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**CETA and Multi-level Governance: Implications for Provincial and
Municipal Governments**

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The pace of negotiation in the Canada-European Union (EU) Comprehensive Economic and Trade Agreement (CETA) has slowed considerably, with several deadlines for the final text come and gone. These delays reflect in large part the complexities of the politics and societies in question. Both of these continent-wide entities encompass substantial variation in populations, economic foundations and, consequently, sub-national provincial and regional interests. CETA continues efforts by Ottawa to promote a stronger common market via elimination of non-tariff barriers to capital, goods, services, and labour across provinces and outside our borders. This follows upon changes made in provincial practices through the Agreement on Internal Trade (AIT) in 1995 and the Canada-U.S. Agreement on Government Procurement of 2010. CETA would eliminate tariff and non-tariff barriers, open access to procurement at all levels of government, promote regulatory convergence, and increase skilled labour mobility via mutual recognition of professional qualifications. Negotiations also cover trade in services (e.g. finance, environment, engineering, architecture), protection for intellectual property (patents, copyright,

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trademark, and industrial design), investment in raw materials sectors and telecommunications, and rules governing electronic commerce. Since procurement, services, corporate regulation and labour mobility involve provinces, they are involved in negotiations and have pledged through the Council of the Federation to accept the CETA if it meets their concerns.

CETA is difficult to evaluate at this point, since the negotiations are closed and only limited and partial information is available. In leaked European Commission briefs to member states, European negotiators have expressed satisfaction with the state of the talks, if Ottawa lives up to current commitments, since provisions on investment protection and procurement go beyond what Canada has offered previously even to the U.S. While its transnational character is used as a justification for secrecy, the domestic implications of CETA are considerable, as these may constrain powers of governments and reduce accountability to citizens. CETA, like other processes of globalization and regional institutionalization, encroaches on democratic space. CETA will have constitutional-level impacts as it constrains provincial and local powers. While Ottawa cannot force provinces to follow the provisions of CETA, there would be long-term constraints on provincial and municipal policies. This policy brief surveys some potential effects on provinces and municipalities, though the final impact will not be known until a text is released and an agreement ratified. It will only make passing reference to investor rights, dispute settlement and public procurement, which are addressed by others in this publication series.

The Important New Role for Provinces

In interviews with this author, European officials insisted they would participate in CETA negotiations only if the provinces were involved and would be unlikely to conclude a deal if one or more large provinces refused to participate. This was a response to past thwarted partnership talks between the EU and Canada which faltered on provincial unwillingness to collaborate. Several areas of provincial jurisdiction are on the table in the CETA – government procurement, including municipal purchasing and infrastructure; public services; professional qualifications and labour mobility; and harmonization of regulations. Under constitutional precepts, provinces cannot directly negotiate but are invited to the table for areas under provincial constitutional competence. As the process unfolds, provincial negotiators are meeting

in working parties on these themes, and being kept informed of the federally mandated themes by negotiators at Foreign Affairs and International Trade Canada (DFAIT)¹. Most provinces participated from the outset, with Newfoundland later joining in March 2011. European negotiators expect sub-national commitments to be enforceable, similar to the North American Free Trade Agreement (NAFTA) or EU-member state mechanisms, with financial or trade penalties for failure to comply with economic and trade commitments.

Hence provinces have much at stake in the CETA negotiations. CETA has seen an unprecedented, if limited, involvement of sub-national governments in international negotiations. At the very least it has ensured that federal negotiators are clear about where particular provinces stand on key issues. For some trade advocates, provincial constitutional powers may impede commerce. The Canada Europe Roundtable for Business argues that cooperation between Canada and the EU will require “internal policy coherence and coordination” including greater federal and provincial cooperation, clarifying issues of jurisdiction that impact on trade and investment” (CERT 2009). Provinces have been allowed to declare “reserved” areas of regulation and services that they would protect under CETA. This “negative list” approach means that new initiatives would be subject to CETA, which could require new services to be open to European competitors. Reservations are limited, cannot be altered in ways considered inconsistent with CETA and, if repealed, cannot be reinstated. While CETA advocates hope the reservations will not narrow the scope of the agreement, critics are concerned this reservation process does not provide adequate protection for essential services and regulations.

