

The impacts of NAFTA and CUSMA on Canadian provinces

by

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Abstract

This thesis explores the role of Canadian provinces in the negotiations of the North American Free Trade Agreement (NAFTA) and the Canada-United States-Mexico Agreement (CUSMA) and examines the impacts of these Free Trade Agreements (FTAs) on provinces, particularly New Brunswick. From a critical political economy perspective, this thesis argues that the negotiations of NAFTA and CUSMA by federal authorities reduce international trade policy to technical matters, bypassing the role of provinces, including provincial legislatures, within existing Canadian federalism. This has also undermined the influence of parliamentary and provincial institutions, including provincial legislatures, in international trade policy, despite the latter's impact on local development. As a result, provinces have to align their regulatory frameworks with the liberalization and regulatory harmonization terms stipulated in these FTAs.

Dedication

To the pillars in my life, my beloved wife, Brenda, and my children, Katia and Leonardo, for their immeasurable love, support, and encouragement.

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List of Abbreviations

AIT	Agreement on Internal Trade
APEC	Asia Pacific Economic Cooperation
BITs	Bilateral Investment Treaties
CFTA	Canadian Free Trade Agreement
CHST	Canada Health and Social Transfer
CCTN	Continuing Committee on Trade Negotiations
CETA	Canada-European Union Comprehensive Economic and Trade Agreement
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
C-TRADE	Federal-Provincial-Territorial Trade Committee
CUSFTA	Canada-United States Free Trade Agreement
CUSMA	Canada-United States-Mexico Agreement
DFNB	Dairy Farmers of New Brunswick
ECA	Environmental Cooperation Agreement
EU	European Union

FTAs	Free Trade Agreements
GDP	Gross Domestic Product
GRP	Good Regulatory Practices
ICSID	International Centre for Settlement of Investment Disputes
ISDS	Investor-State dispute settlement
JCPC	Judicial Committee of the Privy Council
MEAs	Multilateral Environment Agreements
MLA	Member of the Legislative Assembly
MP	Member of Parliament
NAAEC	North American Agreement on Environmental Cooperation
NAALC	North American Agreement on Labor Cooperation
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization
OECD	Organization for Economic Cooperation and Development
REB	Research Ethics Board
TRQs	Tariff Rate Quotas

UNCITRAL United Nations Commission on International Trade Law

WTO World Trade Organization

Chapter One

Introduction

This thesis examines the role of Canadian provinces in the negotiation of the North American Free Trade Agreement (NAFTA) and the Canada-United States-Mexico Agreement (CUSMA). The study also focuses on the impacts of these Free Trade Agreements (FTAs) on provinces, particularly New Brunswick. The British North American Act of 1867, or the Constitution Act, established that the federal authority is responsible for negotiating FTAs because international trade and commerce fall under this jurisdiction. The Constitution Act also indicates that the federal level cannot impose international trade agreements on provinces in matters of provincial jurisdiction. This is enforced by the decentralized federal system which is a partnership between two equal, autonomous, and interdependent orders of authority that jointly decide national policy (Cameron and Simeon, 2002). Despite this form of federalism, provinces do not have a direct role in negotiating international trade policy under the control of federal authorities. This means that provinces did not participate directly in shaping the provisions of NAFTA and CUSMA but followed their implementation. However, provinces hold constitutional power and autonomy in certain areas to regulate independently within their respective jurisdictions. This lack of provincial participation in the negotiations of FTAs overlaps between international trade commitments and provincial powers. Despite the provincial right to regulate set by federalism, provinces have to align their regulatory frameworks and policies with the liberalization and regulatory harmonization terms stipulated in FTAs. Hence, this thesis argues that NAFTA and CUSMA negotiations, without any provincial influence or political

contestation, impact the democratic decision-making process that underlies Canadian federalism. This means that FTA negotiations disregard the participation of provinces within the existing democratic institutions, such as provincial legislatures, with no input or influence to shape FTAs. As a consequence, NAFTA and CUSMA restrain provincial jurisdiction because provinces have no option but to align with the stipulations of these FTAs.

The thesis asks the following questions: What role did Canadian provinces play in NAFTA and CUSMA within federalism, particularly in areas under provincial regulatory jurisdictions? What are the impacts of NAFTA and CUSMA on Canadian provinces? What are the impacts of the ambiguous overlapping of federal and provincial jurisdictions in NAFTA and now CUSMA?

This research answers those questions through the notion of neoliberalism from a critical political economy perspective. Neoliberalism, in this thesis, refers to a historic political project of class rule and state power which creates competition among firms and workers while protecting firms (Leo, Gindin and Albo, 2010). Neoliberalism requires the intervention of the state to promote international property rights in a free trade area (Leo, Gindin and Albo, 2010). In the context of neoliberalism, the depoliticization of international trade policy refers to the elimination of the political character of decision-making and policy formulation by framing it as a technical issue (Burnham, 2017) centered around the executive branch at the national level (Cox, 1987; Poulantzas, 2000). A critical political economy perspective provides alternative insights through the analysis of the implications of international trade policy on federalism and provincial jurisdictions. The negotiations of NAFTA and CUSMA, without provincial influence,

impose restrictions on domestic regulations and limit the ability of provinces to adopt policies that may conflict with the obligations outlined in FTAs. Hence, a critical political economy perspective provides the framework to show the impacts of NAFTA and CUSMA on provinces.

Following the critical political economy perspective, this thesis argues that the depoliticized Canadian international trade policy in charge of the national executive branch, particularly the Prime Minister's office, does not provide provinces with any role or influence to shape international trade negotiations, despite the strong impact of NAFTA and CUSMA on provinces. FTAs contradict the provincial powers to regulate in certain areas set by federalism. Provinces have to align their regulatory frameworks and policies with the liberalization and regulatory harmonization terms stipulated in these FTAs. Under neoliberalism, FTAs moved beyond removing tariffs to emphasize regulatory harmonization for provinces. As a consequence, NAFTA and CUSMA constrain the democratic decision-making process that underlines Canadian federalism and provincial jurisdiction because these FTAs are considered technical matters without space for provincial influence or political contestation. The impact on democratic decision-making in international trade policy refers to the process by which the executive branch decides the outcomes of FTAs without any political contestation or influence from provinces and within provinces, particularly legislatures.

This thesis employs primary and secondary sources. Primary sources were international and national free trade agreements, international arbitral decisions in the NAFTA and CUSMA framework, official reports, publicly available government information, position papers, transcripts from federal and provincial legislative debates,

and interviews with relevant stakeholders involved in international trade policy. The Research Ethics Board (REB) of the University of New Brunswick reviewed and authorized interviews under file UNB REB File #2022-174. The secondary sources employed in this thesis were books, academic articles, and media news.

Based on the research questions, I analyzed the information obtained from primary and secondary sources to understand Canadian provinces' role in international trade policy and the impacts of NAFTA and CUSMA on provinces. Also, the analysis of secondary sources allowed me to construct the literature review and theoretical perspective for this thesis. Furthermore, primary and secondary sources were used to explain the historical account of implementing neoliberalism in Canada and its repercussions on provinces. This historical account also provided the framework to understand the impacts on provincial jurisdictions in the context of neoliberalism and the negotiation of FTAs. I outlined three main key aspects by intertwining the notion of neoliberalism within a critical political economy perspective with an understanding of the international trade negotiation process. First, the negotiation of FTAs is exclusively led by the executive branch, excluding provinces. Second, I identified the direct constraints on provincial jurisdiction through the rulings of international arbitral tribunals that arise from NAFTA and CUSMA and the enforceable CUSMA obligations for regulatory harmonization. Third, I examined how these FTAs restrain the democratic decision-making process, provincial jurisdiction, and local producers.

As an international student living in New Brunswick, I chose this province as the jurisdiction to develop a case study because Atlantic Canada, including New Brunswick, is not discussed in the literature. And despite being a small province, New Brunswick is

an exporting province in the NAFTA-CUSMA bloc, particularly in the refined oil, forestry, seafood, and manufacturing sectors (Library of Parliament, 2020).

My interest in analyzing the impacts of FTAs at the subnational level began with my professional experience working as an international negotiator of investment treaties and as an official in international trade cooperation in Mexico. From 2005 to 2010, I worked for the Mexican Ministry of Economy in the negotiations of Bilateral Investment Treaties (BITs) and Investment chapters of FTAs. I also represented Mexico before the Investment Committee Bureau of the Organization for Economic Cooperation and Development (OECD). I operated the “National Contact Point” within the framework of the Guidelines for Multinational Enterprises of the OECD to foster corporate social responsibility, including the mediation of *bona fide* agreements on controversies involving transnational corporations. I participated with the OECD in the elaboration of regulatory improvement proposals to boost business opportunities in Mexico. I also collaborated in the presentation of the periodical country policy evaluation before the World Trade Organization (WTO), and in training and capacity building developed by the Investment Experts Group of the Asia Pacific Economic Cooperation (APEC).

In this experience I learned that authorities do not address the impacts of FTAs on the sub-national level in international negotiations. In contrast, many subnational authorities ignore international trade obligations, either because of a lack of interest and knowledge or in-existent political coordination. As a political science student with a background in international negotiations, my academic interest lies in the impacts of NAFTA and CUSMA on subnational entities.

