The Role of Sub-National Actors in International Economic Relations:

Lessons from the Canada-European Union CETA

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1. Introduction

In 2009, Canada and the European Union (EU) commenced the negotiation process for a Comprehensive Economic Trade Agreement (from now on referred to as CETA). The CETA was an eagerly anticipated deal which had been in the pipeline for some years. The CETA aims to eliminate an estimated 98% of customs tariffs between both parties and more importantly tackle issues relating to non-tariff barriers such as special licensing, regulatory

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2 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 Stanko 2012, at 4. Regarding concluding a PTA, there had been several attempts in the past to bring both parties to the negotiating table. Notably, in 1976, Canada and the EU signed a Framework Agreement for Commercial and Economic Cooperation. Subsequently, other bilateral agreements followed. These include the Transatlantic Declaration of 1990, which established how Canada and the EU consult with each other. There was also the Joint Canada-EU Political Declaration and Action Plan of 1996, which outlined commitments of both parties to working together in many areas. Furthermore, the Canada-EU Partnership Agenda of 2004 strengthened the relationship between these two sides. 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 Deblick and Rioux, 2011, at 51-53.
regimes, and anti-dumping measures between Canada and the EU. After seven years of negotiations, both parties finally signed the CETA in October 2016.

The CETA belongs to a genre of Preferential Trade Agreements (PTAs), which are cross continental and expansive in their scope. These PTAs popularly referred to as mega-regional agreements, are arguably trailblazers in regional economic integration, such as the North American Free Trade Agreement (NAFTA) was more than two decades ago. However, the rise of mega-regional agreements has divided opinions across the world. 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. For instance,

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3 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 of the agreement. See D’Erman2016, 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.


5 Mega-regionals are described 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-megaregional/, 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 this 21st century PTAs).

6 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.

7 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 about 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: ‘…CETA’s 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
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. More so, concerns have been raised about the impact of mega-regional trade agreements on areas such as local content or local hiring policies, and on vital public services like water and wastewater systems. For example, it has 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.

These concerns about the far reaching scope of mega-regional PTAs are more heightened from the perspective of sub-national actors in federal countries as against non-federal countries. This is mainly because of federal countries; unlike other non-federal countries by

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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 acts (civil societies) recorded considerable success 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/](http://www.pour.press/good-news-the-war-on-ttip-and-ceta-can-be-won/), accessed 21 September 2016. H Sponenberg (2016) European cities and regions rally to stop TTIP, Euro Observer, 25 April 2016, [https://euobserver.com_regions/133173](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](https://cupe.ca/ceta-corporations-loop-canadians-dark), accessed 29 March 2017.
their very nature have a more delicate power balance, which is being tested by the ever-increasing encroachment of international economic disciplines.\textsuperscript{10}

The propensity for sub-national governments in federal countries to affect the processes of international norms was a prominent feature during the CETA, 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.\textsuperscript{11} For sub-national governments within the EU, this was not the case. They did, however, have their say on the outcome of the CETA deal. Notably, Wallonia, a sub-national region in Belgium with a population of just over 3.5 million almost unravelled the whole process when it opposed the national ratification process of the CETA in Belgium.\textsuperscript{12} These recent developments associated with the CETA bring to the fore a growing significance of sub-national governments 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.

\textbf{1.1 Aims, objectives and scope of paper}

Using the CETA as a case study, this paper seeks to identify evidence of shifting forms of cooperation observable in the design and negotiation of new styled PTAs springing up in the world trade and investment system. To achieve this aim, the analysis will focus on the


\textsuperscript{11} See Kukucha 2013b, at 534; Paquin 2013, at 551 and Goff (2016) Canadian Trade Negotiations in an era of deep integration, at 8.

\textsuperscript{12} Also, there have been constitutional challenges to the CETA among the other EU Member States operating federal systems such as in 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 to 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 favor of Germany ratifying the CETA deal. See BBC (2016) Thousands challenge EU-Canada trade agreement in the 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.
different strategies adopted by Canada and the EU to engage their sub-national governments in the CETA negotiation/ratification process, and the possible implications for future mega-regional trade agreements. To put the discussions in the 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 to engage their sub-national governments in the CETA negotiation process; and

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’ being made against these new styled mega-regional economic agreements.

Due to the limited scope of this paper, the reference to sub-national governments in Canada is primarily used in the context of provincial governments. Although municipalities and cities are interested parties who have contributed to the CETA process, they are not the primary focus of this paper. This is because they were not involved in direct negotiations during the CETA. They would, however, be referred to severally, especially in the context of civil society engagement with political actors during the CETA. Furthermore, the reference to sub-national governments within the EU is used loosely to refer to the generality of regional and local governments within the EU member states. The main reference in this paper would be to the Committee of Regions (CoR), which is an institution of the EU that represents the interests of regional governments in Europe.

2. Contextualising the analysis: Federal 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 divided competencies among multiple levels of government.  

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.' Bernier also points out that international law had initially failed to recognize the particular challenges presented by federal systems when designing international law instruments. As such, federal systems have always been at the centre of controversies surrounding sub-national participation in international relations. 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. In line with this approach, the conventional position in international law for the better part of the Westphalian era of statehood is that federal systems have a responsibility ensure that their sub-national governments do not infringe the international law obligations which the State is subject to. This obligation applies as the default rule unless a contrary intention is evidenced in the text of an international treaty. In some instances, international treaties have ‘opt out’ clauses negotiated into them. This can operate by way of federal state clauses, which make it possible for federal systems to


14 Wheare 1963, at 183.

15 See Bernier 1973, at 1-6 and 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.

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


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

20 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.

