

## **Provincial Pitfalls: Canadian Provinces and the Canada-EU Trade Negotiations** **Christopher J. Kukucha (University of Lethbridge)**

The proposed Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union (EU) has a number of potential benefits. For Europe, it offers the possibility of improved access to the North American market, and serves as a template for other negotiations outside the stalled Doha Round of the World Trade Organization (WTO). CETA also complements Canada's long-term interests in balancing American trade dependence and limiting future trade disputes, which have previously damaged Euro-Canadian trade relations. Although Stockwell Day, Canada's Minister of International Trade, and Québec Premier Jean Charest both promised to "deliver" the provinces in current CETA negotiations this paper will argue that a Canada-EU trade agreement, at least one that moves beyond existing trade commitments, will be limited by sub-federal interests. As argued elsewhere, Canadian provinces impact not only Canada's foreign trade policy but also the evolution of international norms and standards. In the case of Europe, historic examples include long-standing disagreements related to alcohol and agriculture. Technical barriers focusing on geographic indicators, genetically modified food, and electrical standards are also contentious issues in ongoing CETA negotiations. Advancement on government procurement will also be restricted due to limited market potential, differences on bidding thresholds, and Canada's recent *Buy American* agreement with the United States. In addition, Canadian provinces have no interest in significantly liberalizing services, especially related to health and education, or significantly altering existing obligations for labour mobility. Finally, there is a perception among some Canadian officials that European negotiators are attempting to transfer EU standards and practices to the North American market. This has created an atmosphere of extreme caution within provincial negotiating teams, which further limits the possibility of a comprehensive, groundbreaking, accord.

### ***Preliminary Stages***

The EU offers an attractive market for Canadian exporters. Its 27 member-states have a population of 500 million consumers and an estimated Gross Domestic Product (GDP) of \$19 trillion. In 2008 the EU was also Canada's second ranked trading partner with approximately \$52 billion in exports of goods and services.<sup>1</sup> In a joint study released prior to the negotiations, it was estimated that a Canada-EU agreement would increase bilateral trade by 20 per cent, with a corresponding rise in GDP of \$12 billion by 2014. Highlighted sectors include aerospace, plastics, chemicals, wood products, fish and seafood, aluminum, automotive parts and wheat, beef, and pork. Growth in service-based industries was expected for engineering, transportation, and computer services.<sup>2</sup>

Not all observers, however, share this optimistic projection of growth. Michael Hart, for example, has suggested that Canadian officials seem to be "spurred on by the romantic notion that God might have erred in placing Canada next door to the world's

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<sup>1</sup> Foreign Affairs and International Trade Canada, *Canada-European Union: Comprehensive Economic and Trade Agreement (CETA) Negotiations*, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/can-eu-report-intro-can-ue-rapport-intro.aspx> (17 November 2009).

<sup>2</sup> Government of Canada and the European Commission, *Assessing the Costs and Benefits of a Closer EU-Canada Economic Partnership* (Ottawa: Government of Canada, 2008).

leading economy.” In the post 11 September era, he argues, the priority for Canadian business is the “hardening” of the Canada-US border and access to this market. He also questions the EU as a source of increased trade in non-traditional sectors. Specifically, “Europe buys low-processed resources from Canada at world prices ... [and] none of these goods face trade barriers.” Canada, on the other hand, “buys North Sea oil and luxury goods from Europe, few of which are sensitive to trade barriers.” Therefore, a Canada-EU agreement “would hardly boost this existing trade.”<sup>3</sup> Finally, Hart cites other “extraneous” hurdles, including Canada’s laggard position on climate change and EU opposition to the seal-hunt in Newfoundland and Labrador.

Despite these realities, Canada has sporadically pursued improved trade linkages with Europe. Historically, however, Ottawa did not consult with provincial governments on matters of EU trade. The provinces, for example, were not active players in Pierre Trudeau’s 1976 Canada-Europe Contractual Link (or Third Option) as most issues fell under federal jurisdiction. In 2004, after two decades of pursuing North American integration, the Canada-EU Partnership Agenda was initiated, highlighted by negotiations for a Canada-EU Trade and Investment Enhancement Agreement (TIEA). The new accord was to expand discussion beyond market access and include investment, mutual recognition of professionals, regulatory practices, financial services, e-commerce, sustainable development, science and technology, and consultation with civil society. Although these issues had sub-federal implications European negotiators did not engage Canadian provinces until late in the talks. As one provincial official noted, the EU wanted to “make inroads on services and procurement.” At the time, however, “we were focused on the Doha Round and didn’t bite.” When negotiations for the TIEA collapsed in 2006 the European perception was that the “provinces were directly to blame.”<sup>4</sup>

As a result, the EU was ambivalent about pursuing further trade negotiations with Canada. Initially, it was Charest who raised the possibility of renewed Canada-EU discussions with European Trade Commissioner Peter Mandelson at the 2007 World Economic Forum in Davos, Switzerland. At the time, Mandelson told Charest “not to bother ... unless he could guarantee the other provinces were on board.”<sup>5</sup> Charest, however, had several motives for pursuing this initiative, especially during French President Nicolas Sarkozy’s term as chair of the EU in late 2008. Québec had several offices in Europe, including one in Brussels, where the province openly lobbied EU officials on economic and cultural issues. In addition, Québec faced a shortage of medical practitioners and was in the process of negotiating an agreement with France on the recognition of professional credentials. Ultimately, Charest was successful in bringing the provinces together on this issue, a point that was emphasized in a letter from Day to EU members in early 2009. The only province to not comply was Newfoundland and Labrador, which was fighting Ottawa on oil and gas royalties and was protesting an

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<sup>3</sup> Michael Hart, “Transatlantic Free Trade Follies; Pursuing Free Trade with Europe Appeals to the Romantic Notion that God Erred in Placing Canada Next to the World’s Leading Economy, but the Chances for Success are Slim,” *The Ottawa Citizen*, 8 October 2008, A19.

<sup>4</sup> Personal interview, 12 November 2009. The Canadian officials interviewed for this project spoke on the condition of anonymity with the understanding there would be no direct quotations without permission. Future references will cite only the dates of these meetings. Locations are excluded, given the small number of bureaucrats working in this policy area (to best ensure confidentiality).

<sup>5</sup> Kevin Dougherty, Former Premier to Represent Québec in Trade Talks with EU; Johnson to Spell Out Province’s Priorities,” *The Gazette*, 7 May 2009, B2.

expected EU ban on all seal products, including oil and pelts.<sup>6</sup> Official trade negotiations between Canada and the EU began on October 19, 2009.