The role of Canadian provinces in NAFTA and CUSMA and the impacts on sub-national entities continue to be understudied. Thus, this research fills the gap in the analysis of both the role of provinces in the negotiation of NAFTA and CUSMA and the impacts of these FTAs on provinces. This thesis is divided into six chapters. The second chapter examines theoretical perspectives on international relations, encompassing neorealism, neoliberal institutionalism, and rational choice institutionalism. Finding and gathering literature on comparative public policy, the different levels of state authorities, and stakeholders in the negotiation of NAFTA and CUSMA is difficult. Despite this limitation, the discussion of debates on international relations, some including international and domestic levels of analysis, is central to understanding the negotiations of these FTAs, and their impacts on the subnational level. The neorealist approach underscores the power-seeking essence of nation-states in the international order that generates a zero-sum game (Schlegel, 2019). The neoliberal institutionalism literature discusses an institutional cooperative advantage approach where countries obtain reciprocal gains (Fraser and García, 1994; Mayer, 1998; Mehanna and Shamsub, 2002; Hufbauer and Schott, 2005; Perreault, 2020). Other scholars add the domestic or two-level game approach (Putnam, 1988) to neoliberal institutionalism in order to reach a consensus at the international level, known as the rational choice institutionalism perspective (Cameron and Tomlin, 2000; Kukucha, 2003, 2009). Neoliberal institutionalism and rational choice institutionalism imply that as a side effect, provinces benefit from the cooperative trade advantages (Avery, 1998; Cameron and Tomlin, 2000; Mayer, 1998; Kukucha, 2003, 2009). Neorealism, neoliberal institutionalism, and rational choice institutionalism do not discuss the implications of FTAs at the sub-federal level. In

contrast, the critical political economy shows that the depoliticization in FTA negotiations expands trade and investment to maintain neoliberalism in the form of provincial regulatory harmonization (Burnham, 2017; Lamp, 2009; Leo, Gindin, Albo, 2010; McBride and Fry, 2022; O'Brien, 1995; Soederberg, 2000, 2014).

The third chapter of this thesis explores the transition from the welfare state to neoliberalism and the role of provinces in the negotiation of NAFTA and CUSMA. To understand the role of provinces in international trade policy, this chapter starts with the interpretation of the Canadian Constitution and the powers of federal and provincial jurisdictions. Also, it describes the evolution from the Canadian welfare state to neoliberalism as core features that changed paradigms in federal-provincial relations and the predominance of federal authorities in trade negotiations. This chapter shows that provinces did not have a role or influence in the negotiation of NAFTA and CUSMA because the depoliticized negotiation of these FTAs. International trade policy does not take in account contestation and debate with Parliament and Legislative Assemblies. This means there was no participation from provincial legislatures or provincial responses to federal authorities. The chapter also explains the role of provinces in the Canada-European Union Comprehensive Economic and Trade Agreement (CETA), because of the latter's importance in pushing provinces to adopt international trade obligations by participating only as observers.

The fourth chapter focuses on the core differences between NAFTA and CUSMA and examines three mechanisms that amplify regulatory harmonization and undermine provincial jurisdictions in Canada. The first mechanism is the investor-State Dispute Settlement (ISDS) under NAFTA chapter 11, "Investment," in which provincial

jurisdictions and their autonomy to regulate were subordinated to international trade and investment disputes. The second mechanism is CUSMA chapter 28, “Good regulatory practices” (“GRP”), which seeks regulatory harmonization. CUSMA’s chapter 28, “GRP,” represents a new pathway to perpetuate neoliberalism through more liberalization and regulatory harmonization on provinces (Lamp, 2019; McBride and Fry, 2022; O’Brien, 1995). CUSMA’s dispute settlement state-to-state under chapter 31 is a third mechanism that enforces all international obligations at the provincial level, allowing investors through state authorities to invoke regulatory harmonization under chapter 28, and the main obligations of the “Investment” chapter 14 between Canada and the US. In this way, chapter Four shows the impacts of international trade policy on provinces and the subordination of provincial jurisdictions to NAFTA and CUSMA.

Chapter Five focuses on NAFTA’s and CUSMA’s impacts on New Brunswick, including the negotiations, implementation, and restraints in provincial jurisdiction. This case study shows a concrete example of the absence of the role of the province in international trade policy. It also explores the impacts of CUSMA on the dairy industry. Federal authorities regulate the dairy industry. This means that provinces are subordinate to federal stipulations with no option for autonomy, even though impacts are on the provincial dairy farmers, restraining local producers. The liberalization and market access provisions of the CUSMA’s dairy sector, coupled with Canada's loss in the first case under chapter 31, "Dispute settlement," illustrate the impacts of this FTA on provinces and local producers. The dairy sector shows how the depoliticized nature of NAFTA and CUSMA limits the democratic decision-making process of Canadian federalism. FTAs treat international trade policy as technical matters, overlooking the inclusion of

provincial representation, such as provincial legislatures, in existing democratic institutions such as the Parliament. Consequently, provincial legislatures lack the necessary influence and ability to participate in political debates concerning NAFTA and CUSMA.

Chapter Six shows how this study fills the gap in understanding the role of Canadian provinces in international trade policy and the impacts of these FTAs on provinces through a critical political economy perspective. This thesis shows how the depoliticized Canadian international trade policy in charge of federal authorities does not provide provinces with any role or influence in FTA negotiations. However, provinces without an influence in FTAs have to align to NAFTA and CUSMA obligations, even though according to federalism they possess powers to autonomously regulate certain areas. This thesis shows how in the context of neoliberalism, FTAs negotiated by federal authorities moved beyond tariffs to emphasize regulatory harmonization. As a consequence, provinces have no option but to align their regulatory frameworks and policies with the terms of regulatory harmonization of NAFTA and CUSMA, which restrains provincial jurisdiction.

Hence, NAFTA and CUSMA undermine the democratic decision-making process of Canadian federalism. These FTAs minimize their inherently political character and policy formulation by excluding provincial representation and political contestation. In the negotiation and decision-making process of NAFTA and CUSMA, the executive branch holds exclusive authority without involving provincial representation or political contestation from provincial Legislative Assemblies and parliamentary debates. The lack

of provincial influence in international trade policy limits the ability of provinces to shape policies that directly impact their jurisdictions.

Chapter Two

Theoretical perspectives on international trade and Canadian provinces

This chapter offers an analysis of the mainstream perspectives on the North American Free Trade Agreement (NAFTA) and the Canada-United States-Mexico Agreement (CUSMA) and how these perspectives understand the impacts of Free Trade Agreements (FTAs) on Canadian provinces. The theoretical perspectives analyzed in this chapter are neorealism, neoliberal institutionalism, and rational choice institutionalism. Finding and gathering literature on comparative, public policy, and the different levels of state authorities and stakeholders involved in the negotiation of NAFTA and CUSMA is difficult. For this reason, international relations theories continue to be predominant in understanding the negotiations of these FTAs. Yet, neorealism, neoliberal institutionalism, and rational choice institutionalism consider the nation-state as the unitary actor in international relations, limiting their explanation and understanding on the impacts of NAFTA and CUSMA on Canadian provinces.

Unveiling NAFTA and CUSMA from mainstream perspectives

Neorealism, neoliberal institutionalism, and rational choice institutionalism recognize an anarchic international system. This prevailing anarchy is translated into a lack of hierarchy at the international level (Keohane, 1986; Powell, 1994). I will first present the key points of neorealism and how this framework understands the impacts of NAFTA and CUSMA on Canadian provinces. The neorealist perspective recognizes the asymmetries of power between strong and weak nation-states and argues that stronger nation-states take advantage of that power. For neorealism, anarchy in the international order prevents cooperation between powerful and weak nation-states. It considers that

when cooperation prevails over conflict, it is only for a limited period. Therefore, cooperation is complicated because trust is lacking, and powerful countries act unilaterally most of the time (Krasner, 1976). Neorealism argues that the state is the unitary actor in the international system, where power asymmetries accentuate and limit formal cooperation. (Krasner, 1976; Waltz, 1986).

From a neorealist perspective, Schlegel (2019, p.248) argues that under NAFTA and CUSMA, economy and security issues go hand in hand with the main objective of strengthening the US security policy. But US dominance sees no value in including its NAFTA-CUSMA counterparts in security decisions as equals and reaffirms its own power by military means. As a consequence, the US economically dominates the North American region as part of a geopolitical strategy to benefit its security policy interests. And this dominance is now extended in CUSMA because the economy and security go hand in hand. Canada had to cooperate with the US in the North Atlantic Treaty Organization (NATO) operations in Afghanistan because, within this perspective, NAFTA and CUSMA stand for the US economic and military dominance to favor its economic reach and military capabilities. The neorealist perspective refers to the use of power to strengthen US security and its dominance with no need to create a full political or legal framework in the North American region. (Schlegel, 2019).

Mayer (1988) and Cameron and Tomlin (2000) argue that neorealism does not provide an appropriate framework to explain NAFTA because international agreements do not matter in the context of international anarchy. As such, neorealism remains limited in explaining the impacts of NAFTA and CUSMA on Canadian provinces because it does not acknowledge the existence of other social forces besides the state, such as economic

actors and sub-national states (Krasner, 1976; Powell, 1994). Even if economic forces are recognized, they all respond and subordinate to the sole national state's interest (Krasner, 1976). In neorealism, different interests and forces, such as large corporations, foreign investors, sub-national entities, groups in civil society, and citizens, are reduced to the homogeneous entity of the state.