21 Bernier 1973, at 171,
expressly escape liability if their sub-national units do not comply with the requirements of a treaty in areas where they have the constitutional competence to act.\textsuperscript{22}

Despite the status quo described above, the activities of sub-national governments (both within federal and unitary states) in the international economic system have remained contentious, with sub-national actors becoming increasingly active on the international economic scene; despite the international and domestic restrictions to their participation in this sphere.\textsuperscript{23} 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.\textsuperscript{24} Contrastingly, there is another school of thought – the ‘revisionist’ school, which is more amenable to the idea of sub-national governments gaining both legitimacy and responsibility for their actions on the international scene.\textsuperscript{25} In the context of foreign affairs federalism, revisionist scholars question the conventional norm of ‘central exclusivity’ in international relations. They instead advocate shared (concurrent) competence between central governments and sub-national actors on matters of foreign policy.\textsuperscript{26}

With this background context in mind, it is understandable why the CETA has been a complicated deal to conclude. As we would see in the subsequent sections of this paper, both parties to the CETA agreement operate contrasting federal systems of governments which

\textsuperscript{22} Hayes opines that the first question to ask when examining the 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.

\textsuperscript{23} 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. See also Hocking 1996a, at 40, Oner 2004, at 34.


\textsuperscript{25} Revisionism encompasses theories, which seek to modify previously accepted norms or historical accounts. For in-depth discussions on the origin, scope and application of revisionism see Morgan 1979, at 525 and Fitzpatrick 2008, at 682.

\textsuperscript{26} See Spiro 1999, at 1223 and 1225 - 1226; Goldsmith 1997, at 1617 and 1643 – 1644; Bradley 1999, at 1089.
have varying conceptions of foreign affairs federalism\textsuperscript{27} i.e., sub-national governments in these two federal styled entities are presented with differing points of entry into an international trade process. With particular reference to the CETA, Canadian provinces played a pivotal role during the negotiation process, while EU regions played a central role during the ratification process.\textsuperscript{28} The aim in the next section of the paper is to identify how sub-national governments (either side of the Atlantic) gained access to the CETA negotiation/ratification process and the impact of their participation in the process and outcome of the CETA. Moreover, 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 is important for strategic geopolitical reasons aside from just trade and investment. Most notably, it has been argued by several scholars that deal with the EU is informed by the need for Canada to: ‘counterbalance US influence and reduce its dependence on its powerful southern neighbour.’\textsuperscript{29} With 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.\textsuperscript{30}

However, a major challenge for Canada when approaching international negotiations is not usually the business and political case for making a deal, but rather, the challenge of how to garner the support of the provinces and how to accommodate the opinions, and oppositions

\textsuperscript{27} Wood and Verdun 2011, at 9.

\textsuperscript{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 excluding sub-national actors from the design and implementation of international economic agreements.

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

\textsuperscript{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.
from some or all of the provinces. This stems from the ambivalent nature of Canada’s constitutional regime as it pertains to allocation and definition of competencies for the central and provincial governments respectively.31 The constitutional provisions which relate to the allocation of powers for foreign relations in Canada include section 91(2) - the treaty-making power, the trade and commerce power, and the Peace, Order and Good Government (POGG) clause; and section 132 of the Constitution Act 1867- Treaty Obligations.32

Section 91(2) of the Constitution Act, 1867 states that:

It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,… (1) The Regulation of Trade and Commerce33

Section 132 also states that:

The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.

31 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 30 & 31 Vict c 3. In 1982, the BNA which is Canada's founding constitutional document was renamed the ‘Constitution Act 1867’. The Peace, Order and Good Government (POGG) clause is the introductory phrase of section 91 of the Constitution Act, 1867, which outlines the scope Parliament’s legislative jurisdiction in Canada. This clause [the POGG clause] enables the central government to legislate on matters relating to foreign policy in Canada, especially on matters not specifically conferred upon the provinces, i.e., on ‘residuary’ matters. See Stewart 2007 at 67 and McLellan A and Gall D 2006.

33 30 & 31 Vict c 3.
Prima facie, the combined effect of sections 91 (2) and 132 gives an impression that Ottawa inherited unfettered powers from Great Britain over international relations as it pertains to external trade and commerce. However, the scope of Ottawa’s control enumerated above is in reality subject to limitations. First, section 132, only granted the Dominion authority to implement treaties negotiated by Great Britain.\(^34\) Second, further limitations arise from the fact that section 92 of the Constitution Act, 1867 grants the provinces jurisdiction over property and civil rights including the regulation of contracts, the effects of which have a significant impact on the conduct of international trade.\(^35\) Third, precedent from the case of Canada (AG) v Ontario (AG)\(^36\) has further exacerbated the uncertainty because it was held in this case that Ottawa had powers to negotiate international treaties; but that it did not have the right to implement agreements in areas of provincial jurisdiction.\(^37\) This supposes a dualised conceptualization of foreign affairs in Canada.\(^38\) More so, in subsequent cases, the Supreme Court of Canada took a cautious stance and did not rely on the precedence from the ‘Labour Convention case’ to rule in favour of either level of government, preferring instead to maintain a balance between federal and provincial authority in this area.\(^39\) This was presumably calculated to encourage co-operation between the central government and the provinces on matters of foreign relations. The outlook of these provisions and the interpretation given by the Canadian courts have given the provinces opportunities to express themselves at the international level, especially regarding foreign investment facilitation activities (e.g., promotion and the opening of trade offices in other countries).\(^40\)

\(^{34}\) Kukucha 2008a, at 44; Kukucha 2009c, at 21 and 27. See also Bernier 1973, at 51 and De Mestral 2010, at 51.

\(^{35}\) Ibid, generally see Citizens Insurance Company v. Parsons, (1881) 7 App Cas 96. In this case, the Supreme Court of Canada did not use trade and commerce to entrench federal or provincial power. Instead, ‘it reaffirmed that there was no federal power to regulate a single trade or business; and, it indicated that issues...must be determined on a careful case by case basis.’ See also Kukucha 2008a at 44.


\(^{37}\) ibid. See particularly the dictum of Lord Atkinat para. 353-354. See also Morrissette 2012, at 583 and Kukucha 2009c, at 21.

\(^{38}\) See Delagran 1992, at 18 and De Beer 2012, at 54.

\(^{39}\) Kukucha 2009c, at 27.