### ***International Agreements and Canadian Federalism***

The evolution of Canadian federalism has created a unique role for the provinces in matters of foreign policy. At the international level, Canada is subject to the same provisions as other federal states regarding the fulfillment of treaty guidelines. Article 27 of the 1969 Vienna Convention on the Law of Treaties prohibits states from using domestic law as justification for violating international treaty obligations.<sup>7</sup> Similar provisions were outlined in Article XXIV (12), of the General Agreement on Tariffs and Trade (GATT), which stated that “[e]ach contracting party shall take such *reasonable* measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territory.”<sup>8</sup> The WTO also incorporated a similar “federal-state clause.” Article 103 of the Canada-United States Free Trade Agreement (CUSFTA) and Article 105 of the North American Free Trade Agreement (NAFTA), further stipulates that “*all necessary measures*” be taken to ensure the compliance of state, provincial and local governments.<sup>9</sup>

Unlike other federal states, Canada does not have clearly defined constitutional guidelines regarding the international activity of non-central governments. In fact, Section 132 of the British North America Act (1867) grants the Dominion the authority to *implement* treaties negotiated by Great Britain. As Ottawa gained more autonomy over its international affairs, however, three sections of the *British North America Act, 1867* became increasingly relevant. In terms of the “treaty-making power,” the 1937 *Labour Conventions* decision noted that Ottawa had the power to *negotiate* international treaties but did not have the right to *implement* agreements in areas of provincial jurisdiction. Despite initial concerns the ruling would limit federal autonomy, the Supreme Court of Canada did not subsequently use *Labour Conventions* to extend control to either level of government.<sup>10</sup> Judicial review of the “trade and commerce power” followed a similar pattern. In 1867 Parliament was given exclusive control over the regulation of trade and commerce in Section 91(2). The difficulty, however, was that provinces were granted jurisdiction over property and civil rights, which includes the regulation of contracts in which international trade is conducted. As with *Labour Conventions*, the Supreme Court

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<sup>6</sup> L Ian Macdonald, “Canada-EU Trade Deal Would be Feather in Caps of Charest, Harper; It’s a Big-Vision Idea, and the Premier Deserves Credit for Pushing Forward,” *The Gazette*, 8 March 2009, A13.

<sup>7</sup> *Vienna Convention on the Law of Treaties*, 23 May 1969, U.N.T.S. 1155 at 331 (entered into force 27 January 1980).

<sup>8</sup> Douglas M. Brown, “The Evolving Role of the Provinces in Canadian Trade Policy,” in Douglas M. Brown & Murray G. Smith, eds., *Canadian Federalism: Meeting Global Economic Challenges?* (Kingston: Institute of Intergovernmental Relations, Queen’s University, 1991), 90 (emphasis added).

<sup>9</sup> Douglas M. Brown, “The Evolving Role of the Provinces in Canada-US Trade Relations,” in Douglas M. Brown & Earl H. Fry, eds., *States and Provinces in the International Economy* (Berkeley: Institute of Governmental Studies Press, University of California, 1993), 115 (emphasis added). See also, Ian Robinson, “The NAFTA, The Side Deals, and Canadian Federalism: Constitutional Reform by Other Means” in Ronald L. Watts & Douglas M. Brown, eds., *Canada: The State of the Federation 1993* (Kingston: Institute of Intergovernmental Relations, Queen’s University, 1993), 210.

<sup>10</sup> Robert G. Richards, “The Canadian Constitution and International Economic Relations,” in *Canadian Federalism: Meeting Global Economic Challenges?*, 58–9.

ruled that issues “must be determined on a careful case-by-case basis.”<sup>11</sup> A third means of interpreting federal authority is the “Peace Order and Good Government” (POGG) clause. For Canadian provinces, the most relevant judicial decision is *Crown Zellerbach* (1988), in which the Supreme Court ruled that POGG allowed Ottawa to extend control when issues were deemed to be matters of “national concern.”<sup>12</sup> *Crown Zellerbach*, however, has also not served as a precedent for centralized control.

Therefore, these rulings create a level of constitutional ambiguity that grants Canadian provinces a degree of international legitimacy absent in many other federal states.<sup>13</sup> This is especially the case in matters of foreign trade policy. At the international level, trade agreements have increasingly intruded into areas of Canadian sub-federal jurisdiction, such as services, agriculture, alcohol, government procurement, national health and safety standards, energy, and environment and labour issues. Provincial trade and subsidy practices were also targeted by the United States as early as the 1970s, including pork, softwood lumber, automobile production, and Michelin tires. Saskatchewan’s nationalization of American-owned potash firms and Québec’s takeover of Asbestos Corporation were also under fire during this period. As a result, several provinces, especially Québec, Ontario, and Alberta, began to demand a more inclusive role in the formulation of Canadian foreign trade policy.

Historically, Ottawa limited the provinces to a consultative role. During the Tokyo Round of GATT, for example, the Canadian Trade and Tariffs Committee (CTTC) was established, which was responsible for gathering briefs from business, unions, consumer groups, the provinces, and other interested parties. In 1975 a more direct forum for the provinces was created with an ad hoc federal-provincial committee of deputy ministers. In 1977, a Canadian Coordinator for Trade Negotiations (CCTN) was appointed with the mandate to coordinate information from the provinces, the federal bureaucracy, industry, and other non-governmental organizations. Ultimately, these linkages evolved into provincial representation in the Trade Negotiations Office (TNO) of the CUSFTA, and the Committee for the Free Trade Agreement (CFTA). For NAFTA, the CFTA remained in place but Ottawa and the provinces also agreed to create the Committee for North American Free Trade Negotiations (CNAFTN).<sup>14</sup> Ultimately, the CNAFTN process evolved into the CTrade committee system, which involves a series of meetings between Ottawa and the provinces four times annually. Initially, some provincial governments expressed concerns with the content and quality of information available through CTrade. More recently, however, Ottawa has prioritized provincial input due to the complexity of issues such as services, and improved access to information and the agenda-setting process.<sup>15</sup>

Although no formal mechanism for provincial consultation exists in a Canada-EU context, the EU-Canada Joint Co-operation Committee (JCC) does review issues related

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<sup>11</sup> *Ibid.*, 62.

<sup>12</sup> Robinson, “The NAFTA, The Side Deals, and Canadian Federalism,” 214.

<sup>13</sup> Christopher J. Kukucha, “From Kyoto to the WTO: Evaluating the Constitutional Legitimacy of the Provinces in Canadian Foreign Trade and Environmental Policy,” *Canadian Journal of Political Science* 38, no. 1 (March 2005).

<sup>14</sup> G. Bruce Doern and Brian Tomlin, *Faith and Fear: The Free Trade Story* (Toronto: Stoddart Publishing, 1991), 128-130.

<sup>15</sup> Christopher J. Kukucha, *The Provinces and Canadian Foreign Trade Policy* (Vancouver: UBC Press, 2008), 51-53.

to sub-federal jurisdiction. The JCC, created under the 1976 Framework Agreement for Commercial and Economic Co-operation between Canada and the EU, examines trade matters in its EU-Canada Trade and Investment Sub-Committee (TISC). In 2008, for example, TISC reviewed a number of trade irritants in meetings held in Ottawa and Brussels, related to agriculture, alcohol, customs procedures, and other regulatory concerns.<sup>16</sup> Provincial participation in TISC, however, is inconsistent. When meetings take place in Europe, Québec is the only province that attends, due to its provincial office in Brussels. Québec officials, however, do not directly participate in discussions. There is also no “direct” provincial participation when TISC meets in Canada. Provinces are invited, but those that attend “are on the margins.” In recent years, few provinces have engaged the TISC process in Canada, with the exception of Québec and Newfoundland and Labrador.<sup>17</sup>