In an anarchic international system, neoliberal institutionalism also recognizes asymmetrical powers between stronger and weaker states and considers the state is the main actor in the international system. Yet, neoliberal institutionalism challenges neorealism by considering that cooperation is possible among asymmetrical countries to generate mutual gains. This cooperation occurs through a legal framework and institution-building process among states (Keohane, 2005; Powell, 1994). In this way, the power asymmetries of countries do not necessarily lead to asymmetrical results.

This perspective recognizes the importance of international economic and political interests within institutions. Still, the markets function with these institutions to balance out different interests by creating interdependence and cost-sharing mechanisms. Neoliberal institutionalism promotes interdependence by establishing a framework for trade and investment in the context of FTAs. This integration creates interdependence as the states become more reliant on each other. The literature highlights that the 1989 Canada-United States Free Trade Agreement (CUSFTA) was the base for negotiating the 1994 NAFTA. According to this perspective, CUSFTA already favored Canada; as a consequence, NAFTA had no contrary implications because cooperation based on interdependence, cost-sharing mechanisms, and reciprocal gains were already agreed upon since 1989. Accordingly, CUSFTA allowed Canada to enhance reciprocal gains in

NAFTA, mainly with the US, as trade and investment increased among states (Fraser and García,1994; Mayer, 1998; and Hufbauer and Schott, 2005). Within the neoliberal institutionalism perspective between 1980 and 1999, Canada was the state that received most of the NAFTA benefits, obtaining a stimulated GDP, based on its interdependence with the US and bilateral trade (Mehanna and Shamsub, 2002).

Following the assumption of reciprocal gains, the Canada-United States-Mexico Agreement: Economic Impact Assessment (2020), underscores the benefits and the high number of trade flows in the NAFTA-CUSMA region since 1994. It also highlights the benefits of previous NAFTA cooperation:

From a trilateral perspective, NAFTA has contributed to an unprecedented increase in trade flows across North America since its implementation in 1994. Between 1993 and 2018, total merchandise trade between Canada and the United States tripled and total merchandise trade between Canada and Mexico grew almost 10-fold. Overall, total trilateral merchandise trade (the total of each country's imports from one another) had risen to reach nearly US\$1.2 trillion in 2018. (The Canada-United States-Mexico Agreement: Economic Impact Assessment, 2020, p. 2).

The CUSMA: Economic Impact Assessment (2020) is an official document used to support CUSMA benefits for Canada and assumes reciprocal benefits for the countries of the North American bloc. It argues that the 1994 NAFTA achieved the expected results by expanding trade, increasing investment, generating economic growth, and raising living standards. This official view resembles that of neoliberal institutionalism. CUSMA also increases trade and investment under the same beneficial rules negotiated in NAFTA (Beaulieu and Klemen, 2020). The assumed gains are automatically extended to Canadian provinces because it considers the benefits are part of the homogeneous

state, and provinces and territories automatically receive benefits as well. With CUSMA, analysts argue that the agreement benefits Canada because it favors economic sectors such as oil and gas extraction and the automobile industry. It is considered that CUSMA maintains reciprocal gains in the North American region.

This perspective overlooks that between 1994 and 2015, the population's living standard of the region declined because each increase in trade by one percent resulted in a per capita income decline of the region by 7.1 percent (Calderón et al., 2018). Also, this perspective ignores that Canada was the most sued NAFTA country between 1994 and 2018 through the NAFTA investor-State dispute settlement (ISDS) mechanism (to be more thoroughly discussed in chapter Four of this thesis). US large corporations exercised their NAFTA rights as foreign investors to sue the Canadian state when they considered that state measures affected their investment's value or expected profitability through discriminatory state measures. Canada paid damages for more than USD \$263 million to US corporations (Sinclair, 2021). Furthermore, large US corporations won international arbitrations more often than their Canadian (and Mexican) counterparts. These outcomes reflect asymmetrical gains under international cooperation and interdependence, contrary to the non-asymmetrical results assumed by neoliberal institutionalism.

Rational choice institutionalism is another perspective recognizing the anarchic order in the international system, which is widely used to understand NAFTA negotiations. It builds on Robert Putnam's two-level game approach and incorporates it into neoliberal institutionalism (Sterling-Folker, 2013). This approach understands the correlation between international and domestic negotiations to reach a consensus. This

perspective incorporates a two-level bargaining analysis and reiterates how mutual gains in the interdependency of asymmetrical states can be achieved. This perspective highlights how domestic negotiation processes enhance international cooperation, which are not considered in neoliberal institutionalism or neorealism. National negotiators, identified as Level I, need formal or informal ratification from their constituents in international agreements. Formal or informal ratification represent institutional constraints through the intervention of other political branches within the same state, such as the Legislative branch. The perspective also recognizes a Level II, in which domestic veto players and institutional constraints shape international negotiations (da Conceição and Mello, 2017; Putnam, 1988). Putnam (1988) argues that to shape international and domestic negotiations, state authorities attempt to satisfy domestic demands, and decision-makers simultaneously strive to reconcile domestic and international imperatives.

The rational choice institutionalism perspective (Cameron and Tomlin, 2000; Mayer, 1998; Kukucha, 2003; 2009; 2020) explains NAFTA and CUSMA in relation to the interests of the business sector, provinces, and societal actors in an assumed two-level game approach. For rational choice institutionalism, Canada could move ahead in 1994 with NAFTA because it represented the continuation of economic growth and development of sectors accorded in the 1989 CUSFTA. For instance, the automotive sector was entrenched despite NAFTA adjustments in the percentage of rules of origin from 50% in CUSFTA to 62.5% in NAFTA (Cameron and Tomlin, 2000). Thus, the sector continued to be protected to generate economic gains and benefits for Canada, its provinces, and its economic sectors (Cameron and Tomlin, 2000, p.157). Even though

some Canadian provinces did not have officials with the technical capacity to participate in the so-called two-level bargaining or could not hire experts in the NAFTA negotiation process, the literature highlights that provinces agreed to advance negotiations and found international reciprocal gains (Kukucha, 2003; 2009). The interests of Level I and Level II were to improve on CUSFTA gains when NAFTA negotiations began (Cameron and Tomlin, 2000; Kukucha, 2003; 2009).

In 2020, authorities from the federal level leading CUSMA negotiations explained before the Canadian Parliamentary (Parliamentary Committees Appearances, 2020) that Canada established its negotiation objectives on a broad and extensive engagement with over 1,300 stakeholders including provinces and territories. This perspective overestimates the actual use of the so-called two-level game to reconcile domestic and international imperatives in the negotiation process. Within the rational choice institutionalism, Canadian provinces are informed about international trade negotiations as part of a “consultation” process between federal powers and provinces (Kukucha, 2004, 2016, 2018; Keefe, 2005). This does not mean that provinces have a veto or constraining power to decide international trade policy. The lack of a provincial role in international trade negotiations shows how domestic consensus and veto power are assumed but do not occur. Interestingly, there is no literature on CUSMA explaining the two-level game or domestic negotiations, especially as provinces have not played a role in international trade negotiations, and this will be analyzed in chapters Three and Five of this thesis.

Theoretical perspective

Neorealism, neoliberal institutionalism, and rational choice institutionalism recognize an anarchic international order and asymmetry of powers. Neorealism underscores the power-seeking nature of nation-states in the international order that generates a zero-sum game. This perspective subordinates all interests and economic forces to a homogeneous and rational state. Likewise, neoliberal institutionalism and rational choice institutionalism consider the state a homogeneous analysis unit. Thus, these perspectives do not address the impacts and gaps at subnational levels, or even the implications on local producers or laypeople. In contrast, critical political economy shows that the separation between the international, domestic, and individual levels is blurred because the state and society “co-constitute” one another in the world economy (Sterling-Folker, 2013). This perspective shows how economic structures expose patterns of economic and political exclusion. I employ the critical political economy perspective in this research because it allows for understanding how FTAs have built constraints for domestic regulations, excluding the participation of provinces and impacting Canadian provincial jurisdictions that have to align with FTAs.

This thesis draws from the notion of neoliberalism within the critical political economy theoretical perspective to analyze the role of provinces in FTAs and the impacts of NAFTA and CUSMA on provinces. From a critical political economy perspective, neoliberalism is a historical class project and a set of state policies that intensify competitive imperatives and increase dependence on the market in daily life (Soedeberg, 2014; Leo, Gindin, and Albo, 2010). Furthermore, the intervention of the state is central to neoliberalism to promote deregulation, liberalization, free markets, international

property rights, and labor market flexibility in the era of free trade (McBride, 2009; Leo, Gindin, and Albo, 2010, p.21). Thus, neoliberalism changes the mode of regulation as free markets require more rules that the state provides to protect private property owners and contracts. Regulations allow private property owners to go to court when obligations are not met. Such protections are beneficial to those social groups that have leverage in private contracts and in terms of private property (Leo, Gindin, and Albo, 2010, p.35).

Peck and Tickell (2002) denominate as “roll-back” neoliberalism the implementation of this political agenda in the 1980s that displaced and dismantled the welfare state. Also, Peck and Tickell (2002) explain that the decision to allow for provincial economic development and decentralize power through programs of devolution in the 1990s is known as a “roll-out” neoliberalism. This thesis explains how “roll-out” neoliberalism permeates the process of policymaking through regulatory harmonization contained in the “roll-back”. During the 1990s, a “roll-back” neoliberalism occurred in Canada through the downsizing of federal public spending, while “roll-out” took place through the federal state authorities shifting fiscal costs to the provinces to tackle the public deficit (Dunlop, 2009). Despite holding devolved powers, provinces lacking influence in shaping the stipulations of NAFTA and CUSMA are left with no choice but to align their regulatory frameworks and policies with the terms of international trade commitments, which involve liberalization and regulatory harmonization. Hence, regulatory harmonization represents the latest form of "roll-out" neoliberalism, as it requires provinces to internalize the neoliberal standards inherent in the "roll-back" neoliberalism embedded within FTAs. By harmonizing regulations, provinces boost neoliberalism promoted by FTAs. This means that provinces must align

their policies with the principles of deregulation, privatization, and liberalization. As a result, the ability of provinces to autonomously implement policies that deviate from these neoliberal standards is constrained.