\(^{40}\) Kukucha 2009c, at 28-35; Kukucha 2008a, at 44 and Anderson and Lecours 2006, at 22-23.
With regards to international trade negotiations, the central-provincial relationship has steadily evolved to accommodate changing realities posed by globalisation and other geopolitical changes. The impact of globalisation on the central-provincial relationship in Canada has especially been obvious as they relate to the erosion of the traditional dichotomy between domestic and international policy spaces. Over the years, international trade agreements have increasingly expanded in scope to involve issues of provincial interest such as services, agriculture, alcohol, government procurement, national health, and safety standards, energy, and environment and labour now frequently come up in international trade deals. Ottawa responded to the expanding scope of international trade norms and the attendant increase in provincial concerns about these agreements by attempting to institutionalise the interests of the provinces within the Canadian international trade mechanism. For instance, during the Kennedy rounds of GATT negotiations in the 1960s, some provinces submitted formal reports on tariff policy to the federal government and called for greater involvement in the negotiations. Even though Ottawa was still sceptical about the involvement of provinces at this point, this marked the birth of channels of co-operation between the provinces and Ottawa concerning international trade negotiations. Since then, the Central-provincial cooperative mechanism in Canada's international trade talks has grown from strength to strength.

Initially, a Federal Provincial Co-ordination Division (FPCD) was introduced under the Ministry of External Affairs. The FPCD became responsible for keeping the provinces informed of all relevant Canadian international initiatives. Other formal mechanisms introduced by Ottawa for the input of the provinces in international trade negotiations include

41 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.

42 See Kukucha 2009c, at 35 and Kukucha 2008a, at 43. More recently during the CETA negotiations, new areas of provincial interest have included topics such as technology-related topics, involving biotechnologies and information communications technologies. De Beer 2012, at 52.

43 ibid.


45 For details of the role of the FPCD in central-provincial co-ordination in Canada, see Hocking 1993b, at 193-195.

46 ibid.
The Canadian Trade and Tariffs Committee (CTTC) introduced during the ‘Tokyo round.’ Subsequently, an ‘…Ad hoc federal-provincial committee of deputy ministers was established in 1975, which was replaced by a Canadian Co-ordinator for Trade Negotiations (CCTN) in 1977.’ In 1985, during the build-up to the negotiations of the Canada-US Free Trade Agreement (CUFTA) Agreement, ‘The Premiers of British Columbia, Alberta, Saskatchewan, and Manitoba all announced their support for ‘full provincial participation.’ This led to a commitment to continued consultation within the CCTN.

In 1987 after the CUFTA agreement was implemented, the CCTN metamorphosed into the Committee for the Free Trade Agreement (CFTA) with each province having one official representative. A series of consultative committees were also instituted within various provincial departments to cater for sectoral concerns. The use of such committees became popular in the central government - provincial relationship on international trade negotiations throughout the 1980s. For example during negotiations for NAFTA, an additional committee - the Committee for North American Free Trade Negotiations (CNAFTN) was introduced along with the CFTA. Although the CNAFTN was tailored specifically for the NAFTA negotiations, it subsequently metamorphosed into the Federal-Provincial Territorial Trade Committee (CTRADE) system. Under the CTRADE, both levels of government engage in consultations and information sharing, which includes Ottawa making draft documents available to the provinces when Canada enters negotiations in areas of provincial

47 The CTTC was responsible for gathering briefs from businesses, unions, consumer groups, the provinces and other interested parties during the Tokyo Round of trade negotiations. See Protheroe, 1980, at 156; Winham 1986, at 334-337 and Kukucha 2009c, at 36.

48 See Winham 1986, at 332.

49 Kukucha 2009c, at 36.


52 Kukucha 2009c, at 35.

53 Delagran 1992, at 20; Paquin 2013, at 548.

54 Anderson and Lecours 2006, at 52.

55 CTRADE is the current federal – provincial co-operation forum in Canada. It involves a series of meetings between Ottawa and the provinces, which are held four times annually. ibid.
jurisdiction.\textsuperscript{56} In summary, before the CETA, co-operation between Ottawa and the provinces on matters relating to international trade negotiations has been substantial but never extended to actual participation in the negotiation itself.

In the run up to the CETA negotiations, a key talking point concerning Canadian central-provincial cooperation was a request by the EU for Canadian provinces to be involved in negotiations. It was no secret that the EU insisted on the Canadian provinces being part of the bargaining process because some critical sectors covered by the CETA such as government procurement and agriculture fall within the jurisdiction of the provinces.\textsuperscript{57} 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, Woolock argues that during the TIEA negotiation, 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 without provincial support.\textsuperscript{58}

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

\textsuperscript{56} Ibid 54. See also Fafard and Leblond (2012) 21\textsuperscript{st}-Century Trade Agreements: Challenges for Canadian Federalism, at 22.

\textsuperscript{57} See Goff (2016) Canadian Trade Negotiations in an era of deep integration, 2. See also 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.

\textsuperscript{58} Woolock 2011, at 27. See also, D'Erman 2016, at 94.
from previous practices and is directly tied to EU demands for a ‘meaningful’ provincial role in negotiations.\(^5^9\)

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.’\(^6^0\) He argued that the EU did not 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.\(^6^1\)

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.\(^6^2\) 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.\(^6^3\)

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.’\(^6^4\) However, the view in 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. Some arguments are proffered in support of this view.


\(^6^1\) ibid.


\(^6^3\) Paquin 2013, at 551.

\(^6^4\) Goff (2016) Canadian Trade Negotiations in an era of deep integration, at 8.
First, looking at the evolution of provincial-federal relations before the CETA, direct access to negotiations for Canadian provinces 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 direct participation;\textsuperscript{65} having the provinces at the negotiating table for the Canada-EU CETA demonstrates the strides that have been made over the past two decades in federal-provincial cooperation in Canada.

