peculiar nature of the EU's federal system, which unlike Canada has to grapple with more layers of levels of complexity within its multi-level governance framework. Hence, the propensity of sub-national governments within traditional federal systems such as Belgium and Germany to challenge the status quo is not abnormal. Considering the backlash that Wallonia received in the wake of its challenge to the CETA, it is clear that perception about sub-national governments as involved actors in international economic relations still continue to divide opinion.⁶⁷

⁶⁷ Within the EU and across the world, opinions are divided over the action of Wallonia during the Canada-EU CETA. Those who are opposed to the capitalism, globalisation and free trade tenets obviously welcome these developments. However, those in favour of these principles have questioned the motives behind Wallonia's action and have raised concerns about the future of international trade liberalisation. Verlaine points out that: 'The revolt by the Socialist-led regional parliament [of Wallonia] representing just 0.7% of the EU's population is a microcosm of a broader backlash against globalization, under which the region hasn't flourished.' See Verlaine (2016) World News: A Belgian Region's Anti-Globalization Stand Once an Industrial Powerhouse, Wallonia has Hit Hard Times in the Post-War Era of Expanding Free Trade, The Wall Street Journal Asia, 28 October 2016. Also, the action by Wallonia has been welcomed by some activists who see it as a new constitutional weapon to scupper future mega-regional trade deals. For instance in a publication by Namur, it is stated that: '...Because many of the provisions in CETA and TTIP fall within the ambit of regional government, the Walloon resolution is of huge importance. To acquire legal force, CETA must be approved and ratified by all EU member-states and the resolution is therefore a decisive first step towards ensuring the non-adoption of the treaty.' See Namur (2016) Good news! The war on TTIP and CETA can be won, Pour Écrire la Liberté, 10 May 2016, <http://www.pour.press/good-news-the-war-on-ttip-and-ceta-can-be-won/>, accessed 21 September 2016.

A columnist writing in the Economist argued that: 'CETA would make Europe EUR 5.8 billion a year richer, by one estimate. But the real danger of letting Wallonia derail it is the precedent it would set. With so many potential vetoes, ... it is hard to imagine the Transatlantic Trade and Investment Partnership (a much bigger deal between America and the EU) being passed.' See The Economist (2016) Hot-air Walloons; The Canada-EU trade deal, The Economist, 22 October 2016, <http://search.proquest.com.proxy.library.dmu.ac.uk/saveasdownloadprogress.getfilefor>, accessed 10 March 2017. See also, a publication in Newstex, where it is argued that there is a 'globalisation trilemma' (i.e., a scenario where stakeholders the world over are attempting to have the most two of: economic integration, national sovereignty and democracy), which creates a hard choice for all stakeholders involved in the economic liberalisation process. It is further argued that this is however impossible because 'Liberalisation, like many economic shifts, creates winners and losers. Many existing political structures advantage the votes of the losers, giving them, in many cases, the ability to block changes that generate net, though unevenly distributed, benefits. In order to move toward greater liberalisation, then, one either has to ignore popular opinion in these places

It is also argued that the Wallonia may not have opposed the CETA ratification if it did not feel pressured by genuine concerns about the impact of the CETA on its local economy and perhaps by external influences to take the steps, which it did. It is doubted if Wallonia realistically fancied its chances of coming out on top against the EU system. It appears that Wallonia was simply standing up as a proxy for the growing opposition movement against the proliferation of mega-regional trade deals.

4. Conclusion: The CETA and implications for the future

We can predict with some degree of confidence that sub-national governments in Canada and the EU will play a role of some sort in future mega-regional economic deals.⁶⁸ What is not so clear at present is whether the CETA model of direct provincial involvement during negotiations will be replicated and/or become accepted practice within these two systems (i.e. Canada and the EU) and the broader international system. As we have seen from the comments made by Canadian commentators, they are not so optimistic that that would be the case. However, one thing is clear, the dynamics of cooperation after the CETA process will never return to the status quo. Whatever role sub-national governments might play in future mega-regionals, it is obvious that the events which unfolded during the CETA are more than the proverbial ‘storm in a teacup’. What are most noticeable from the CETA are the patterns of engagement, which emerged on either side of the Atlantic. Most notably, the alignment of across the Atlantic demonstrates a growing capacity of non-traditional involved actors in international relations to influence the processes which were erstwhile dominated exclusively by States and international organisations. However, these developments must not be divorced from another reality, which is the fact that the participation of sub-national actors in international relations will always be fraught with challenges. However, one certainty in the days ahead is that the globalisation juggernaut has fragmented the existing order in international relations and opened up new possibilities for interactions, which seemed unthinkable less than 50 years ago.

(abandoning the democracy leg of the trilemma), or change the locus of political decision-taking (abandoning national sovereignty).’ See Newstex (2016) The Economist: Free exchange: Making sense of the Wallonian veto, Newstex, 24 October 2016, <http://search.proquest.com.proxy.library.dmu.ac.uk/saveasdownloadprogress.getfileform>, accessed 10 March 2017.

⁶⁸ According to Goff, ‘Future research should focus less on establishing that subnational actors will be involved in trade agreements and more on establishing when they will be involved.’ See Goff (2016) Canadian Trade Negotiations in an era of deep integration, at 7.

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