Part of “roll-back” neoliberalism is the implementation of “locked-in” norms. “Locked-in” norms or obligations are the implementation of binding and enforceable international trade agreements that constrain democratic decision-making and state activity (Gill and Cutler, 2014; McBride, 2003; McBride and Fry, 2022). The term “locked-in” norms or obligations in the context of FTAs refers to international trade and investment obligations that, once implemented within a country, become difficult to change because such international trade obligations are legally binding and subject to international dispute settlement mechanisms if there is an attempt to change them (Gill and Cutler, 2014, pp. 7-8). In Canada, the depoliticization of international trade policy, under the authority of the executive branch without provincial input, “locks-in” international trade commitments that become irreversible once adopted, and hence further neoliberalism.

Within the critical political economy perspective, the depoliticization of international trade policy encompasses a deliberate process to eradicate or minimize the inherently political character of decision-making and policy formulation. This process involves framing international trade policy as technical or managerial issues rather than subjecting them to political contestation or including public discussions in existing institutions such as provincial legislatures. Consequently, alternative viewpoints, social conflicts, and democratic participation are excluded from the decision-making process around international trade (Burnham, 2017). In the case of NAFTA and CUSMA

negotiations, provincial participation is excluded by constraining and marginalizing political contestation, alternative perspectives, and democratic decision-making without the participation of provincial legislatures and provincial responses to federal authorities. Thus, depoliticization legitimizes and prioritizes neoliberalism by reducing international trade policy to technical matters without taking into account contestation and debate with Parliament and Legislative Assemblies.

Key elements of a critical political economy approach in NAFTA and CUSMA

The framework of this analysis is the notion of “roll-back” and “roll-out” neoliberalism under a critical political economy perspective. Regulatory harmonization is the new form of “roll-out” neoliberalism as it will be explained in this thesis, because provinces have to internalize the standards of neoliberalism included in the “roll-back” neoliberalism of FTAs. Also, this chapter explained the process of depoliticization as the concentration of power around the executive branch, which is key to this research (Cox, 1987; Poulantzas, 2000). In this depoliticization of international trade policy, a network of professionals with technical expertise dominates the negotiation and implementation of FTAs, a process delinked from citizen participation (O’Brien, 1995). Hence, the federal authorities of the executive branch depoliticize international trade policy and “lock in” FTAs to be implemented at the provincial level (Gill and Cutler, 2014). Chapters Three and Five of this thesis thoroughly explain the authority of the executive branch and depoliticization. As a consequence of the depoliticization of international trade policy, NAFTA and CUSMA impact provinces and the democratic decision-making that underlines Canadian federalism and provincial jurisdiction with no participation or political contestation from existing democratic institutions such as the Legislative

Assemblies. Hence, neoliberalism sets the context in which provinces align their regulatory frameworks and policies with those stipulated in FTAs.

As I will explain in the following chapter, the “roll-back” neoliberalism of the 1980s was followed by “roll-out” neoliberalism through decentralized provincial powers while disregarding the inclusion of provinces in shaping international trade policy. The notion of neoliberalism and depoliticization within the critical political economy allows for an examination of the role of provinces in negotiating and implementing NAFTA and CUSMA. These FTAs impact provinces through “locked-in” obligations, including regulatory harmonization at the provincial level.

Chapter Three

From the welfare state to neoliberalism. The provincial role in international trade policy in the North American region

This chapter explains how and why Canadian provinces did not play a role in the negotiation of the North American Free Trade Agreement (NAFTA) and the Canada-United States Agreement (CUSMA). This chapter addresses the centralization of political power around the executive branch and how NAFTA and CUSMA negotiations had an impact on provinces. The chapter argues that NAFTA and CUSMA lead to provincial restraints on the provincial right to regulate autonomously and welfare intervention. Also, “roll-back” and “roll-out” neoliberalism introduced domestic regulatory ambiguity when implementing these FTAs. While federalism allows provinces the right to regulate, this autonomy can result in inconsistencies with the provisions of “locked-in” FTAs. “Locked-in” norms are difficult to change once they are agreed upon and implemented. To solve the inconsistencies between international trade policy and domestic regulations, depoliticized international trade policy pushes for regulatory harmonization, constraining democratic decision-making and provincial jurisdiction in the form of in-existent debate within the provincial legislatures or significant input from Parliament in international trade policy.

I will first examine the ruling of the Constitution Act that facilitated the consolidation of neoliberalism in Canada, whereby the federal authorities hold the power to decide international trade policy. Also, I present a historical account of the transition from the welfare state to the adoption of “roll-back” neoliberalism and “roll-out” neoliberalism in Canada. This chapter analyzes the role of provinces in NAFTA and CUSMA negotiations, but also the Canada-European Union Comprehensive Economic

and Trade Agreement (CETA). It looks at the Agreement on Internal Trade (AIT) from 1995 and the 2017 Canadian Free Trade Agreement (CFTA), seeking a regulatory harmonization aligned with CETA in areas such as supply management, government procurement, and the environment.

The Canadian Constitution and international trade policy

Canada is a decentralized federal system, and the Constitution plays a relevant role in delineating the nature of federal-provincial participation in the negotiation of Free Trade Agreements (FTAs). In a decentralized federal system, the most significant governing powers, such as education, health care, natural resources, and social development, are given to provincial rather than federal authorities (Inwood, 2013; Government of Canada, 2023). The Canadian Constitution rules that the federation cannot impose international trade agreements on provinces regarding matters of provincial jurisdiction. Provinces can autonomously rule in certain areas of exclusive sub-federal jurisdiction and create regulations.

This decentralized system is the legacy of the British North American Act of 1867, or the Constitution Act, which established jurisdictions between the federal and provincial state authorities. The Act granted control over the regulation of trade and commerce to the federal authorities in Section 91 (2). As per Section 92 (13) of the same Act, the provincial levels control property and civil rights, which means provinces have the authority to regulate trade and commerce within their respective territory, including the regulation of contracts in which international trade is conducted (Government of Canada, 2023). In other words, the federal authority holds the power to ratify

international treaties but does not have the legal right to implement the treaty rules in subnational jurisdictions (Rafiq, 2018, pp. 28-29).

Case laws also interpret the constitution, and in 1937, the Judicial Committee of the Privy Council (JCPC) decided the Labour Conventions case. Under the Labour Conventions case, the JCPC ratified restrictions on the federal powers to implement international trade agreements in areas of provincial responsibility (Cameron and Simeon, 2002; Monahan, 2001). The Supreme Court of Canada, which became the final appellate body in 1949 in substitution of the JCPC, has developed more case laws through the interpretation of the Constitution. But, there are not case laws regarding federal and provincial powers in international trade negotiations. The Constitution Act along with the 1982 Charter of Rights and Freedoms include the following areas as exclusive of provincial powers, direct taxation within the province, management and sale of public lands belonging to the province, prisons, hospitals, municipalities, formalization of marriage, property and civil rights, administration of civil and criminal justice, education, incorporation of companies, natural resources, and matters of a merely local or private nature (Government of Canada. 2023). While the Canadian Charter of Rights and Freedoms was adopted in 1982, it did not change federal jurisdiction to negotiate and conduct international trade policy.

From the Canadian welfare state to neoliberalism

This section explains the dismantling of the Canadian welfare state to implement “rolled-back” neoliberalism. This includes how NAFTA simultaneously "rolled back" and "rolled out" neoliberalism, while effectively "locked-in" depoliticized international trade policy under the control of federal authorities, without provincial participation.

The transition from the welfare state to the neoliberalism was a process already undergoing in the 1970s. Canada's welfare state was a system of policies and programs aimed at promoting its citizens' well-being and social protection. This includes social services and benefits to ensure access to healthcare, education, and housing, providing unemployment benefits, and social assistance (McBride, 1997; 2009). After World War II, the federal authorities grew their capacity and public service compared to most provinces. In Canada, the federal authorities hold the spending power to allocate funds in various areas, even in those that fall under provincial jurisdiction, without having any corresponding federal responsibility (Inwood, 2013; Cameron and Simeon, 2002). This meant that the federal authorities used their spending power to intervene in the economy and social policies by providing financial support to provinces, which allowed to protect citizens through universal healthcare, social assistance programs, education, or workers' rights (McBride, 1997; 2009).

In the 1980s there was a shift towards "rolled-back" neoliberalism in Canada. In 1985, the Royal Commission on Economic Union and Development Prospects for Canada, commonly known as the McDonald Commission ("the Commission"), was crucial for the consolidation of "roll-back" neoliberalism. "The Commission" was established in 1982 with the mandate to evaluate and provide insights into Canada's economic policies, specifically in areas such as trade relations and investment. As part of the recommendations, "the Commission" urged prioritizing trade relations with the US rather than working on provincial trade barriers. In addition, "the Commission" advised free market as opposed to state intervention, continuing the path of neoliberalism in the country (Egan and Guimarães, 2019; McBride, 2009). Also, "the Commission" advised a

constitutional amendment to make FTAs enforceable (which did not occur), even when their substance lay in areas of provincial jurisdiction (McBride, 1997). Following the 1985 recommendations from the McDonald report, the federal authorities accelerated the implementation of “roll-back” neoliberalism in the form of privatization, deregulation, and market liberalization, including the negotiation of CUSFTA in 1987 (Cameron and Simeon, 2002).