Second, it is important to note that provincial presence at the negotiating table made a significant difference in the outcome of the signed CETA agreement, in that their input is reflected in the substance of the agreement reached between Canada and the EU.\textsuperscript{66} 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.\textsuperscript{67}

Furthermore, Côté has described the CETA 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.’\textsuperscript{68} In line

\textsuperscript{65} 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 the 1980s, Ottawa refused and insisted on maintaining only ‘close consultation, but nor an ultimate right of refusal for the provinces.’ Eventually, the compromise reached was the establishment of the CCTN.

\textsuperscript{66} 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 such as 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 reflected in the final negotiation position adopted by Canada. See Kukucha 2009c, at 37.


\textsuperscript{68} 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
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.\textsuperscript{69} Also, a new mechanism will be created to harmonise provincial regulations whereby provinces are to offer each other the same access Canada does to countries with which it has trade deals. These changes are not unconnected with the fact that the provinces feel included in the CETA negotiations; hence, they are more willing to make concessions like this. To buttress how significant this is, Brad Duguid, Ontario's minister responsible for trade, has described the agreement reached by the provinces (i.e., the agreement to revise their internal trade agreement) as ‘unprecedented.’\textsuperscript{70} 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 efficient, as only time will tell.

The unprecedented nature of internal bargaining between Ottawa and the provinces during the CETA negotiation process can be better appreciated when considered from a broader perspective of the year books theme – ‘shifting forms of cooperation in international economic law.’ Referring back to status quo discussed in section 2 of this paper, a significant difference between what was obtainable in Ottawa-provincial relations pre-CETA and post-CETA is that the CETA marks a shift in the direction of the negotiation process for international economic agreements in Canada. Pre-CETA, provinces in Canada had ‘low level’ participation/involvement in a linear process. This occurred only during the consultation phase of trade negotiations, as seen in the era of the CCTN and more recently the C-Trade committees. However, with the CETA negotiations, Canadian intergovernmental cooperation has metamorphosed from ‘low level’ participation for sub-national governments’ to a ‘higher level’ of participation. It is argued that provincial involvement during CETA negotiations constitutes a greater level of participation because the insistence of the EU on Canadian provinces joining direct talks indicates a new degree of priority attached to sub-national involvement in international trade relations. Furthermore, it underscores a growing


\textsuperscript{70} ibid.
realisation in international economic relations that it is no longer plausible to neatly compartmentalize domestic and international policies as separate issues. ⑦¹ In this regard, a lesson from CETA is that the encroachment of international trade/investment issues under the new models of deep integration PTAs into the sphere of provincial jurisdiction in Canada are creating opportunities for subnational actors to make new inroads into the processes of international economic relations. Some people may argue that the provinces only got a seat at the negotiating table because the EU insisted on this. ⑦² However, the bigger picture is that the EU would not have insisted and Ottawa would not have agreed if the dynamics did not favour provincial involvement in the process. It is argued that provincial involvement was imperative rather than just permissive because having the provinces on board was crucial to a meaningful agreement being reached. As such, the real significance of the CETA case study in this regard is about the growing influence of sub-national actors during the negotiation of international economic agreements.

3.2 Sub-national Participation in CETA: The EU Perspective

Although the EU project is currently facing a tough 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. ⑦³ More so, the EU also enjoys exclusive competence

⑦¹ This argument has theoretical support from Robert Putman’s ‘two level game’ theory which analyses the intersection between domestic and international regimes and its impact on the policy choices made at both the domestic and international levels. Putman focuses on the impact of domestic ‘win sets’ and the opportunities and constraints, which these factors have in international negotiations. See Robert D Putman, ‘Diplomacy and Domestic Politics: The Logic of Two-Level Games’ (1988) 42(3) IO 427-435 and 27-460. See also Habegger 2003, at 244.

⑦² Woolcock 2011, at 27. See also, D’Erman 2016, at 94.

⑦³ See Article 2 Treaty on the Functioning of the EU (‘TFEU’). Rosas argues that ‘the question of exclusive competence should be regarded 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.
regarding external relations with third states. 74 However, as Rosas explains, although the EU has 'so-called exclusive competence' for external relations, the governance structure for the EU’s foreign relations is far more complicated than that. For instance, concerning 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 ratification from not only the EU but also its Member States. 75 Also, EU Member States continue to conclude international agreements in their names without the participation of the EU as a contracting party, sometimes including matters which belong to an EU exclusive or shared competence. 76

With regards to the engagement of sub-national governments in external relations, the EU structure is remarkably different from what is obtainable in Canada. 77 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. 78 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. 79 However, as we progress into an era where mega-

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74 See TFEU, Articles 3, 207 and 218. The management of foreign 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 foreign relations to the European institutions on matters connected to the attainment of the customs union. This delegation of power to the EC was done to effectively empower it 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.

75 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.’

76 Rosas 2015, at 1074

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

78 See D’Erman 2016, at 91.

79 See TFEU. Article 5. 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
regional PTAs are raising more suspicion 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 negotiations, the European People’s Party Group (EPP Group) of the CoR in a communiqué stated 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.’ ⁸⁰ 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 about being side-lined during the CETA negotiation process by the EC and is reflective of a rising disquiet among the CoR about the trajectory of future mega-regional PTAs such as the TTIP. This view is further supported by the diplomatic 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. ⁸¹ 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. ⁸²

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

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⁸² ibid.
the Regions will be a key partner in this process.\textsuperscript{83} 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.\textsuperscript{84}

This, however, is not a view supported by EU law scholar Valerie 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 EC had more leverage through which to conduct negotiations unlike in Canada.\textsuperscript{85} According to her, ‘the delineation of competencies within the EU about international trade made for a more streamlined process, in contrast to the Canadian form of provincial-federal involvement in negotiations.’\textsuperscript{86} She further argues that this is a testament to the efficacy of intergovernmental-ism within the EU—which she believes ‘...has more integration between regional and central levels about trade negotiations than does Canada, which instead provides an example of sharper debates between the provincial and federal levels.’\textsuperscript{87} 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 intergovernmental-ism, 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 concerning the ‘Walloon stand-off’ during the CETA ratification process, 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,

\textsuperscript{83} ibid.