In the current Canada-EU negotiations, however, Canadian provinces enjoy an expanded level of engagement. In the early phase of talks, approximately 12 negotiating groups were established, with provinces actively involved in six, and often seven, of these forums. According to provincial officials, this is a significant departure from previous practices and is directly tied to EU demands for a “meaningful” provincial role in negotiations. It is also noted, however, that these developments do not represent a change in the “culture” of federal-provincial engagement in matters of trade policy. In fact, the EU has not called for direct provincial participation in all areas of negotiations. In some cases, EU demands have also contributed to an increase in federal-provincial tensions when Ottawa’s administrative procedures are not consistent with those of the provinces.<sup>18</sup>

### ***Alcohol***

Alcohol and agriculture are two case studies that illustrate historic tensions in the Canada-EU trade relationship. In terms of alcohol provincial governments have historically maintained monopolies or near monopolies on the sale of alcoholic beverages. In an effort to raise revenues, provincial liquor control boards carefully regulated the sale and importation of all alcohol, with an emphasis on wine and beer. Beer imports from other countries, for example, were subject to high tariffs; similar restrictions were previously extended to domestic producers, requiring them to operate breweries in individual provinces. Several provincial governments also discriminated in favor of local wine makers by imposing extremely high prices on international and other Canadian products. In some cases, liquor control boards prohibited the sale of wines made in other countries and provinces.

Canada’s first dispute with the European Economic Community (EC) centered on a 1979 Statement of Intent signed by Canadian provinces, which explicitly limited the capacity of provincial liquor boards to regulate sales of alcohol. In the years following the agreement a number of European countries questioned provincial compliance with

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<sup>16</sup> Canada and the European Union, *Report to the Canada-European Union Joint Cooperation Committee*, [http://docs.google.com/viewer?a=v&q=cache:IvUYDdtMZIoJ:ec.europa.eu/external\\_relations/canada/docs/2008\\_jointreport\\_jcc\\_en.pdf+TISC+Canada+Provinces&hl=en&sig=AHIEtbRcSW3H1wYLcZuPN9Kj8Je318Dn6g](http://docs.google.com/viewer?a=v&q=cache:IvUYDdtMZIoJ:ec.europa.eu/external_relations/canada/docs/2008_jointreport_jcc_en.pdf+TISC+Canada+Provinces&hl=en&sig=AHIEtbRcSW3H1wYLcZuPN9Kj8Je318Dn6g) (5 November 2009).

<sup>17</sup> Personal interview, 12 November 2009.

<sup>18</sup> *Ibid.*

these guidelines. Specifically, Ontario's marketing and distribution practices, and its policy of protecting local wineries through differential markups, were viewed as violations of the Statement of Intent. The matter was submitted to a GATT dispute panel, which focused on the regime's federal-state clause in its 1987 ruling in favor of the EC. Canada and Europe reached an agreement in December 1988 that froze existing price differences for beer. The principle of national treatment was also extended to listing practices. Provincial beer distribution was not addressed.<sup>19</sup>

The EC/GATT dispute revealed significant differences between provinces on the issue of alcohol. Grape growers and wineries in Ontario and BC defended provincial practices by citing European agricultural subsidies. Several other provinces, however, especially those with limited wine production and exports, wanted to settle the GATT challenge because it threatened to disrupt beer sales. In an effort to represent these conflicting interests, Ottawa invited the provinces to three separate EC negotiating sessions following the 1987 GATT ruling. Though the provinces did not attend as full participants, the final 1988 agreement "was made with the knowledge and tacit consent" of the majority of the provinces.<sup>20</sup>

Following the 1988 agreement there were few official complaints from Europe related to Canadian provinces. In the late 1990s, however, the EC called for a further review of provincial liquor distribution practices. In December 2000 it initiated a dialogue with Ottawa and several months later the federal government contacted the main wine-producing provinces -- Ontario, Québec, and BC -- regarding participation in these discussions. As one official pointed out, "this was the first time in over a decade the provinces were directly involved in the EC wine dispute."<sup>21</sup> Federal officials attended these meetings, but only as observers. This model was based on earlier provincial involvement in 1990s discussions with the United States regarding market access. Those meetings, however, had been with American commercial groups rather than US government representatives.<sup>22</sup>

A subsequent wine-related development was the 2003 agreement between Canada and the EU regarding labeling and market access. Under this deal, Canadian producers were no longer allowed to label products using the terms sherry, champagne, port, or chianti, which the EU argued were exclusive geographic regions in Europe. Overall, this agreement had a negligible impact on Canadian provinces. Indeed, the Vintners Quality Alliance (VQA), which establishes standards in Ontario that are also voluntarily followed in BC, had already prohibited the use of these terms. The accord also allowed domestic wineries in BC and Ontario to exclusively sell Canadian wines in private retail outlets. Finally, label protection was extended to Canadian products such as ice wine and whisky.<sup>23</sup>

Unfortunately, the EU once again targeted Canadian policies for beer and wine in 2006. In its WTO complaint, the EU argued that \$28 million in domestic tax-breaks for Canadian brewers and vintners were discriminatory as they were denied to foreign

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<sup>19</sup> Brown, "The Evolving Role of the Provinces in Canadian Trade Policy," 101.

<sup>20</sup> *Ibid.*, 106.

<sup>21</sup> Personal interview, 28 August 2001.

<sup>22</sup> *Ibid.*

<sup>23</sup> Lisa Grace Marr, "Canada Inks Wine Deal; Until Now Canadian Vintners Have Been Shut Out of the European Market," *The Spectator*, 17 September 2003, C8.

producers. The support was defended by the Conservative government of Stephen Harper as being necessary due to comparable incentives granted to European producers, especially in France and Germany. At the time, this dispute, and the Conservative's departure from the EU backed Kyoto Protocol, was viewed as part of an overall decline in Euro-Canadian relations. This was reinforced when Harper cancelled a Canada-EU summit scheduled for Finland in November of that year.<sup>24</sup> Once again, however, a negotiated settlement was reached in early 2009. Under the terms of the agreement Canada eliminated tariffs applicable to non-alcoholic beer, bulk wine, fortified wine, and vermouths. Progressive reductions were also implemented for sparkling wine in containers holding less than 2 litres with alcohol content below 14.9 per cent.<sup>25</sup>

### *Agriculture*

Agriculture is another contentious sectoral issue for Canadian and European officials. In fact, as CETA talks began Day announced that Canada's support of dairy, poultry, and egg producers was "not up for negotiation."<sup>26</sup> Agriculture, however, will be a difficult issue to ignore. The EU has repeatedly stressed its view that supply-management is "an unfair competitive advantage" and made it clear that Canadian practices "could prove to be a deal breaker."<sup>27</sup> There are also several provinces seeking greater liberalization of agricultural goods, especially grains and red meats. As one provincial official noted in response to Day's comments, "technically, everything is on the table for CETA, including agriculture."<sup>28</sup>

Regardless, previous WTO and NAFTA commitments suggest that any new Canada-EU agreement will have only a modest impact on Canadian trade policy. The WTO's Agreement on Agriculture, for example, replaced Canada's existing quota system for dairy, poultry, and eggs with tariffs, but these were set at higher average rates than previous import quotas. As part of its deficit reduction strategy, Ottawa had also eliminated export grain subsidies in its 1995 federal budget, which exceeded the 36 percent target set by the WTO. Even in the sensitive supply-managed sectors, the Canadian government met and in some cases surpassed WTO targets.<sup>29</sup> In all cases, these cuts were driven by budget considerations. During the 1990s, Canada was simply not able to afford high levels of subsidization for agricultural producers.