Large Canadian companies, including US companies’ subsidiaries, were also influential in supporting and inserting CUSFTA (and later, NAFTA) into the federal state’s agenda as a priority (McBride and Shields, 1998; O’Brien, 1995). For instance, the interests of Ontario in the automotive industry during CUSFTA and NAFTA negotiations were not domestic and public but rather private and regional. This was influenced by the leading role of “the Big Three,” General Motors, Ford, and Chrysler (Clarkson and Mildemberger, 2011; Mayer, 1998). In NAFTA, the US auto industry led by “the Big Three” had high levels of control over the Canadian automobile industry (Clarkson and Mildemberger, 2011). The strategy implemented by federal authorities, pushed by large corporations, implemented the “roll-back” neoliberal recommendations from “the Commission” with the negotiation of CUSFTA and NAFTA. In the context of “rolled-back” neoliberalism, the depoliticized negotiation of CUSFTA and NAFTA impact the democratic decision-making process that underlines federalism, without taking in account contestation and public debate with Parliament and Legislative Assemblies to influence FTAs.

During the 1990s, a “roll-out” neoliberalism occurred in Canada. “Roll-out” neoliberalism meant downsizing federal public spending and unilateral central authority

actions to shift fiscal costs to the provinces to tackle the public deficit (Dunlop, 2009). In 1995, the downsizing of federal public spending led to the devolution of powers, or more decentralization, to provinces in labor, health, education, and welfare assistance programs. For instance, the strategy included the enactment of legislation known as the Canada Health and Social Transfer (CHST) legislation, impacting citizens, mostly those in less favorable economic conditions. As a consequence, those relying on social assistance, healthcare, or education programs experienced a decrease in support. This decrease is attributed to federal budget deficits, as devolution of powers to provinces were accompanied by reduced budgets to further expand neoliberalism (Dunlop, 2009; McBride, 2009). Within the devolution of powers, provinces were granted greater autonomy with fewer resources to intensify local competition and offer better investment conditions (McBride, 2009). Thus, provinces were confronted with implementing social policies under their jurisdictional powers in the starting era of FTAs with a diminished budget. The devolution of powers to provinces in social policy reaffirmed centralized power in federal state authorities in the depoliticized international trade policy.

Provinces in domestic and international trade agreements

In CUSFTA and NAFTA negotiations, the federal authorities remained in control of all negotiations in accordance with the Constitution Act, which has not been amended. In the domestic process of CUSFTA and NAFTA negotiations, provinces used the Continuing Committee on Trade Negotiations (CCTN) to present their concerns (Paquin, 2013). British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, and Quebec supported CUSFTA and NAFTA negotiations but also called for full provincial participation (Kukucha, 2004; Keefer, 2005). In addition, two provinces, Quebec and

Ontario, hired former federal officials to represent their concerns (Paquin, 2013; Kukucha, 2016). Smaller provinces sent provincial representatives from their bureaucracies (Paquin, 2013). Those provinces are not specifically referred to in the literature but based on the size referred in the analyses, these provinces are presumably New Brunswick, Newfoundland and Labrador, Nova Scotia, and Prince Edward. Federal authorities promised to seek all the provinces' views before endorsing any agreement (Keefer, 2005).

During the negotiation process of NAFTA, Savoie (1999) describes an episode to show the incremental power of the federal authorities, with no restraints or voice from provinces. This also shows the centralization of power around the Prime Minister on international trade policy. Savoie (1999) explains that during the final hours of NAFTA negotiations, the American Ambassador asked Prime Minister Chretien about his political authority to agree to a final deal, given that he had yet to appoint his Cabinet.

"What happens if we work all this out and then your new trade minister doesn't agree?" Chretien replied, "Then I will have a new trade minister the following morning." (Greenspon and Wilson-Smith as cited in Savoie, 1999, p. 652).

When provinces have a say in FTAs, it is because large corporations are based there. For instance, large corporations and foreign investors in NAFTA led the voice of bigger provinces supporting technical capacity in order to safeguard their interests. This is the case of Alberta in the energy market. Another example in the energy market is the intervention of large corporations and foreign investors in Quebec to loosen its dependence on federal powers through FTAs. Large corporations actively intervened and advocated for their interests, facilitating a more favorable market access and securing exports to the lucrative US market (McBride and Shields, 1998; O'Brien, 1995). In the

automotive sector, “the Big Three” made their interests prevail in Ontario, using the province’s voice to turn the province into an automotive hub within the North American bloc (Clarkson and Mildenerger, 2011; Mayer, 1998). At the same time, large corporations and foreign investors directly address and control their interests with federal authorities, as will be explained in the case study in chapter Five of this thesis.

In the final stage of NAFTA negotiations in 1993, authorities from the executive branch negotiated non-binding labor and environmental side agreements. The executive branch in Canada negotiated these side agreements without provincial influence, even though such side agreements overlapped with provincial jurisdiction in the context of “rolled-out” neoliberalism. Hence, Canadian provinces did not have a role in negotiating the non-binding North American Agreement on Labor Cooperation (NAALC) and the North American Agreement on Environmental Cooperation (NAAEC) considered “non-trade agreements.” The NAALC was signed only by four Canadian provinces: Alberta, Quebec, Manitoba, and Prince Edward. The NAAEC was signed only by Alberta, Quebec, and Manitoba (Kukucha, 2003). Cameron and Tomlin (2000) explain that provinces were given the explicit right to opt-out of these agreements. Only some provinces ratified the non-binding labor and environmental agreements belonging to provincial or shared jurisdiction sectors.

Still, increased inconsistencies remained between domestic regulations and the adoption of international standards within NAFTA. For that reason, provincial authorities agreed in 1995 to reduce the barriers and address the differentiated domestic regulatory framework in an attempt to harmonize and enhance Canadian interprovincial trade through the AIT (Doern and MacDonald, as cited by Egan and Guimarães 2019). The

AIT became the first attempt to trigger internal trade liberalization and harmonization within the regulatory framework of NAFTA. The AIT was a non-binding interprovincial trade agreement to reduce trade barriers and achieve a more harmonized system, allowing for amendments or revocations (Inwood, 2013). Nevertheless, the AIT was subject to many exceptions. And because of its non-binding nature, it did not provide comprehensive means of addressing internal barriers which were not aligned to international trade policy. NAFTA foreign goods enjoyed better access to a province than goods from other provinces (Schaefer, 1997). Hence, the AIT created less trade between provinces than FTAs between countries (Teeter, 2019). As the AIT proved ineffective in tackling interprovincial trade barriers, several provinces negotiated additional internal agreements to reduce trade barriers that differed in terms of the provinces involved and the scope of internal liberalization (Egan and Guimarães, 2019; Beaulieu and Zaman Mustafa, 2019). The additional internal agreements included the New Western Partnership Agreement of 2010 with Alberta, British Columbia, and Saskatchewan. This agreement eliminated interprovincial barriers and eased restrictions on professional mobility and procurement thresholds (Inwood, 2013). The Atlantic Procurement Agreement of 2008, between New Brunswick, Newfoundland and Labrador, Nova Scotia, and Prince Edward Island, reduced interprovincial trade barriers related to public procurement in goods, services, and construction. The Ontario-Quebec Trade and Cooperation Agreement and the New Brunswick- Nova Scotia Partnership Agreement on Regulation and the Economy aimed at reducing intra-provincial trade barriers. These agreements were meant to build on the AIT, which was rife with exemptions. (Kukucha, 2018; Egan and Guimarães, 2019).

In response to persistent internal trade barriers, federal authorities changed the mechanism of briefing provinces in international trade policy. The CCTN was replaced with the Federal-Provincial-Territorial Trade Committee (C-TRADE) following the NAFTA negotiations. This adjustment aimed to address the challenges encountered in fostering interprovincial trade cooperation (Kukucha, 2003; 2018). According to Kukucha (2020), the C-TRADE is a mechanism for discussions on regulatory reforms, trade disputes, and negotiation of mutual and reciprocal agreements. Still, provinces do not formally participate in international trade negotiations even when federal authorities engage with provinces during this process (Fafard and Leblond, 2012). The participation of provinces is limited to receiving information in the context of the C-TRADE (interviewees in the case study of chapter Five elaborate more on this matter).

In Canada's decentralized federalism, provinces and their Legislative Assemblies do not have any constitutional ratification power or even a political role when federal authorities negotiate FTAs. Furthermore, some provinces lack the expertise, technical resources, and financial capacity to effectively participate in FTAs (Kukucha, 2004; 2018). While this chapter primarily examines the impacts of NAFTA and CUSMA on Canadian provinces, the CETA is also relevant to this analysis because it set the policies and policy practices for domestic regulatory harmonization along the lines of FTAs. To advance CETA negotiations, the European Union (EU) demanded a provincial commitment to ensure compliance. In response, the federal authorities provided a seat for all provinces at the table of negotiations because the EU wanted to ensure guarantees of provincial compliance (Kukucha, 2016; 2018). At the same time, federal authorities bargained issues without formal provincial presence, in sectors such as agriculture,

customs procedures, trade facilitation, intellectual property rights, and the creation of a dispute settlement committee and institutional matters. Provinces did not have access to all negotiating areas and were excluded even in some areas where they shared constitutional jurisdiction (Paquin, 2013). Federal negotiators sought formal compliance from provinces to advance market access. For instance, provinces agreed on giving more comprehensive market access for municipal and provincial procurement under their jurisdiction (Sinclair and Trew, 2019; McBride and Fry, 2022). CETA then triggered some domestic regulatory harmonization. CETA required the AIT to align with the agreed market access provisions. Ultimately, the AIT was amended 14 times without improving interprovincial trade according to international trade needs (Teeter, 2019). Hence, the federal authorities, provinces, and territories adopted the CFTA in 2017 to replace the AIT.