\textsuperscript{84} ibid.

\textsuperscript{85} D’Erman 2016, at 91.

\textsuperscript{86} ibid.

\textsuperscript{87} ibid.
which was exploited by Wallonia to hold off the ratification of the CETA.\footnote{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. Especially, in a letter to the EC 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. The signatories to the letter argued that a ‘mixed agreement’ was appropriate since both agreements (CETA and TTIP) 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, \url{http://www.europarl.europa.eu/RegData/etudes/ATAG/2016/586597/EPRS_ATA(2016)586597_EN.pdf}, accessed 03 April 2017. This position has been further strengthened by the Court of Justice’s opinion delivered in May 2017.} \footnote{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 which, on the EU side, is responsible for what?’ see Rosa 2015, at 1075.} 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.\footnote{See Court of Justice of the European Union Press Release No 52/17 Luxembourg, 16 May 2017 Opinion 2/15.} However, the options of agreements that 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 unchartered 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. This position has been further strengthened by the Court of Justice’s opinion delivered in May 2017. The Court stated that the EU-Singapore FTA in its current form cannot be concluded by the EU alone because:

The provisions of the agreement relating to non-direct foreign investment and those relating to dispute settlement between investors and States do not fall within the exclusive competence of the EU, so that the agreement cannot, as it stands, be concluded without the participation of the Member States.\footnote{See Court of Justice of the European Union Press Release No 52/17 Luxembourg, 16 May 2017 Opinion 2/15.} Another viewpoint held by some commentators is that Belgium and its complicated system of federalism are 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 is unsurprising,
considering the peculiar nature of the EU’s federal system, which unlike Canada has to grapple with more layers of complexity within its multi-level governance framework. On this point, the EU system has been criticised severally by euro sceptics as being undemocratic, and adverse to the clamours for change. The scope of this paper is limited to a consideration of the international trade relations regime of the EU; as such it is not the intention of the author to delve into the wide ranging debate about democracy in the EU. However, in the context of EU external trade relations, it is important to point out that the fallouts from the CETA case study, coupled with other key events such as Brexit reflects growing unease within the EU system about the current structure for incorporating the opinions and input from the grassroots into the negotiation process of PTAs. More so, considering the backlash that Wallonia received in the wake of its challenge to the ratification of the CETA agreement, it is clear that perception within the EU about sub-national governments as involved actors in international economic relations continue to divide opinion. 91

91 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 naturally 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, some activists who see it as a new constitutional weapon to scupper future mega-regional trade deals have welcomed the action by Wallonia. 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 immense 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 agreement, The Economist, 22 October 2016, http://search.proquest.com.proxy.library.dmu.ac.uk/saveasdownload?progress=0, accessed 10 March 2017

See also, a publication in Newsxtex, 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 (abandoning the democracy leg of the trilemma), or change the locus of political decision-making (surrendering national sovereignty).’ See Newsxtex (2016) The Economist: Free exchange: Making sense of the Wallonian
The situation is open to numerous interpretations. However, one such interpretation which is important in the context of mega-regional trade agreements going forward is that the opposition to the CETA by sub-national governments such as Wallonia is a reflection of a general disillusion with the trajectory of neo-liberal trade tenets. From this perspective, a critical question is: would Wallonia 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? From a practical standpoint, it is doubted if Wallonia realistically fancied its chances of coming out on top against the EU system. Rather, it appears that Wallonia was merely standing up as a proxy for the growing opposition movement against the proliferation of mega-regional trade deals. This brings to the fore the significant role played by non-state actors in the CETA. The next section of the paper will examine the relationship between civil societies and sub-national governments during the CETA.

4. Shifting forms of Cooperation: Sub-national Governments and Non-State Actors (NGOs)

As it was pointed out in the introduction, mega-regional agreements such as the CETA have generated mixed reactions across the world. Stakeholders are divided in their opinions, perceptions, expectations, and interpretations of these agreements. Predictably, national governments in Canada and the EU were on the same side, advocating on the merits of the
CETA.\(^{92}\) On the other side of the divide, some sub-national governments and civil societies have been aligned in their opposition to the proliferation of mega-regional trade deals.\(^{93}\)

Drawing on the detailed accounts of Trew, this section of the paper examines the nature and scope of contact that non-state actors had with provincial governments, municipalities, European decision makers and other non-governmental groups in Canada and Europe during the CETA process.\(^{94}\)

### 4.1 Social Movement Mobilisation against the CETA within Canada

From the outset, civil society groups in Canada had apprehensions about the CETA deal. A number of these groups mobilised themselves under the umbrella of the Trade Justice Network (TJN)\(^{95}\) and publicly raised concerns that there were scarce details and limited public debates about the CETA.\(^{96}\) The TJN strongly advocated for regular meetings between all stakeholders to remedy this situation. However, this had limited effect especially about forcing more transparency on the part of Ottawa. As such, civil societies adopted a parallel tactic to influence the negotiation process by engaging with the provinces that had a seat at the negotiation table.\(^{97}\) Civil societies aimed to leverage on these actors to act as proxies in the negotiation process. To achieve this, they targeted provinces, which had vested interests


\(^{93}\) Although the Canadian federal government argues that the CETA was the most transparent and collaborative trade negotiations Canada has ever conducted, the view is different for groups who are critical of the proposed agreement for some reasons, some of which have already been discussed in this paper.

\(^{94}\) Trew, 2013, at 570.

\(^{95}\) The Trade Justice Network (TJN), which brought together a variety of non-governmental organizations interested in hearing more about the proposed Canada-EU agreement, was initiated in February 2010 in Ottawa. The meeting included representatives from labour, environmental non-governmental associations (ENGOs), food sovereignty and farmers' organizations, student federations, and cultural and social justice advocates.

\(^{96}\) This view has been echoed by The Council of Canadians who argue that the first time people in Canada and Europe were allowed to see the official text of the agreement was only at the announcement of the completion of CETA negotiations. According to them, ‘The deal was signed without any public consultation. See The Council of Canadians (2017).