In contrast, some provinces, such as Alberta, are interested in dismantling Canada-EU agricultural barriers. This is evident with the province's opposition to the Canadian Wheat Board. The Wheat Board is a Crown corporation that sets prices for

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<sup>24</sup> Steven Chase, "EU Triggers Trade War Over Beer and Wine: Emerson Defiant Over Tax Cuts to Domestic Producers," *Globe and Mail*, 30 November 2006, B6.

<sup>25</sup> Affiliated Customs Brokers Limited, *Canada Reduces Duties on Wine and Beer to Settle WTO Dispute with EU*, <http://www.affiliated.ca/NewsDetails.aspx?lang=en-CA&id=4995> (12 November 2009).

<sup>26</sup> Andrew Mayeda, "Canada Won't Bend on Supply Management in EU Trade Talks: Stockwell Day," *Nanaimo Daily News*, 19 October 2009, B4.

<sup>27</sup> Doug Saunders, "Will Trade Talks be Cowed by Dairy Farmers? Negotiation of Major Treaty Between Canada, EU Could be Bugged Down by Tiff Over Selling Butter and Cheese Across Atlantic," *Globe and Mail*, 19 October 2009, A6.

<sup>28</sup> Personal interview, 12 November 2009.

<sup>29</sup> Grace Skogstad, "Canadian Agricultural Trade Policy: Continuity Amidst Change," in Fen Osler Hampson, Martin Rudner, and Michael M. Hart, eds., *Canada Among Nations 1999: A Big League Player?* (Toronto: Oxford University Press, 1999), 76.

Western producers' wheat exports; however, these prices are dependent on successfully acquiring foreign markets. Generally, this system provides price benefits for Canadian producers owing to Canada's comparative advantage in this sector, which reinforces Ottawa's argument that the Wheat Board is not a market-distorting mechanism. Some producers, however, have argued that higher prices could be charged if grain was sold directly to consumers. In support of this position, Alberta released four separate reports on the Canadian Wheat Board in June 2006. Two of those studies recommended changing the board's business model to make it better represent "goals of marketing choice." The third report focused specifically on Australia and its single-desk marketing system. The final study discussed the elimination of federal supports and the future of the Wheat Board.<sup>30</sup>

It is important to note, however, that agricultural protectionism does exist in provinces favoring liberalized trade. One example is trade in sugar. In several reviews dating back to 1995 the Canadian International Trade Tribunal (CITT) found that dumped and subsidized sugar from the EU and United States was damaging Canadian sugar-beet farmers and processors. Canada does not subsidize sugar producers, whereas EU and US programs result in domestic sugar prices that are two-to-three times higher than world prices. Import quotas in these countries also exclude imports from developing states and Canada. These practices result in the over-production of sugar, which is dumped at reduced prices into other markets. During the 1990s foreign producers were able to capture 15 per cent of the Canadian sugar market, which resulted in severe anti-dumping duties being applied to the EU and United States. There is, however, some indication that the Canada might be willing to reconsider these measures in ongoing negotiations. In fact, existing duties have created a "duopoly" in Canada with Rogers controlling sugar in Western Canada and Tate and Lyle PLC's Redpath dominating the Eastern Canada market. Together, these two companies control 97.4 per cent of the Canadian sugar market, and in the words of one food industry executive, allow them to "make money hand over fist." If these measures are targeted in Canada-EU negotiations it could challenge Alberta's stated commitment to liberalization, as Rogers processes its sugar in Taber, and acquires the majority of its sugar beets in the southern half of the province.<sup>31</sup>

### ***Sanitary Measures, Technical Barriers to Trade, and Regulatory Cooperation***

Sanitary measures regulatory cooperation, and other technical barriers, are also a focus of Canada-EU negotiations. These issues are not new to the Canada-EU trade relationship. One of the first major disagreements was the lengthy WTO dispute on beef hormones. In this case, imports of hormone treated beef from the US and Canada were banned as they did not meet EU standards. In 1997, however, a WTO dispute panel ruled against the EU. Despite this decision, the EU refused to comply and in 1999 Canada was allowed to enact retaliatory measures, which it did on Roquefort cheese, truffles, and Dijon mustard.

The EU responded by initiating a series of scientific studies focusing on the safety of beef hormones. Not surprisingly, the European Scientific Committee on Veterinary

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<sup>30</sup> Alberta, Agriculture and Food, *Studies Explore Grain Marketing Options for Prairie Wheat and Barley*, [http://www1.aric.gov.ab.ca/\\$department/deptdocs.nsf/all/com10799](http://www1.aric.gov.ab.ca/$department/deptdocs.nsf/all/com10799) (13 January 2007). The province's position on agricultural reform is regularly updated on Alberta, *Choice Matters: Marketing Choice for Alberta Producers*, <http://www.choicematters.gov.ab.ca> (13 January 2007).

<sup>31</sup> Sean Silcoff, "Showdown Over Sugar," *National Post*, 5 July 2005, FP1.



Measures Relating to Public Health published three different opinions in 1999, 2000, and 2002 highlighting ongoing health concerns related to six different beef hormones. On the basis of these findings the EU maintained its ban on Canada and US beef. The EU also launched a subsequent WTO dispute process on Canadian and US retaliatory measures in February 2005, arguing that these actions were no longer justified due to new scientific findings. The panel, which ruled in March 2008, once again confirmed that the EU ban was inconsistent with WTO standards but that Canada had also violated several “procedural” issues. A WTO Appellate Body Report issued in October 2008 re-affirmed Canada’s rights to maintain retaliatory measures.<sup>32</sup>

An additional irritant is “geographic indicators.” In these cases the EU has argued that Canada must abandon the use of trademark names associated with specific European geographic regions, such as Parma Ham and Feta Cheese. Producers in England’s “Cheddar District” are also pushing for the term “cheddar” to be removed from all cheese not from that region.<sup>33</sup> In a related incident, the EU banned exports of flaxseed from Canada in October 2009, an annual export market of \$320 million, due to concerns of contamination by genetically modified flax. Canada has argued that the modified genes are included to allow the crop to grow in soil sprayed with herbicides. Canadian officials also point out that the number of contaminated seeds is minute, approximately one in every 10,000. At this point, however, the EU has refused to reconsider its ban on Canadian flax.<sup>34</sup> On a more positive note, Canada and the EU did negotiate the removal of a ban on Canadian genetically modified canola in July 2009. The EU made it clear, however, that this was an issue-specific decision and did not alter its commitment to a broader regulatory ban on genetically modified products.<sup>35</sup>

One way to prevent regulatory issues from damaging broader trade relations is to negotiate Mutual Reciprocal Agreements (MRA’s). In 1998 Canada and the EU negotiated an MRA dealing with technical barriers, which included annexes focusing on pharmaceuticals, watercraft, and electrical safety. According to one provincial trade official, this was a very “top-down” process, with limited engagement with the provinces. This was not problematic for the first two issues, which were areas of federal jurisdiction, but the electrical annex was primarily provincial. The MRA committed Canada and the EU to establishing an implementation process that included conferences and other confidence-building measures.<sup>36</sup> After Ottawa negotiated the agreement, however, the provinces announced they would not support the MRA due to a lack of provincial involvement. As another former trade negotiator noted, the “the process died” and the electrical MRA became “virtually useless.”<sup>37</sup>

There are separate Canada-EU agreements for sanitary measures, technical barriers, and regulatory mechanisms in CETA. In a recently leaked draft text of CETA,

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<sup>32</sup> Foreign Affairs and International Trade Canada, *WTO Panel Cases to which Canada is a Party: Canada - European Community - Beef Hormones*, [http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/update\\_hormones.aspx?lang=en](http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/update_hormones.aspx?lang=en) (8 November 2009).