The official CFTA text explains that the agreement focuses on domestic trade between provinces, aligning with the international trade obligations outlined in CETA, for instance in provincial and municipal government procurement. The CFTA also aims at reducing compliance costs for Canadian firms at home and internationally and ensures that Canadian firms secure the same access to Canada's market as that guaranteed by firms from Canada's international trading partners (Canadian Free Trade Agreement, 2022). The CFTA has a negative list approach in which all products are covered except those specifically exempted (Egan and Guimarães, 2019). The exemptions include occupational licensing requirements, specific local and state provisions for public purchasing contracts, preferential treatment in particular energy markets, and different company registration requirements. Exemptions in the negative list approach include

government procurement, goods, services, and construction thresholds. The CFTA incorporates a regulatory reconciliation process to address and eliminate trade barriers. For instance, this reconciliation process resolves differences in diverging or duplicative regulations that impede the flow of goods (Egan and Guimarães, 2019; The Canadian Free Trade Agreement, 2022).

The CFTA also includes more than four hundred labor market certifications under provincial jurisdiction with varying licensing and residency requirements, and not all provinces provide reciprocal recognition of qualifications. Another matter covered by the CFTA is the supply management rules limiting the interprovincial movement of dairy products by setting variations in the packaging and labeling of food products (Kleiner et al. as cited in Egan and Guimarães, 2019). At the same time, the CFTA recognizes that provincial authorities preserve the ability to adopt and apply their laws and regulations for economic activity in the public interest, including protecting public health, social services, safety, consumer protection, promoting and protecting cultural diversity, and workers' rights (Canadian Free Trade Agreement, 2022). This is particularly relevant because as I will explain in the following chapter, international investment disputes have resulted from the lack of consistency between provincial regulations and FTAs. When implementing FTA obligations, provinces have to comply with international commitments and at the same time uphold the set mandate under provincial jurisdiction of social policy and economic development. However, provinces lacked the authority to negotiate CETA (or any other FTA) to establish rules safeguarding public objectives. The terms of CETA were dictated by federal authorities, resulting in CFTA being ultimately

subordinated to any FTA. This means that provinces have to adopt and implement “locked-in” FTAs.

Also, CFTA aims to promote greater liberalization and regulatory harmonization among provinces. As part of this effort, provinces work towards removing trade barriers in interprovincial trade to achieve the objectives set by CFTA (Beaulieu and Zaman Mustafa, 2019). Rancourt and Wittevrongel (2021) analyze the progress in reducing interprovincial trade barriers from 2017 to 2021. Alberta, Manitoba, and Ontario have improved their policies to incentivize interprovincial trade. However, other provinces and territories, particularly British Columbia, followed by Saskatchewan, Nova Scotia, and the Prince Edward Islands, have added more barriers to internal trade. The ranking shows that Newfoundland and Labrador, New Brunswick, Yukon, and Quebec remain unchanged in eliminating internal trade barriers. The depoliticization of international trade policy under the executive branch gives federal authorities the control to decide FTAs without provincial influence. In contrast, while decentralization seemingly provided more power to provinces, decentralization also led to a more powerful federal force in control of international trade policy. And this set the stage for CUSMA to establish a mandatory regulatory harmonization that will push for a provincial alignment towards more liberalization, including those provinces with a pending task on harmonization.

The CUSMA negotiations in 2018 and 2019 followed the same pattern as NAFTA and CETA, in terms of the depoliticized international trade policy, lack of provincial role, or substantive participation of Members of Parliament (MPs) or Members of Legislative Assemblies (MLAs). Under the lead of federal authorities, the technical language of

CUSMA indicates a heavy reliance on already-existing rules and template texts established in CUSFTA, NAFTA, and CETA. The use of already existing templates and rules in CUSMA negotiations highlights the depoliticization of Canadian international trade policy (Gill and Cutler, 2014; McBride and Fry, 2022). An example of existing rules and the use of templates by federal authorities is found in the publicly official 2021 text of the Canadian model of the Foreign Investment Promotion and Protection Agreement (Government of Canada 2022). This text is used for Bilateral Investment Treaties (BITs) and for Investment chapters in FTAs. Moreover, this 2021 federal Canadian text model holds the Investor-state dispute settlement (ISDS) used in all FTAs. The limited-time agenda for CUSMA negotiations to conclude the agreement was no exception in adopting benchmark language from former agreements and template texts (Kukucha, 2020; Wolfgang and Rama, 2019). Ultimately, the role provinces play in international trade negotiations and the effectiveness of the C-TRADE Committee is reduced to keeping provinces informed about the advances in the negotiation of FTAs led by authorities of the executive branch deciding the provisions of international trade commitments. This outcome shows the depoliticized international trade policy and centralization in federal authorities to decide FTAs.

The provincial politics in NAFTA and CUSMA

This chapter explained the transition from the welfare state to neoliberalism, encompassing the processes of "roll-back" and "roll-out," the depoliticization of international trade policy in control of federal authorities of the executive branch, and the lack of provincial influence in NAFTA and CUSMA negotiations. The chapter focused on the absence of provincial involvement in NAFTA and CUSMA negotiations despite

increased decentralization and devolution of powers. In the context of the lack of provincial influence on the negotiations of NAFTA and CUSMA, the strategies to integrate provinces into "locked-in" FTAs include domestic mechanisms like the CCTN and the C-TRADE Committee, allowing provinces to participate as observers with no role to influence FTAs. These domestic mechanisms have been used only to keep provinces briefed about the advances in the negotiation of FTAs. In line with these strategies, this chapter delved into the depoliticization of international trade policy under the control of federal authorities within the executive branch, resulting in a concentration of power to negotiate FTAs without provincial influence or political contestation. The chapter showed that the depoliticized international trade policy impacts the democratic decision-making process inherent in Canadian federalism.

Within the framework of neoliberalism, FTAs prioritize "locking-in" deregulation, expanding market access, and achieving regulatory harmonization, all without provincial involvement. This chapter also examined domestic mechanisms established between federal authorities and provinces used to facilitate market access and regulatory harmonization, such as the AIT in 1995 and the CFTA in 2017. Following the ineffectiveness of the AIT, the current CFTA in line with CETA is the domestic mechanism to push provinces into regulatory harmonization. However, this chapter also showed that as provinces align their regulations to CFTA and FTAs, these mechanisms restrain provincial policies that deviate from the "locked-in" standards, thereby restricting their autonomous regulatory powers. In line with these strategies, the depoliticized international trade policy shows the impacts on the democratic decision-making that underlies Canadian federalism without considering existing democratic institutions such

as provincial legislative assemblies. Also, this chapter analyzed that under CUSMA negotiations, federal authorities continued to hold the decision-making of FTAs, despite the existing decentralization and devolved powers.

The following chapter Four explores the impacts of NAFTA and CUSMA on provincial jurisdictions, as they must adhere to the “locked-in” FTA provisions and prioritize harmonization over the provincial right to regulate autonomously. The following chapter shows that the lack of provincial input in determining the terms and conditions of FTAs constrains the provincial ability to advance their policies. The impacts of NAFTA and CUSMA on provinces involve a complex interplay between the transfer of authority, restrained jurisdictional powers, and the challenge of regulating autonomously within the context of "locked-in" FTAs, where provincial influence in international trade policy is absent. The following chapter shows how “locked-in” NAFTA and CUSMA push for more provincial liberalization and regulatory harmonization.

Chapter Four

NAFTA and CUSMA mechanisms that impact provinces

This chapter discusses the mechanisms that further “locked-in” norms at the provincial level in the depoliticized negotiations of NAFTA and CUSMA. These mechanisms are the NAFTA investor-State dispute settlement (ISDS); CUSMA’s chapter 28 establishing mandatory regulatory harmonization and; the CUSMA state-to-state disputes settlement. These mechanisms impose regulatory harmonization on provinces because foreign investors and states can initiate international trade dispute mechanisms when regulations under provincial jurisdiction are inconsistent with NAFTA and CUSMA. And the resolution of an international trade dispute triggers domestic regulatory change and harmonization, which then become “locked-in.” This chapter argues that CUSMA furthers this process even when the NAFTA-ISDS has been eliminated. Chapter 28 for mandatory regulatory harmonization and the state-to-state dispute settlement are the novel mechanisms for this purpose.

This chapter first shows how CUSMA differentiates itself from NAFTA in several ways including the enforceable labor and environmental trade chapters, and Article 34.7, “Review and Termination.” Article 34.7 introduces a procedure for CUSMA states to terminate the FTA 16 years after its entry into force, and a joint review six years after its implementation. I also will focus on CUSMA content that stipulates mandatory regulatory harmonization because this novelty “locks-in” obligations that impact provinces. These international obligations become entrenched and difficult to modify once they are agreed upon, undermining the provincial power to regulate autonomously

in certain areas, such as environmental protection, natural resources, or performance requirements.