Regulatory Harmonization

Harmonization of regulation across the member states of the EU and Canada’s provinces is a significant goal of CETA negotiations. Differences in regulatory regimes on each side of the Atlantic sometimes lead to non-tariff barriers to trade. In addition, the substantial variation across provinces fragments Canada’s market and inhibits commitments to trading partners such as the EU. Supporters of CETA see it as a major opportunity to continue the construction of Canada’s internal market and decrease barriers to commerce between the provinces. They argue that harmonized regulations on areas as diverse as liquor sales, securities, corporate registration,

¹ Since 2013, Foreign Affairs, Trade and Development Canada (DFATD)

business licensing, trucking and shipping, constructions trades, licensing and accreditation of professionals, health and safety, and the environment would reduce non-tariff barriers, thus improving transatlantic economic efficiency while enhancing Canada's internal market (Krstic, 2012). CETA could become a ground-breaking compromise between North American and European regulatory approaches which could influence any future transatlantic accord between the EU and the U.S.

The Canada-EU Joint Study (2008) identified several policies where provincial involvement was critical: science and technology, energy, environment, transport, employment and labour mobility, social policy education and training, competition policy, business subsidies and fisheries (Boscariol 2012). On professional accreditation, Patrick Leblond (2008) suggests that "each Canadian province has different regulations, which means different requirements for recognizing professional qualifications, licences to practice and accreditations. These divergent regulations represent a barrier to labour mobility and have a negative impact on trade in services." Provinces looking to attract skilled professional immigrants in the face of aging populations would potentially benefit from coordination of professional standards and enhanced mobility rights for trained individuals.

Yet critics worry that the coordination of regulations (with the potential for penalties under investor rights provisions) could prevent provinces from enacting regulations in the public interest in health and safety and environmental fields, among others. For instance, Ontario's green energy guidelines have already been questioned by the EU. Provinces like Nova Scotia, which have bans on hydraulic fracking to extract fossil fuels, could have those bans nullified under CETA provisions if European firms challenged them based on expropriation of lost hypothetical profits. Critics such as the Trade Justice Network (2010) assert that the right to regulate must be preserved with provinces allowed to exceed EU levels of protection on environment, cultural, health and other matters without being forced to compensate for loss of potential trade or investment benefits for European firms. Supporters consider these worries exaggerated and argue the economic gains would be substantial.

Public Services and Public Goods

CETA provisions could open public services, infrastructure or resources to European investors. European firms have expressed interest in gaining access to provision of core services and utilities, including many usually provided by public entities at present such as education and health, and infrastructure like sewage, water, electricity, roads, ports and other transport facilities. The negative list approach to reservations could preclude the carving out of new roles for government in unanticipated areas of public need. Europe has reserved core public services at the community-wide level, effectively harmonizing across all EU member states and regions. Canada has left it to provinces and territories to make reservations creating a patchwork of rules as some provinces shelter services, regulations and resources while others do not.

Critics suggest that protection for vital services may be uneven and inadequate, given the wide variation in provincial reservations. They also express concern that CETA will encourage the privatization of infrastructure, services, and resources. There is nothing in CETA as leaked which would require privatization of existing public services such as health care or water distribution for instance. However, should privatization occur, European firms would be afforded the same rights as local bidders and no preference could be extended to local investors. Without a nationwide agreement on reserved areas, Canadian firms may have less chance to invest in or provide services for vital infrastructures, resources and services in Europe while European investors may be able to gain footholds in such ventures in some Canadian provinces.

Municipal Governance Implications

Municipalities have not been involved in the CETA negotiations, even though municipal interests are affected. The Federation of Canadian Municipalities published “principles” for a fair and effective deal. These include “reasonable procurement thresholds” to protect smaller purchases; “streamlined” rules, which are enforced gradually in consultation with municipal officers to reduce burdens of compliance; protections for Canadian content in “strategic industries or sensitive projects”; disputes processes which allow municipalities to “appropriately defend their policies and by-laws”; “consultation and communication” with local government during talks to ensure concerns are proactively considered; and an assurance for reciprocity by local governments in Europe (FCM 2010).

Some municipalities dissent from the FCM positions and have passed declarations in local councils seeking exemption from CETA (Geist 2012). B.C. municipalities passed a resolution demanding that “the provincial government negotiate a clear, permanent exemption for local governments from [CETA]” (Gurzu 2010). Concerns include potential loss of autonomy over preferential policies for local food purchases to reduce greenhouse gas emissions; and procurement encouraging local content to strengthen communities by creating local jobs and expanding the tax base. Municipalities would incur administrative costs from compliance with CETA; where EU firms might be involved there could be appeals processes, penalties and other encumbrances which would limit effective and responsive governance. Organizations like the FCM are concerned with securing compensation for such costs. CETA supporters counter that local preferences increase costs to taxpayers and reduce efficiency, undermining economic performance. Municipalities are creatures of the provinces, so they are not involved in negotiations and opt-out measures will likely be ineffective.