\(^{97}\) Trew, 2013, at 570.
that were important in the CETA negotiation process. For instance, civil societies targeted New Democratic Party governments in Manitoba and Nova Scotia, ‘…Due to their connections to labour and other social movements.’\textsuperscript{98} It is also reported that Ontario and Quebec were also on the radar of civil societies because these provinces had reservations about the effect of the CETA on local content rules on transit, energy projects, liquor, etc. ‘…And both provinces’ concern for the need to protect supply management systems for dairy, poultry, and eggs.’\textsuperscript{99} More so, during the CETA negotiations, there was frequency of contact between members of the TJN and some provinces. It is reported that civil societies met with provincial trade ministers and CETA negotiators in provinces such as Alberta, Manitoba, Ontario, Quebec, Nova Scotia, and Newfoundland and Labrador.\textsuperscript{100} Also, provincial labour federations, public sector unions and the Council of Canadians met with the Nova Scotia and Manitoba governments on several occasions.\textsuperscript{101} Furthermore, the TJN was reported to have contacted ‘municipal mayors and councillors viewed as sympathetic to the idea of excluding municipal procurement from CETA.’\textsuperscript{102} These targeted solicitations bore substantial dividend in March 2010, when the Burnaby City Council passed a motion calling for a ‘clear, permanent exemption for municipal governments with an emphasis on CETA’s procurement chapter but also considering liberalization commitments that would cover municipally delivered services.’\textsuperscript{103} Subsequently, other municipalities towed the same line, eventually resulting in motions on CETA being passed across over 80 municipalities in Canada.\textsuperscript{104} This was considered a significant victory because there was a follow through on February 2012, when the city of Toronto overwhelmingly supported a call for a permanent exemption.\textsuperscript{105}

\textsuperscript{98} ibid.

\textsuperscript{99} ibid.

\textsuperscript{100} Ibid, at 571

\textsuperscript{101} Ibid, at 571-572

\textsuperscript{102} ibid.

\textsuperscript{103} Ibid. See also Council for Canadians (2010) Burnaby, North Vancouver city councils pass CETA resolutions, demand answers on municipal impact of Trans-Atlantic free Trade, 27 April 2010, \url{http://canadians.org/fr/node/4222}, accessed 03 April 2017.


\textsuperscript{105} Trew 2013, at 572-573; see also Lauren (2012) Toronto City Hall Requests Exemption from CETA, 6 March 2012, \url{http://tfpc.to/news/ceta}, accessed 03 April 2017.
According to Trew:

The municipal campaign was tactically important in developing a political base that shared civil society concerns with at least parts of the deal, but it also served other purposes. It was an entry point to the CETA negotiations for organizations and activists not accustomed to thinking about trade agreements, and it created media opportunities for ‘non-traditional’ municipal issues.\(^{106}\)

These alignments between civil societies and sub-national governments in Canada during the CETA are worthy of note because, for the first time, social movement action against free trade tenets in Canada benefited from the provinces having unprecedented access to negotiations. In effect, CETA can be considered as a learning curve, where these unlikely allies have had an opportunity to perfect new strategies for consistent action against established actors in international trade relations.\(^{107}\)

We also see that civil societies engaged with municipalities, even though they were not involved in direct negotiations. This strategy was necessary because the municipalities had grievances about being left out of talks. Civil societies leveraged on this situation to galvanise full spread ‘opt outs' by municipalities and cities across Canada. The significance of this strategy would be revisited in section 5.4 of this paper.

4.2 Social Movement Mobilisation against the CETA within the EU

Across the Atlantic, similar patterns of engagement between civil societies and sub-national governments were also noticed from the onset of the CETA process. More importantly, the CETA created political opportunity structures for cross-fertilisation of ideas and strategies between civil societies on either side of the Atlantic.\(^{108}\) For instance, the TJN in Canada did not limit its efforts to just building coalitions with municipalities and provinces in Canada.

\(^{106}\) Trew 2013, at 573.

\(^{107}\) Attar and Clouthier 2015, argue that: ‘The value of a revitalized trade consultative process should not be underestimated.’ (at 468). They point out that: ‘In recent years, we have observed, both in Canada and across Europe, growing public interest in trade deliberations, interest that, in the case of the secretly negotiated Anti-Counterfeiting Trade Agreement (ACTA), morphed into a pan-European opposition movement widely credited with the European Parliament's rejection of the agreement.’(ibid).

\(^{108}\) ‘Political opportunity structures’ is defined by Princien and Kerremans ‘…As the set of characteristics of a given institution that determines the relative ability of (outside) groups to influence decision-making within that institution. See Princien and Kerremans 2008, at 1130.
alone. The TJN had made it a priority from the early stages of the CETA negotiations to also build a broad based coalition with civil societies and political groups within the EU. In fulfillment of this objective, the TJN sent its first delegation to Brussels in 2010, during the fourth round of the CETA negotiations. 109 During this trip, it is reported that the TJN had a series of meetings with European based civil society groups such as the European Coordination-Via Campesina, Seattle To Brussels, and the European Federation of Public Services Unions (EPSU), etc. The TJN delegation also met with Members of the European Parliament (MEPs) from three political groups-the European United Left-Nordic Green Left, the Greens, and the Socialists & Democrats. 110 In the second visit to Brussels in 2011, the TJN expanded on its coalition building efforts by shifting its focus to the raising of awareness about substantive issues relating to the CETA. They engaged their counterparts within the EU on controversial matters relating to the CETA such as the investor-state dispute settlement process, CETAs coverage of oil sands and genetically modified crops, etc. 111

In summary, there is no doubt that there were massive efforts by civil societies to influence the outcome of CETA. Moreover, it is important to ascertain if these transatlantic social movements which emerged during the CETA will endure post-CETA. It is postulated in this paper that these transatlantic coalitions between civil societies and sub-national political institutions either side of the Atlantic will endure because other mega-regional agreements involving Canada and the EU such as the TTIP is on the horizon. Strategies may change, but it is difficult to envisage future mega-regional trade deals not being influenced by these stakeholders.