Also, the chapter examines the elimination of the NAFTA-ISDS mechanism between Canada and the US, which was inserted in exchange for a new legally binding chapter of mandatory regulatory harmonization, namely Good Regulatory Practices (“GRP”), which allows international arbitral tribunals to decide the best practices to harmonize policies and regulations at all levels. NAFTA-ISDS cases, CUSMA chapter 28, and the state-to-state dispute settlement demonstrate how these FTAs undermine provincial jurisdictions without a role in the negotiation of FTAs. In addition, this chapter examines how CUSMA impacts provinces in contrast with the Canadian Free Trade Agreement (CFTA). The CUSMA and CFTA mechanisms represent two separate regulatory harmonization and liberalization endeavors aimed at limiting provincial autonomy and reinforcing “locked-in” international trade obligations at the provincial level.

International trade disputes and provincial regulatory harmonization

During NAFTA negotiations, both trade in goods and foreign investment were central on the table of negotiations. For that reason, NAFTA included an investment chapter that employed the rules of the World Bank’s International Centre for Settlement of Investment Disputes (ICSID), and the rules of the United Nations Commission on International Trade Law (UNCITRAL, 2023) to solve international trade disputes. The inclusion of ISDS in the NAFTA Investment chapter served to protect all forms of investment from state intervention (McBride, 2009). In the “locked-in” NAFTA, large corporations and foreign investors from the North American region had the power and

the right to sue a host country through the ICSID or the UNCITRAL arbitration rules when those large corporations considered that the host country policy or measure affected the operation or expectations of their foreign subsidiaries. When NAFTA-ISDS decisions favored foreign investment or investors, international arbitrators awarded damages according to the financial loss caused.

Canada was the most sued country under NAFTA Chapter 11, “Investment,” with 44 disputes, brought mostly by US investors. From 1994 to 2018, Canada lost or settled 10 cases with compensation and paid damages and settlements totaling more than \$USD 263 million (Sinclair, 2021, pp. 4-10). The cases analyzed in this thesis involving the NAFTA-ISDS mechanism shed light on the ways large corporations exploited provincial policies inconsistencies and provincial jurisdiction with NAFTA. Moreover, these cases highlight that the depoliticized international trade policy constraints provincial jurisdiction, because provincial participation was excluded from NAFTA negotiations, undermining democratic decision-making without taking in account contestation and debate with Parliament and Legislative Assemblies. This means there was no participation from provincial legislatures or provincial responses to federal authorities. The NAFTA-ISDS cases analyzed are Mobil Investments Inc. and Murphy Oil Corporation, Windstream Energy, Abitibi Bowater, Mobil Investments Canada Inc., and Lone Pine Resources (under active arbitration), (Global Affairs Canada, 2022).

Mobil Investments Inc., Murphy Oil Corporation, and Mobil Investments Canada Inc. were cases brought to NAFTA-ISDS mechanisms by the same large corporations following the same claim at different moments. The second claim was filed to increase the awarded compensation. The first case, Mobil Investments Inc. and Murphy Oil

Corporation, shows how a powerful private actor challenged the ability to implement provincial public policy in natural resources. The Petroleum Board of Newfoundland and Labrador adopted the Guidelines on Research and Development Expenditures in 2004, which required operators of offshore petroleum projects to allocate a specific percentage of their revenue to research and development, as well as education and training initiatives within the province. At the time, Mobil Investments Inc. and Murphy Oil Corporation participated as partners in the Hibernia and Terra Nova oil and gas fields off the coast of Newfoundland and Labrador. They alleged through the NAFTA-ISDS mechanism that the 2004 Guidelines were inconsistent performance requirements. In 2007, the international arbitral tribunal ruled that the guidelines issued by Newfoundland and Labrador constituted a “prohibited performance requirement,” under NAFTA. In 2014, Mobil Investments Canada Inc. made an additional claim for damages under the NAFTA-ISDS mechanism. The international arbitral tribunal allowed Mobil Investments Canada Inc. to seek a compensation for damages from 2012 to 2018, and until the completion of the projects, expected in 2047. In February 2020, following a settlement agreement, the arbitration concluded. The award forced the province to eliminate the regulation in question, indicating that it was inconsistent with NAFTA's provisions. The tribunal's award compelled the province to remove its regulation, indirectly harmonizing its policies in alignment with the deregulation and liberalization provisions outlined in NAFTA (ICSID Case No. ARB(AF)/07/4, 2007 and ICSID Case No. ARB/15/6, 2015).

The Windstream Energy case shows the conflicts a province encountered in implementing environmental policies within its jurisdictional powers. This case revolves around Windstream Energy's proposal for an offshore wind energy project in Lake

Ontario. In February 2011, the province of Ontario announced a moratorium on freshwater offshore wind development, citing the need for additional scientific research to assess potential impacts. However, Windstream Energy alleged that this provincial moratorium breached the provisions outlined in NAFTA. Windstream Energy claimed that the province's decision resulted in a loss of potential profits and undermined its legitimate expectations. This case highlights the tension between provincial environmental policy objectives and its contradiction under NAFTA's provisions. The Windstream Energy case shows how ISDS-NAFTA mechanisms challenge provincial policies and how provinces have to restrain the implementation of environmental policies in line with the NAFTA liberalization. This case highlights the provincial limitation to regulate autonomously because a regulation did not comply with NAFTA obligations. This also triggers indirect regulatory harmonization in line with the liberalization stipulated in FTAs (UNCITRAL Windstream Energy LLC (U.S.A.) v. The Government of Canada, 2016).

In the Abitibi Bowater case, the company undermined the province's capacity to implement measures in environmental and public policy. The case involved the bankrupt of a large corporation that closed its timber mill in Newfoundland and Labrador, leaving unpaid bills, unemployed workers, unhonoured pension obligations, and contaminated industrial sites. In order to facilitate the clean-up and reclamation of the closed mill sites, the province seized the company's assets. The assets included water, timber rights and the hydroelectric holdings (Sinclair, 2015; 2021). The large corporation, under bankruptcy, claimed an expropriation under NAFTA-ISDS. The arbitral tribunal favored the large corporation due to the provincial measures and set compensation. The

compensation reflects the undermining of provincial powers considering that international arbitral tribunals never mandate the devolution of property considered to be expropriated but instead set high amounts of compensation to prevent authorities from repeating such measures, which constraints provincial powers. This case demonstrates the limitations on a province to enforce its jurisdictional powers effectively, furthering neoliberalism, particularly in matters related to environmental and labor policy under its jurisdiction. The arbitration panel's decision constrained the ability of a province to regulate and pursue policies under its jurisdiction, namely environmental and labor protection. The decision of the international arbitral tribunal illustrates indirect regulatory harmonization in line with the protection of private property owners and contracts, and showing a precedent for other provinces contemplating similar actions (ICSID Case No. UNCT/10/1, 2010).

Lone Pine Resources is an active case under litigation. The dispute started in 2012 because the company claimed that Quebec undermined the rights of the corporation. Between 2006 and 2011, Lone Pine Resources obtained an exploration permit with the objective of engaging in hydraulic fracturing or fracking. In 2011, following the public and legislative debate, the province of Quebec enacted legislation that revoked all permits for oil and gas development under the St. Lawrence River, where Lone Pine operated. Additionally, the legislation prohibited any further exploration activities by resource companies in the area. Lone Pine alleges under NAFTA-ISDS that it did not receive meaningful consultation regarding the provincial legislation nor was compensated for the revoked permit and the resulting loss of potential revenue.

These cases show the challenges provinces face in exercising their powers autonomously within the Canadian federal framework, particularly when their regulations clash with the "locked-in" obligations of NAFTA. Table 1 shows the contrast between provinces using their jurisdictional power, versus the implementation of NAFTA and the breach of international trade obligations. Under NAFTA, international arbitral tribunals were allowed to decide over provincial jurisdictions outside of legislative debate. I consider this an indirect harmonization because arbitral awards under the NAFTA-ISDS could not explicitly require a counterpart to enact a new regulation, but rather influenced provincial policy measures and regulations. Still, they could determine potentially high amounts to be paid for compensation (Sinclair, 2021, p. 12). This allows arbitral tribunals to set a precedent if a province decided to proceed in a similar manner with the same or another foreign investor.

In the following examples, New Brunswick and Ontario backed away from policies and legislations once intended to be passed due to the fear of exposure under NAFTA-ISDS. In 2003 during the campaign for the provincial election in New Brunswick, the high cost of automobile insurance was an issue, and one of the candidates considered setting up a public automobile insurance program. This issue in the candidate's public agenda was abandoned (Kukucha, 2018), as private insurance corporations vigorously opposed public insurance plans and threatened to take action under NAFTA-ISDS to compensate for lost profits (Sinclair, 2015). In 1995, Ontario did not pursue legislation mandating blank cigarette packaging (Kukucha, 2018). As part of intensive lobbying against proposed regulations to require plain packaging of cigarettes,

large corporations considered the regulation as an expropriation under NAFTA obligations. As a result, Ontario chose not to proceed with the legislation (Sinclair, 2015).