Enforcement of Compliance in Canada’s Federal System

Historically, the courts have restricted Ottawa’s use of the treaty power to bind provinces to international treaty commitments. While Ottawa can conclude treaties in any field, provincial legislation may be required to implement them and enforcement of treaties cannot override provincial constitutional powers.² While later judicial decisions have modified federal treaty powers modestly, the courts have chosen not to completely dismiss this important protection for the federal principle, while finding means to ensure Canada’s ability to perform as an effective international actor (Laforest 1974). It is unclear if a mechanism to compel provincial compliance could withstand a court challenge without a constitutional amendment.

As Fafard and Leblond (2012) point out, the status quo would likely prevail with Ottawa stuck with legal and punitive costs and seeking compensation from the provinces if they violate CETA. With the current disengagement between Ottawa and the provinces and the unilateralism preferred by the current federal government, governments are unlikely to agree on new mechanisms in time for CETA. Some close to the CETA talks argue that nothing substantially will change – Ottawa has always been able to unilaterally make international agreements and has

² See *Labour Conventions Case 1937*, Judicial Committee of the Privy Council.

non-constitutional tools to compel provincial payment using transfers or other fiscal instruments (Interview with Ontario government official, Jan. 27, 2011; DFAIT briefing, Feb. 4, 2011). Nonetheless, an explicit commitment by provinces and specific provisions for dispute resolution in areas of provincial competence may embolden the federal government which has previously been politically constrained not to punish provinces that violate international commitments. Provinces may also be more vulnerable than they think. Evolving jurisprudence in the U.S. and other jurisdictions may permit claimants aggrieved at provincial policies to sue in foreign courts and have assets of those provinces seized as compensation (Van Harten and Loughlin 2006).

Conclusion

For the first time in international talks, provincial governments have been at the CETA negotiating table in their areas of jurisdiction. If finalized as envisioned by negotiators, CETA could have profound implications for Canadian federalism. It could cement the provisions in the AIT and extend them to municipalities in more enforceable fashion, with implications for decision-making flexibility and democratic accountability at the local level. Supporters of CETA believe that the loss of provincial and municipal policy autonomy may be an acceptable cost given the benefits of trade liberalization. Leblond (2010, 78) argues that Canadian federalism must adjust: “With globalization increasingly pushing to the international level the governance of issues that were once considered solely domestic — and thus in provincial jurisdiction — Canada must be institutionally prepared to take a strong common position and ensure commitment at all levels of government to international agreements. Otherwise, we run the risk of losing our ability to interact economically and politically at the international level.”

Luz and Miller (2002, 975) note that transnational legal regimes like CETA “have serious consequences for Canada's traditional federal structure and could impose significant costs on the constitutional powers of the provinces,” limiting their abilities to pursue divergent policies and priorities in a fashion inconsistent with the principles of federalism. CETA will not alter the entire balance of power between federal and provincial governments. However, provincial acquiescence in a dispute mechanism could bolster the political ability of Ottawa to undertake cost recovery and limit provincial capacity to act in the interests of constituents, deviating from principles of legislative sovereignty and federalism. Furthermore, the breadth of CETA would mean more policy areas are restrained, with implications for democratic responsiveness. Given

the likely differential ability to adjust, some regions may fare much better than others, potentially increasing regional disparity with implications for national unity.

In a broader sense, transnationalism and liberalization over the past three decades have resulted in nations surrendering policy autonomy. There may be strong reasons for accepting limitations on parliamentary sovereignty, federal diversity and democratic decision-making if the majority gains economically. But increased inequality after NAFTA entered into force in the 1990s leads some to question if a deal will benefit most Canadians. For CETA to break with this pattern and produce widespread benefits for Canadians, it must be accompanied by well-designed adjustment measures to permit Canadian workers, entrepreneurs, firms, provinces and regions to make the best use of increased market access and the altered competitive climate. This is especially important in a regionally diverse country, where wide variations in local industry suggest different abilities to benefit from increased economic exchange with Europe. Depending on the final text, there could be clear regional winners and losers, requiring active adjustment measures to permit all provinces to benefit. The current federal government's "limited state" approach and its disengagement and disagreements with provinces on policies to promote competitiveness, labour skills and economic change are worrisome. The policies required to maximize benefits of CETA, to promote positive adjustment for workers and firms and to prepare for regional divergences in impact will likely be neglected, so some regions may face more threats than opportunities from CETA.

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