Another important consideration is to ascertain whether these social movements had any positive impact on the outcome of the CETA. Trew believes these groups had a positive impact because ‘… Several TJN delegations to Europe had resulted in EU parliamentarians taking notice of CETA when, at least within left and center-left groups, critical attention was usually spent on Europe's agreements with Latin American, African, and Asia-Pacific country negotiations.’ 112 To demonstrate the impact of this last point made

109 ibid
110 ibid.
111 Trew 2013, at 574.
112 Trew 2013, at 575.
by Trew, it was announced in March 2015 that the Socialist and Democrats (S&D) Group in the European Parliament had adopted with near unanimity a solid position paper on Investor-State Dispute Settlement (ISDS), opposing the inclusion of the controversial mechanism in trade deals with both the US (TTIP) and Canada (CETA). It was noted specifically by David Martin MEP that the S&D was ‘…responding to the thousands of constituents and the many civil society organisations that have asked us to clarify our position.’ Also, Jude Kirton-Darling MEP said: ‘This decision by the European Socialists and Democrats Group will prove to be a real game changer not only in the negotiations between the EU and the US but also concerning the ratification of the Canada agreement.’ He further stated that:

The European Commission and Europe's Conservatives will need our support in the end if they want to see TTIP through. Today, we are sending them a loud and clear message we can only contemplate support if our conditions are met. One such condition is we do not accept the need to have private tribunals in TTIP.

Richard Corbett MEP said: ‘Today the Labour Party has demonstrated that engaging with our neighbours across the EU yields tangible results in the interest of the general public.’

The alignment of interests noted above, and the battles they have won in their war against CETA and other mega-regional trade deals is significant moving forward. Although the establishment, i.e., the traditional actors in international relations have triumphed on this particular occasion with the CETA, the tenacity of these players and their resolve to be heard has implications post-CETA. These implications would be considered in the next section of the paper.


114 ibid.

115 ibid.

116 ibid.

117 ibid.
5. The CETA and implications for the future

From the discussions above, the CETA case study has key talking points from which we can draw some lessons that may potentially have a bearing on future mega-regional economic agreements.

5.1 Traditional federal systems acting as checks and balance for new styled deep integration PTAs?

In section 2 of this paper, the problematic nature of federal systems in international law was highlighted. Given this, it is not surprising that during the CETA process, federal systems such as Canada, Belgium, and Germany have featured prominently, reiterating once again the fact that federal countries have a propensity to impact (both negatively and positively) the process of negotiations, ratification, and implementation of international economic agreements.

From the Canadian perspective, the ambivalence in the constitutional allocation of competencies for trade relations continues to curtail Ottawa’s negotiating position in international economic relations. Coupled with the ever expanding scope of PTAs, this could be considered as a welcome development from a pro-democracy standpoint because Canada is forced to prioritise internal cooperation with its sub-national units when it commits to external obligations. Also, the EU insisting on provincial involvement in the CETA negotiations has opened up the possibilities for broader representation of involved actors in the framing of future international economic agreements. Even though the CETA model of negotiations may not be replicated in the future, it demonstrates the potential options open to framers of the next generation of trade rules.

From the EU perspective, where there remains some confusion as to whether mega-regional trade agreements such as the CETA and the TTIP should be classed as EU-Only agreements or as mixed agreements, it is argued that as long as this ambivalence persists, then future PTAs post-CETA, will continue to face the scrutiny of sub-national governments in federal systems within the EU. As previously mentioned in this paper, The European Court of Justice (ECJ) waded into this matter in May 2017 and has lent its support to member states having the right to scrutinise certain EU PTAs, including the CETA, TTIP and the EU-Singapore
It is argued in this paper that although concerns about the scope and impact of mega regional trade agreements are shared across board by both federal and none-federal states alike, the CETA case study shows that traditional federal systems by their very nature have the greater propensity and political capacity to challenge the legitimacy of these deals. Schill echoes this point stating that post-CETA:

International economic law’s constitutional frontiers will be further exposed in a host of upcoming decisions that all involve the relationship between constitutional law and international economic law. For one, the German Constitutional Court will have to decide on the merits of the constitutional challenge to CETA, and proceedings before other constitutional courts may follow.

This prediction by Schill is not unfounded as it is becoming glaring among stakeholders that future trade talks such as the EU-Britain trade relationship, post-Brexit must prepare for constitutional challenges experienced during the CETA. For example, from the perspective of civil societies, the fallouts during the CETA originating from Belgium, have been welcomed because they see it as a potent constitutional weapon to scupper future mega-regional trade deals such as the TTIP. 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.  

5.2 Need for review of the EU's system of internal dialogue during the negotiation of international trade deals.

In addition to the ambivalence on the constitutional competence between the EC and the member states for trade talks, the CETA has also exposed a growing unease within the EU's CoR about their limited role in international trade negotiations. Negotiating a trade deal

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119 See Par Roosevelt Namur, 2016. ‘Good news! The war on TTIP and CETA can be won.’
120 See previous discussions in section 4 of this paper about Cecilia Malmström’s engagement with the CoR.
with Canada revealed obvious differences in the priority levels accorded to sub-national actors either side of the Atlantic. While the provinces in Canada had direct access to negotiations and municipalities were able to determine whether or not to opt out of certain CETA provisions, the CoR voiced frustrations about their limited level of participation in the internal dialogue system of trade negotiations within the EU. More significant is the fact that the complaints by the CoR are a microcosm of wider discontent at the grassroots of the EU. Considering that the concerns raised about the nature of deep integration PTAs are held by people from the local constituencies, which the CoR represent, it is argued that there is need for the EU to review their involvement in future PTAs. To be realistic, the possibility of this happening is slim due to the EU’s regimented structure for trade negotiations. However, with rising nationalism sentiments across Europe as evidenced by Brexit, if the EC does not shift in its position on this matter, this would further fuel the negative perception about the EU not being amenable to change. Hence, it would be interesting to see if the calls by the CoR for more participation in the TTIP would shift the stance of the EC. If this is the case, then the CETA would be remembered as a watershed moment where the dynamics of EU trade negotiation where forced to change.