<sup>33</sup> Saunders, Will Trade Talks be Cowed by Dairy Farmers?

<sup>34</sup> Martin Mittelstaedt, “Attack of the Triffids has Flax Farmers Baffled,” *Globe and Mail*, 27 October 2009, A1.

<sup>35</sup> David Akin, “EU Lifts Ban on Canadian GMO Canola,” *The Ottawa Citizen*, 16 July 2009, A3.

<sup>36</sup> Personal interview, 12 November 2009.

<sup>37</sup> Helmut Mach, “Why Alberta Should be Wary of EU Trade Deal; Proposals Have Costs, but few Potential Benefits,” *Edmonton Journal*, 19 May 2008, A14.

however, it is clear that all three agreements re-affirm already existing obligations under the WTO's Sanitary and Phytosanitary (SPS), Technical Barriers to Trade (TBT), and General Agreement on Trade in Services (GATS) provisions.<sup>38</sup> Due to earlier compliance issues, Ottawa and the provinces have also consulted extensively on SPS, TBT, and regulatory issues in Canada-EU negotiations. Although this suggests only marginal advancement on these issues in CETA, a number of Canadian officials at both levels of government remain deeply skeptical of EU motivations. Specifically, there is concern the EU is pursuing a "colonial" agenda designed to transfer regulatory standards to its trading partners, a strategy the EU has adopted in the International Organization for Standardization (ISO) since its inception in 1947. Although the ISO is essentially a non-governmental organization, consisting of representatives from various groups responsible for defining national standards, it still provides an indication of EU objectives. Based on the leaked CETA draft text, however, there is no indication that Canada has significantly deviated from its existing international commitments.<sup>39</sup>

### ***Government Procurement***

Government procurement is another highly contentious aspect of CETA. In both NAFTA and the Uruguay Round the provinces were able to protect a number of specific procurement priorities. The CUSFTA had restricted itself to federal procurement. NAFTA extended this to include the procurement of goods, services, and construction services. Canada, however, succeeded in exempting research and development, health and social services, utilities, communications, education and training, and financial services. Activities related to the delegation of government services to private corporations were also excluded from NAFTA.<sup>40</sup> Although Article 1024 of NAFTA committed all three signatories to pursue further liberalization in procurement, at both levels of government, these negotiations did not occur. Participation in the WTO Agreement on Government Procurement (GPA) was limited mainly to developed countries. Unlike other signatories, however, Canada did not grant foreign parties equal status with domestic suppliers when it came to bids for government procurement contracts. Also, Ottawa was able to exempt provincial, municipal, and regional governments from the GPA. Thus, under the GPA Canada was not able to bid on government contracts in the jurisdictions of other signatories. Canadian provinces, however, could gain access to procurement contracts in US states.<sup>41</sup>

Provincial autonomy in this sector, however, resulted in unforeseen economic consequences due to a "Buy American" clause in the 2009 economic stimulus legislation in the United States, the *American Recovery and Reinvestment Act* (ARRA). Much of this federal funding was designed to give preferred access to US iron, steel, and related materials for construction projects. For the most part, however, state and municipal governments directly controlled the contracts for these projects. Therefore, Canadian

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<sup>38</sup> Trade Justice Network, *Leaked CETA Text*, <http://www.tradejustice.ca/tiki-index.php> (3 May 2010); Canada and the European Union, *Joint Report on the EU-Canada Scoping Exercise*, March 5, 2009, 4.

<sup>39</sup> Personal interview, 12 November 2009.

<sup>40</sup> Denis Lemieux and Ana Stuhec, *Review of Administrative Action Under NAFTA* (Scarborough: Carswell, 1999), 65-66.

<sup>41</sup> International Trade Canada, *Consultations on FTAA and WTO Negotiations: Sectoral Consultations – Government Procurement*, <http://www.dfait-maeci.gc.ca/tna-nac/discussion/govproc-en.asp> (17 May 2005).

bidders were excluded unless specific local governments waived Buy American provisions. Interestingly, other governments, including Britain, France, Germany, Australia, Chile, Mexico, Chile, Peru, and Singapore, did not face similar exemptions due to separate agreements ensuring reciprocal sub-federal procurement rights with the US.<sup>42</sup> Canada also had no means of challenging Buy American provisions using NAFTA or WTO dispute mechanisms due to already noted exclusions.

Therefore, Canada's only option was to pursue a negotiated settlement offering greater US access to Canadian provincial and municipal contracts. Initially, a successful outcome was considered unlikely, as the American procurement market is significantly larger than Canada's. As a senior provincial trade official noted at the time, the "US is operating within existing agreements," which means that Ottawa is essentially "asking for a favour."<sup>43</sup> Despite these challenges, a bilateral procurement agreement was successfully negotiated in February 2010. Under the terms of the deal, Canada was granted permanent access to the procurement markets of the 37 US states compliant with the WTO's GPA. Temporary admittance, until September 2011, was also permitted for specific projects funded by the ARRA. In return, permanent access was granted to US suppliers in provincial procurement markets. Temporary entry to provincial and municipal construction contracts not covered by the GPA was also granted until September 2011. Almost immediately, however, critics pointed out that the majority of ARRA funding was already committed prior to the new agreement. Annexes 2, 4, and 5 of the deal also outlined numerous exemptions for Canadian provinces, especially in terms of services and construction procurement (as noted below).

Critics of CETA have argued against the procurement provisions in the leaked draft text. A recent report by the Canadian Centre for Policy Alternatives (CCPA), for example, highlighted a number of concerns, including the prohibition of preferences for domestic suppliers, mandatory time limits for bids, a complaint process for unsuccessful bidders, and an electronic submission process to tender bids for all levels of government in Canada.<sup>44</sup> A number of valid questions are raised in the report, especially cost concerns for smaller provincial, regional and municipal governments. The prohibition of offsets, which are used to correct balance of payments problems through local development, investment, licensing of technology, and domestic content purchases, are also targeted. Finally, the CCPA has criticized a new set of demands by EU negotiators, tabled in December 2009, that call for a comprehensive list of entities to be opened for bidding at thresholds of \$130,000 for goods and \$200,000 for services. These include federal agencies and institutions such as the Bank of Canada, the House of Commons, Elections Canada, and Transport Canada. All provinces and territories are to be included as are airports, government transit, ports, water, and energy providers.