5.3 The evolution of social movement mobilisation across the Atlantic

From the CETA process, we can see that the politically charged nature of deep integration PTAs is acting as a catalyst for expansion and redefinition of social movements (both coordinated and uncoordinated) against the world trade system. Free trade and neoliberal systems such as the G20 and the WTO had previously been the primary target of challenges and protest by civil societies. However, a stagnation of the WTO system in recent years has come with an attendant shift in focus from multilateral institutions to mega-regional clusters and supranational organisations as the new platform for expanding the reach of neoliberal trade tenets. This has not gone unnoticed with civil societies, which have, in turn, shifted their attention to dismantling these new expressions of what they perceive as capitalist oppression.

However, what is unique about the CETA experience is that in this instance, civil societies had to adapt and vary their engagement strategies in line with the peculiar nature of the CETA negotiation. Specifically, the cross-continental nature of the CETA necessitated civil societies and sub-national governments forming broad coalitions across the Atlantic in their quest to deepen accountability and transparency in the negotiation process for the CETA. It is
argued that the unprecedented scale and level of coordination achieved in the social movement against the CETA is a remarkable development which will most likely feature in future mega regional economic arrangements.

Furthermore, within the literature on social movements, these patterns of engagement which emerged between civil societies and political institutions within Europe for the CETA process resonates with views of scholars such as Marks and McAdam and also Reising who had argued in the late 90s that the EU’s expanded competence was bound to lead to a shift in political activism from states towards the EU. In the area of trade and investment, this also seemed to be the natural progression expected, especially after the Lisbon Treaty. However, the CETA case study shows that there are still constraints on interest groups operating solely at this level (at EU level). Most of the effective protests against CETA were garnered at grassroots levels within the EU member states, in particular with the political support of allies within federal systems such as Belgium and Germany which had the constitutional capacity to disrupt the CETA deal.

5.4 Excluded stakeholders and the opt-out option from mega-regional trade agreements

Another noticeable trend from the CETA case study which has potentially reverberating implications post-CETA is the increasing number of opt outs by local governments, cities, and municipalities from international economic agreements both sides of the Atlantic.

In Canada, only the provinces were privileged to join the CETA negotiations proper. Some municipalities and cities, on the other hand, reverted to ‘opt outs’ as a way of registering their displeasure with some parts of or the whole CETA agreement or plausibly to register their dissatisfaction with being left out of the negotiations. In Europe, the situation is similar

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121 See Marks and McAdam 1996, at 251; Reising 1998, at 3; Cf: Princen and Kerremans 2008, at 1131.
122 In 2012, Victoria City Councillor Marianne Alto who put forward the successful resolution for Victoria to opt out of the CETA said that ‘The imminence of passing the deal is pushing municipalities into a last-ditch place: if we can't be party to the deal, we don't want to be part of it…’. See David P. Ball, ‘Canada-Europe free trade: after Victoria's pullout, Vancouver demands clarity on 'clandestine' CETA deal’ May 14th, 2012 http://www.vancouverobserver.com/politics/2012/05/14/canada-europe-free-trade-city-victoria-votes-against-clandestine-ceta-deal
with over 2000 cities/councils around Europe joining a growing list of so called ‘CETA and TTIP free zones.’

This raises two key questions:

1. Would these stakeholders have opted out if they participated in the negotiations of the CETA? According to the Friends of the Earth:

All over Europe, cities, and counties, such as Amsterdam, Cologne, Edinburgh, Grenoble, Barcelona, Milan, Vienna, Thessaloniki, stand against the so-called transatlantic free trade agreements, denouncing the lack of transparency of the negotiations and calling for local and regional bodies to play an integral part in the negotiation. By declaring their cities and counties CETA- and TTIP-free zones, mayors, and local politicians affirm their will as elected representatives to make citizens' voices heard by their governments and by the European Commission, defending local communities and democratic institutions as spaces for debate and decision-making.

The request by the Friends of the Earth for local and regional bodies to play an integral part in the negotiation of future international trade agreements by the EU is not an unrealistic expectation. However, if these actors are given an active voice in the future trade negotiations, it is only a matter of time before other stakeholders would demand audience too. In this regard, it is not logistically feasible to accommodate all interested parties' and viewpoints in future international trade negotiations. However, with some excluded actors now resorting to opting out of agreements in protest, there is need for a re-consideration of the existing mechanism for cooperation between all relevant actors and stakeholders or else the international economic system runs the risks being made obsolete.

2. What is the legal implication of this so-called ‘opt outs’?

This is a more difficult question which the scope of this paper does not cover. However, it is a critical question which must be highlighted because it represents a dimension to social movement mobilisation against neo-liberal trade tenets which goes beyond the CETA AND has potential implications for the legitimacy of international law in general. Commenting on one of the ‘opt out’ declarations by the city of London in Ontario Canada, a business leader -

Gerry Macartney, the city’s Chamber of Commerce’s chief executive officer argued that ‘It makes little difference whether the city decides to opt in or opt out of it…’

Is this the case? Given the nationalistic sentiments sweeping across the world in the wake of Brexit and the election of Donald Trump into the White House in the USA, we are witnessing a growing agitation of people and sovereign states to opt out of international instruments. As this trend continues, the legitimacy of the post-WW2 international law system is coming under intense scrutiny. As such it is important for future research to focus on the impact of this trend on the future of international relations in the 21st century and beyond.

5 Conclusion

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. What is not so clear at present is whether the CETA model of direct provincial involvement during negotiations will be replicated and 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 ante. Whatever role sub-national governments might play in future mega-regionals; it is evident 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 civil societies with provinces in Canada and civil societies/regions within the EU 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


125 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.
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.
Reference List