These demands have definite implications for provincial governments. It is important to remember, however, that permanent concessions in separate bilateral and regional agreements must be consistent and function under the guidelines of the WTO's GPA. What is also missing from the CETA draft text is any indication of the exclusions listed for signatories. Once again, the recent Buy American agreement provides a good

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<sup>42</sup> "Buy American: NAFTA did its Best to Help," *Globe and Mail*, 10 June 2009, A14.

<sup>43</sup> Personal interview, 12 November 2009.

<sup>44</sup> Scott Sinclair, *Negotiating from Weakness: Canada-EU Trade Treaty Threatens Canadian Purchasing Policies and Public Services* (Canadian Centre for Policy Alternatives: Ottawa, 2010), 6.

indication of what Ottawa and the provinces will be willing to concede. In the Buy American text all provinces (and two territories) established separate commitments. Some provinces, such as British Columbia, opened procurement bidding to all provincial ministries, agencies, and commissions, with the exception of the provincial legislature. Ontario, on the other hand, excluded numerous procurement purchases, such as urban transportation and highway construction. Other notable exclusions, as cited in the GPA, include crown corporations, municipalities, measures for Aboriginal Peoples, hospitals, and publicly funded schools and academic institutions (with the exception of Ontario and Quebec). Thresholds for sub-federal bids were set at \$355,000 for goods and services and \$5,000,000 for construction services.<sup>45</sup>

Therefore, despite EU demands, it is unlikely that CETA will deviate significantly from the exclusions and thresholds in the Canada-US Buy American accord. Another consideration is procurement commitments under existing internal Canadian agreements. Although Canada has an overarching Agreement on Internal Trade (AIT) there are also regional agreements between provinces. In 2006, British Columbia and Alberta signed the Trade, Investment, and Labour Mobility Agreement (TILMA). In terms of bidding thresholds, levels were reduced to \$10,000 for goods (from \$25,000) and \$75,000 for services, which were previously set at \$100,000. Construction thresholds, however, remained at \$100,000. Similar reductions took place for public sector procurement. Construction project contracts were now open for bidding at \$200,000 (from \$250,000) and municipalities, academic institutions, school boards and hospitals (MASH) set limits of \$75,000 for goods and services, down from a previous threshold of \$100,000.<sup>46</sup> These thresholds are all significantly lower than Buy American or CETA.

The Trade and Cooperation Agreement between Ontario and Québec (TCA), signed in September 2009, also addressed procurement. In Chapter Nine, Public Procurement, both provinces agreed to similar TILMA provisions, with some minor differences. In the case of government procurement, the threshold was set at \$25,000 for goods and \$100,000 for construction and services. Higher limits were also set for MASH procurement, with \$100,000 for goods, services, and construction. Both provinces also agreed to a dispute settlement process in these sectors.<sup>47</sup> It should be noted, however, that both the EU and the United States have no interest in lowering contracts to TILMA or TCA levels. As noted, there is limited potential for growth in the Canadian procurement market and by dropping thresholds to internal levels EU and US internal projects could become vulnerable to Canadian bids.

Finally, there is also the fact that provincial governments will always use procurement to protect jobs and provide services. In Ontario, for example, the provincial government was adopting “Buy Ontario” provisions in provincial renewable energy policies, at the same time it pushed for a loosening of sub-federal procurement practices in the United States. In this case, Ontario goods and labour were set at 25 per cent of wind projects and 50 per cent of large solar projects. This is in addition to the 25 per cent

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<sup>45</sup> Cliff Sosnow & David Peaker, *The "Buy American" Agreement: Opening Up the Canadian and U.S. Procurement Markets*, [http://www.blakes.com/english/view\\_bulletin.asp?ID=3873](http://www.blakes.com/english/view_bulletin.asp?ID=3873) (5 May 2010).

<sup>46</sup> Alberta, International and Intergovernmental Relations, “Trade Accord will Benefit Economy: TILMA Transforms Internal Trade and Labour Mobility in Canada,” *News Release*, 31 March 2009, 2.

<sup>47</sup> Ontario and Québec *Trade and Cooperation Agreement Between Ontario and Québec*, September 11, 2009, 52-53.

levels that already exist for public-transit vehicles.<sup>48</sup> Therefore, it is clear that CETA's procurement provisions are significant but do not pose the threat cited by some critics

### *Services*

Services and investment are linked together in Chapter XX of CETA. Once again, it is helpful to briefly review previous NAFTA and WTO commitments to fully understand the negotiating priorities for Canadian provinces. In these negotiations several provinces did not have well-developed positions on services. Limited bureaucratic resources made it difficult for some provincial negotiators to focus on services, especially when other issues had higher economic priority. In other cases there was open disagreement among provinces. In terms of health and education services, some provincial governments supported the idea of further liberalization, due to a perceived comparative advantage, while others advocated greater protectionism. The movement of service-based professionals added another dynamic to these discussions.

In terms of NAFTA, the provinces were able to define clear positions on Annex I and Annex II of the agreement. Annex I excluded all provincial health measures, as defined in Article 1206, that existed prior to January 1, 1994 relating to national treatment, Most-Favoured Nation (MFN) status, and local presence requirements. As Mark Crawford has noted, this reservation immediately excluded most health services as the "basic nature of provincial schemes have not changed since 1994."<sup>49</sup> Less clear, however, was whether emerging privately funded health-care services would be exempt. The Supreme Court of Canada's decision to strike down Québec's prohibition of private health insurance in *Chaoulli v. Québec (Attorney General)*, rendered June 9, 2005, further reinforced the possibility that these services could be exposed to the NAFTA dispute settlement process. The Annex II "Social Service Reservation" clause, on the other hand, excluded provincial social services "established or maintained for a public purpose." As a result, Canadian officials have argued that Annex II includes "private-delivery" of "publicly-funded" services. Ultimately, BC pushed for a clear definition of social services in Annex II, which resulted in "public education, public training, health, and child care" being included in provisions, related to cross-border services and investment.<sup>50</sup>

In subsequent years, a number of provinces also focused on the potential exposure of services under NAFTA's Chapter 11 provisions. In Ontario, the Canadian Union of Public Employees (CUPE) raised concerns that private for profit operations, such as child-care, could be targeted under Chapter 11. As a result, the province's Ministry of Economic Development and Trade (MEDT) was asked to evaluate a CUPE legal opinion on the issue. In drafting the rationale for the government's position, MEDT argued that funding mechanisms, barring any unlikely government expropriation initiatives, were consistent with NAFTA commitments.<sup>51</sup> More recently, provincial health services were targeted under NAFTA's Chapter 11 and 15 (Competition Policy). In February 2008,

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<sup>48</sup> Jeffrey Simpson, "Ontario Showing its Hypocrisy, This Time on Free Trade," *Globe and Mail*, 16 October 2009, A13.

<sup>49</sup> Mark Crawford, "Truth or Consequences? The Law and Politics of the GATS Health Care Debate," *Canadian Foreign Policy* 12, no. 2 (2005), 108.

<sup>50</sup> Personal interview, 2 August 2004.

<sup>51</sup> Personal interview, 31 August 2005.

Centurion Health Corporation filed a claim arguing that the Canada Health Act limited investment opportunities for foreign investors by creating a “monopoly health care market.” To substantiate its complaint, the company cited problems in building a surgical facility in British Columbia and operating a diagnostic imaging centre in Alberta. Specifically, it was argued that Ottawa had an obligation to ensure that provincial, regional, and municipal health authorities followed international investment commitments as defined by NAFTA.<sup>52</sup> This case remains in the preliminary phase of the NAFTA dispute process. Several provincial officials, however, question its validity. In the case of Alberta, the claimant arrived in the province with the intent of opening a diagnostic clinic without following appropriate procedures defined by provincial legislation. As one bureaucrat noted, “these clinics are allowed in Alberta but the company did not follow legislated guidelines.”<sup>53</sup>

Provincial concerns regarding services were also evident in the negotiation of the WTO’s General Agreement on Trade in Services (GATS). British Columbia, for example, argued for changes to Article I.3 of the GATS, which at the time excluded services provided by regional and local governments. Provincial officials were concerned by successful challenges to Article 55 of the EC Treaty, which was designed to allow similar service exclusions in Europe. Other federal and provincial officials, however, believed the existing language of Article I.3 could be “interpreted broadly” and argued that the recognition of the “right to regulate” and “due respect for national policy objectives” in the GATS preamble protected provincial interests.<sup>54</sup> To date, no state has launched a WTO challenge against Canada applicable to this section of the GATS. In fact, only twelve of 332 complaints dating back to 1995 are in direct reference to services. Only three of these targeted Canada: *Certain Measures Affecting the Automotive Industry*, *Certain Measures Concerning Periodicals*, and *Measures Affecting Film Distribution Services*.

Following the release of the CETA draft text, critics also targeted the agreement’s provisions on services. The CCPA, for example, suggested that EU negotiators were “working to downgrade regulatory standards and break up public services Canadians so value, in order to increase the profit opportunities for European multinationals.”<sup>55</sup> There is a certain element of truth to this statement as all states seek export opportunities for domestic business interests. It is also clear, however, that Ottawa and the provinces will ensure that limitations in previous agreements apply to CETA. In fact, in Section 1, Article 1 of the services agreement the CETA draft text re-affirms its commitment to existing WTO frameworks, permits the right to regulate, provide subsidies and grants, and protect “the privatization of public undertakings.” Other reservations and exceptions are outlined in Articles X (5) and (14) and 50 and 51. Specific commitments for each signatory are specified in Annex 7A, which is not included in the CETA draft text.

As with procurement, however, it is not difficult to anticipate the priorities for Ottawa and the provinces regarding Annex 7A. Based on NAFTA and WTO precedents

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<sup>52</sup> Foreign Affairs and International Trade Canada, *NAFTA - Chapter 11 - Investment Cases Filed Against the Government of Canada: Centurion Health Corporation v. Government of Canada*, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/centurion.aspx?lang=en> (6 November 2009).

<sup>53</sup> Personal interview, 12 November 2009.

<sup>54</sup> Crawford, “Truth or Consequences?” 104-5.

<sup>55</sup> Sinclair, *Negotiating from Weakness*, 14.

it is unlikely that Ottawa or the provinces will expose healthcare, or other “defensive” trade interests such as education. In the early stages of talks, tensions have focused on process, as opposed to specific exclusions. The EU approaches services from a GATS “positive list” perspective, where states make explicit obligations regarding services. Canada, on the other hand, has a “negative” list approach, which identifies specific exclusions, as opposed to commitments. According to one provincial negotiator, however, there are surprisingly few disagreements between Canadian and EU negotiators on services. In most cases, the EU is as sensitive to education, culture, healthcare, as Canada.<sup>56</sup>

Labour mobility is another issue addressed in Chapter XX of CETA. In Canada, there are several provinces that endorse the liberalization of labour mobility, as defined by GATS Mode IV, which allows temporary access for professionals providing services in another country. In 2008 France and Québec also signed a bilateral labour-mobility agreement focusing on the mutual recognition of professional qualifications. Since that time, both signatories have negotiated subsequent MRA’s for several professions, including doctors, lawyers, and some construction trades. Ongoing progress, however, will be limited to those professions where both governments suffer from a shortage of qualified workers. Not surprisingly, other provinces have different priorities on labour mobility. Ontario supports greater access in relation to professional services such as architecture, engineering, management, and accounting. Alberta has also targeted improved access for engineers and environmental service providers. In the early stages of Canada-EU negotiations, it is not clear if these differences can be reconciled. In the EU member states regulate professions, not the European Commission. In Canada, this is a provincial responsibility. Therefore, both Canada and the EU recognize that jurisdictional complexity could limit progress in this issue area.<sup>57</sup>

Once again, any agreement on labour mobility will not exceed existing domestic commitments. One of the primary purposes of TILMA was to increase labour mobility between BC and Alberta. In a number of professions, TILMA removed recertification and examination procedures. Changes were also implemented to improve business registration, with the elimination of filing fees and the production of duplicate annual reports in both provinces.<sup>58</sup> The Ontario-Québec TCA also addressed labour mobility in a wide range of trades, such as electricians, plumbers, carpenters, roofers, and heavy-duty equipment technicians. Credentials in a number of medical fields, chiropractors, dentists, physicians, physiotherapists, paramedics, optometrists, social workers, and pharmacists, were also recognized. Other professions included teachers, architects, engineers, urban-planners, and accountants.

At the same time, however, Part VI of TILMA established clear guidelines for restricting mobility in some professions, usually in the form of additional training or credentials.<sup>59</sup> A First Protocol of Amendment to TILMA, completed in February 2009, also included numerous additional requirements for movement of professionals in its

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<sup>56</sup> Personal interview, 12 November 2009.

<sup>57</sup> Ibid.

<sup>58</sup> Alberta, International and Intergovernmental Relations, “Trade Accord will Benefit Economy,” 1-2.

<sup>59</sup> British Columbia and Alberta, *Trade, Investment and Labour Mobility Agreement Between British Columbia and Alberta*, April 2006, 23-29.

Appendix A.<sup>60</sup> In addition, Article 6.5 of the TCA included provisions allowing regulatory authorities to restrict access on the basis of length of experience, certification, and professional misconduct. Article 6.2 (3) also excludes “all measures pertaining to language requirements or social policy measures including labour standards and codes, minimum wages, and social assistance.” Although both articles include legitimate reasons for limiting mobility, they do have the potential to substantiate protectionism in some sectors. There is no similar language or social policy provision in TILMA. Ultimately, any Canada-EU agreement on labour mobility will reflect these realities. Access will be pursued in areas where signatories have a lack of trained professionals. Regulation will continue in professions with a surplus of labour.

### ***Investment***

The investment provisions outlined in Chapter XX of CETA also include a dispute resolution process similar to NAFTA’s Chapter 11. In Canada, most critics of Chapter 11 point to the Ethyl Corporation decision, in which Ottawa paid \$19 million in damages to this US based company. Centurion Health, Ethyl, and other Chapter 11 cases, however, have established a precedent in Canada that will only be reinforced with CETA. In many ways, Chapter 11 now serves as a “preventative regulatory regime,” with central and sub-federal governments evaluating its potential consequences in public policy decisions. During the 2003 provincial election in New Brunswick, the high cost of automobile insurance became a prominent campaign issue, resulting in calls for a “public” government insurance program similar to those in Manitoba and BC. The Conservative government of Bernard Lord seriously considered the idea but abandoned it because of potential exposure to NAFTA Chapter 11. Automobile insurance was also an issue in Ontario, but again, the government decided not to pursue a public program, in part because of Chapter 11. For similar reasons, Ontario also backed away from legislation calling for blank cigarette packaging.<sup>61</sup> Helmut Mach, Alberta’s former chief trade negotiator, has also downplayed CETA’s investment provisions, noting that “Canada and the EU have few, if any, real investment barriers that need negotiated removal.” Mach acknowledges previous investment disputes, but these were resolved using existing domestic legal procedures.<sup>62</sup>

### ***Conclusion***

Canada’s constitutional ambiguity regarding the role of the provinces in foreign affairs creates unique challenges for Canadian trade negotiators and their international counterparts. As trade agreements intrude deeper into areas of provincial jurisdiction Ottawa must address sub-federal concerns during negotiations to best ensure some degree of compliance by the provinces. These dynamics have taken on a new emphasis in the current Canada-EU negotiations. This paper has identified six specific sub-federal issues areas that have the potential to complicate the current round of negotiations. In all cases, there is evidence to suggest that Canadian provinces will not only influence Ottawa’s

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<sup>60</sup> Trade, Investment and Labour Mobility Agreement, *First Protocol of Amendment*, [http://www.tilma.ca/pdf/TILMA\\_1stProtocolAmendment.pdf](http://www.tilma.ca/pdf/TILMA_1stProtocolAmendment.pdf) (4 November 2009).

<sup>61</sup> Kukucha, *The Provinces and Canadian Foreign Trade Policy*, 101.

<sup>62</sup> Mach, “Why Alberta Should be Wary of EU Trade Deal.”



negotiating position, but also the rules and norms established in this specific international agreement.

The first case that highlights the significance of the provinces, and indicates the impact of sub-federal governments on international outcomes, is alcohol. In fact, one of the earliest Canada-EC disputes challenged provincial distribution practices in this sector. The subsequent GATT ruling against Canada, and the inclusion of similar “federal-state” clauses in the FTA, NAFTA, and WTO, appeared to marginalize Canadian provinces on matters of international trade. Instead, it reinforced the need for sub-federal compliance and contributed to an enhanced role for provincial governments in trade negotiations. As such, subsequent Canada-EU agreements on alcohol included an enhanced consultative role for Canadian provinces. As noted, these obligations also directly reflected sub-federal interests.

Agriculture is another sensitive sector for Canadian negotiators. In this case, Canada must accommodate the interests of different provinces seeking both liberalization and protectionism. For producers of red meats and grains, such as Alberta, there is considerable interest in lowering barriers and increasing exports to Europe. In Ontario and Québec, however, ongoing practices of supply management can only be altered with high political costs. Although some levels of protectionism were removed in the past, due to economic and budget reasons, any Canada-EU agreement will not extend agricultural obligations beyond existing WTO and NAFTA commitments. In fact, Canada announced at the outset of talks that supply management was not on the table, despite European interest in addressing these practices.

A related issue is sanitary measures, technical barriers to trade, and regulatory cooperation. During the past decade Canada and the EU fought a protracted struggle over beef hormones. Although WTO dispute panels noted problems with the actions of both parties, a 2008 ruling legitimized ongoing Canadian retaliation. Other concerns have focused on geographic indicators, bans on Canadian exports of flaxseed and canola, and the EU’s pledge to maintain restrictions on all genetically modified foods. All of these issues have direct implications for Canadian provinces. Previous attempts to regulate technical barriers by negotiating an MRA on electrical standards also proved to be problematic. Provincial officials went into CETA negotiations with concerns of EU motives to extend its regulatory standards, a strategy pursued by the EU in the ISA for decades. At this stage, however, the CETA draft text does not suggest any deviations from existing WTO obligations, especially in areas of provincial jurisdiction.

A fourth challenge for negotiators is government procurement. Canadian provinces have a history of fiercely protecting procurement, as evident with both NAFTA and the GPA. It is clear, however, that CETA will extend procurement rules to sub-federal governments in Canada. Having said that, these provisions are unlikely to move beyond terms outlined in Canada’s recent Buy American procurement agreement, which contains numerous exemptions for Canadian provinces. In addition, the Buy American deal establishes separate commitments for each provincial government (and two territories). It is highly unlikely, therefore, that Canadian provinces will expand these obligations in CETA, which confirms GPA compliance. Ultimately, it is CETA’s procurement annex, which is in the process of being negotiated, that will outline specific provincial responsibilities. An additional barrier to an expansive Canada-EU agreement on procurement is the absence of any real, or potential, market for procurement providers

in Canada or the EU. European negotiators also have no interest in lowering bidding thresholds to TILMA or TCA levels. A lack of a pan-Canadian consensus on thresholds, and ongoing protectionist sub-federal procurement policies, will also stand in the way of significant changes in CETA's forthcoming procurement annex.

Any liberalization of services will face similar challenges. Once again, there are diverging interests of protectionism and liberalization in various provinces, with the exception of issues related to health-care and education. Therefore, any Canada-EU agreement is unlikely to move beyond existing WTO commitments. It is also important to remember that no WTO challenge has directly targeted Canadian services. NAFTA Chapter 11 cases, such as Centurion Health, have potential implications for provinces, but this has not resulted in any systematic reversal of Canadian practices. Progress on labour mobility has some potential but once again, individual provinces have different priorities. EU states and Canadian provinces are also responsible for regulating labour mobility, not central institutions, and that will add another layer of complexity for negotiators. Canadian domestic agreements, such as TILMA, also have numerous exclusions. Therefore, any progress on labour mobility will only occur in areas where all parties, including Canadian provinces, have similar objectives, most likely in terms of medical professionals, some trades, and a select range of professional services.

Finally, a proliferation of new NAFTA Chapter 11 challenges has the potential to impede a progressive Canada-EU agreement. The fact that cases such as Centurion Health target provincial regulatory practices will further increase the sensitivities of federal and provincial negotiators. Ultimately, however, CETA's impact on Canada-EU investment will not be significant. Trans-Atlantic investment has increased without any formal agreement, and disputes have been resolved within existing formal and informal resolution mechanisms. Few barriers also exist for EU investment at either federal or provincial levels.

Therefore, a successful resolution to the CETA process will depend a great deal on the final negotiating positions of Canadian provinces. The capacity of provincial governments to influence Canada's foreign trade policy and international norms and standards is evident when examining alcohol, agriculture, sanitary measures, technical barriers to trade, regulatory cooperation, procurement, services, and investment. The suspicion of EU motivations should also not be underestimated. "There is often the feeling," said one representative, "that European negotiators think Canada is a rather 'complex' place in need of reform. For that reason, we've become very cautious about European intentions." As the same Canadian official made clear, we "can't forget that 85 per cent of our bilateral trade goes to the United States, and for us that always needs to be a priority."<sup>63</sup> This reinforces the fact that the successful outcome of CETA negotiations will not come at the expense of provincial priorities.

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<sup>63</sup> Personal interview, 12 November 2009. The same official expressed concern that EU officials had not guaranteed that CETA would be applicable to sub-federal jurisdictions in Europe. This "creative ambiguity makes it difficult to think the Europeans are really interested in anything comprehensive."