Table 1

<i>NAFTA Chapter 11 Investment. Disputes against Canada originated due to provincial regulatory measures and regulations</i>			
Case and year	Province responsible of regulatory measure	Alleged NAFTA breach related to provincial regulations	Sector
Mobil Investments Canada Inc & Murphy Oil Corporation (I), 2007	Newfoundland and Labrador	Research & Development guidelines issued by the province were inconsistent and breached performance requirements (oil and gas)	Natural resources and performance requirements
Windstream Energy, 2012 Case solved under UNCITRAL rules	Ontario	Breach of the Minimum Standard of Treatment, the province left the investor in a “regulatory limbo” in studies of the environmental safety of offshore wind power.	Environmental protection
Abitibi Bowater, 2012	Newfoundland and Labrador	Breach of Expropriation, executed by the province of water and timber rights and hydro-electric holdings without compensation	Natural resources
Lone Pine Resources, 2012 <u>Active case</u>	Quebec	Breach of the Minimum Standard of Treatment and Expropriation. Corporation	Natural resources and environmental protection

<i>NAFTA Chapter 11 Investment. Disputes against Canada originated due to provincial regulatory measures and regulations</i>			
Case and year	Province responsible of regulatory measure	Alleged NAFTA breach related to provincial regulations	Sector
		challenges Quebec's fracking ban.	
Mobil Investments Canada Inc. (II), 2014	Newfoundland and Labrador	Continued application of the guidelines issued by the province in 2007. The settlement included future damages until 2047.	Natural resources and performance requirements

Table prepared by the researcher with information from Global Affairs Canada. NAFTA Chapter 11. 2022. <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng>

In CUSMA, the approach changed, and the ISDS with the ICSID and the UNCITRAL rules were eliminated between Canada and the US, which was considered a success in the negotiations (The Council of Canadians, 2020). The assumption was that the elimination of the ISDS mechanism in CUSMA would erase indirect pressures for deregulation and indirect regulatory harmonization and the damaging effect of compensating investors for policy changes and regulations. ISDS in CUSMA is only legally binding bilaterally between Mexico and the US under “Investment,” chapter 14. However, obligations in the current CUSMA Chapter 14, “Investment,” still apply between Canada and the US through state-to-state dispute settlement of chapter 31, “Dispute settlement,” as I will discuss later.

CUSMA also incorporated a “legacy clause” that protects NAFTA investments and foreign investors to submit arbitrations under NAFTA-ICSID/UNCITRAL rules for three more years, until July 2023. The first CUSMA legacy dispute Koch Industries, Inc. and Koch Supply & Trading, was presented in 2020 by a US large corporation and was filed against Canada. This CUSMA “legacy clause” case alleges an international breach due to a provincial carbon tax aiming to reduce greenhouse emissions. Each province has programs and regulations for carbon pollution to design their pricing system according to local needs. In 2017, Ontario started a “cap and trade regulation program” consisting of a market-based system that set a hard cap on greenhouse gas emissions while giving flexibility and allowing businesses to buy or sell carbon credits (Ontario government, 2023). In July 2018, the Ontario “cap and trade program” was canceled, prohibiting emission allowances trading. The measure allegedly affected a US large corporation, Koch Industries, who opposed the cancellation (Trew, Pérez-Rocha and Hansen-Kuhn, 2023 p. 39). The large corporation claims a breach of the minimum standard of treatment and expropriation because of the provincial cancelation of the trade and cap program. By the time this thesis is submitted, it is still a CUSMA “legacy clause” active case under NAFTA-ICSID rules.

After the CUSMA “legacy clause” expires in July 2023, there will be other options to use regulations and further neoliberalism impacting provinces. The elimination of the ISDS between Canada and the US does not eliminate the influence of powerful foreign investors in the context of "locked-in" FTAs. This is because the substantive obligations in CUSMA Chapter 14 will still apply in combination with all the FTA chapters and can be enforced through state-to-state dispute settlement of chapter 31.

CUSMA's state-to-state dispute settlement mechanism and regulatory harmonization

CUSMA Chapter 31, "Dispute settlement" provides a framework for the resolution of conflicts between states, through a state-to-state dispute settlement mechanism. This mechanism allows through formal procedures to resolve disputes arising from the interpretation or application of the FTA. Under chapter 31, if any CUSMA country believes another state has failed to carry out its commitments, it can initiate a dispute settlement procedure. A state-to-state dispute settlement can be invoked only by a CUSMA state to sue a state counterpart to determine the inconsistency of trade and investment measures with the FTA. Yet, CUSMA counterparts will bring disputes and further the "locked-in" norms. An example on how this mechanism has been used, will be explained in chapter Five of this thesis. This involves the first CUSMA state-to-state dispute in the dairy sector against Canada.

To provide an overview of this mechanism, the state-to-state involves consultations between states to seek a mutually agreeable solution. If the consultations do not prosper, a dispute settlement panel decides over the controversy. The panel is composed of independent experts who review the case and issue a binding decision on the matter. The panel's decision aims to determine whether a CUSMA state breached its obligations and sets the remedies which include adopting regulatory harmonization in chapter 28, or new regulations that deepen liberalization stipulated in chapter 14, "Investment."

To understand CUSMA chapter 28, "GRP," it is worth analyzing its origins and purpose. In 2005, the Organization for Economic Cooperation and Development (OECD) issued the Guiding Principles for Regulatory Quality and Performance as part of a set of

policy recommendations. These seven guidelines establish clear objectives and frameworks for liberalization and international harmonization, which were supported by Canada and all other OECD member countries. Guideline number one of these principles explains that GRP is “good regulation” that improves:

...co-ordination and avoid overlapping responsibilities among regulatory authorities and levels of government; apply regulatory quality criteria such as transparency, non-discrimination and efficiency to regulation inside government, and encourage private bodies such as standards-setting organisations to adopt criteria for regulatory quality based on the OECD Recommendations (OECD, 2005, Guiding principles for regulatory quality and performance, p.3)

The objective of guideline number six of the OECD Principles (2005) is to eliminate unnecessary regulatory barriers to trade and investment. This is achieved through ongoing liberalization efforts and the improved consideration and integration of market openness at every stage of the regulatory process. To enhance economic efficiency and competitiveness:

Implement, and work with other countries to strengthen international rules and principles to further liberalise trade and investment paying particular attention to transparency, non-discrimination, avoidance of unnecessary trade restrictiveness, harmonisation towards international standards, streamlining of conformity assessment procedures and application of competition principles. Reduce as a priority matter those regulatory barriers to trade and investment arising from divergent and duplicative or outdated requirements by countries. Support the development and use of internationally harmonized standards as a basis for domestic regulations and their review and improvement in collaboration with other countries, to assure they continue to achieve their intended policy objectives efficiently and effectively (OECD Guiding principles for regulatory quality and performance, p.7).

CUSMA incorporates the principles and standards of the OECD. In fact, the investment chapter makes explicit references to OECD principles such as the “Guidelines

for Multinational Enterprises.” The Preamble text in CUSMA incorporates the essence of OECD guidelines by affirming that the three countries negotiate the FTA resolving to:

“Facilitate trade in goods and services between the Parties by preventing, identifying, and eliminating unnecessary technical barriers to trade, enhancing transparency, and promoting good regulatory practices.”

Through chapter 28 “GRP”, CUSMA sets a new international legal precedent to impose legally binding conditions to be enforced under state-to-state disputes of chapter 31 “Dispute settlement”. Chapter 28 on “GRP” stipulates the creation of a harmonized regulatory framework that constraints the jurisdictional powers of provinces in areas that usually undergo considerable debates in the provincial legislatures.

Following CUSMA obligations for regulatory harmonization, Article 28.17 on the GRP chapter establishes that the three CUSMA partners recognize the vital contribution of dialogues between their respective regulatory authorities in promoting compatibility and regulatory cooperation when appropriate, facilitating trade and investment and achieving regulatory objectives. Article 28.17 is the path to challenge regulations as CUSMA encourages regulatory compatibility and coherence subject to internal legislation considering the respect for each country’s sovereignty. The “GRP” chapter allows the use of chapter 31 to address a “sustained or recurring course of action or inaction that is inconsistent” with an obligation of a CUSMA country.

Table 1 shows sectors under provincial regulatory power in the interest of NAFTA. These sectors include environmental protection, natural resources, and performance requirements. These sectors as well as all CUSMA binding chapters will find a convergent mandatory regulatory harmonization under the “umbrella” or

“chapeau” of GRP (Lamp, 2019; Rodrik, 2018). CUSMA counterparts can directly challenge provincial regulations considered an obstacle such as procurement, health services, and other provincial sensitive sectors that include water, or any environmental protection.

The introduction of regulatory harmonization obligations will have a widespread impact to further liberalization. These obligations will bring adjustments in policies and regulations that will directly impact provincial jurisdictions. This is because an arbitral tribunal under the state-to-state dispute mechanism has the power to affect domestic laws under chapter 28 “GRP”. An award can dictate changes to domestic regulations, seeking harmonization to eliminate what they consider unnecessary barriers to trade and investment. For instance, if a regulation is considered a discriminatory performance requirement or a measure tantamount to expropriation affecting foreign investors, this regulation will have to be changed in its entirety. In this scenario, provinces have to align their regulations with FTAs even though the Canadian Constitution Act stipulates the autonomy of provinces to regulate in certain areas. Despite the difficulties associated with passing unpopular legislation that requires approval from legislative assemblies, the commitment to "locked-in" obligations of FTAs prevail.

Under chapter 28, “GRP”, Canada (Mexico, and the United States) must provide access to their domestic regulatory consultation processes to the other countries to influence and change regulations. CUSMA Article 28.9, in its numeral 3, establishes that any interested person, regardless of address, has the opportunity to submit written comments concerning a developing regulation, including any person or corporation from the CUSMA countries. In CUSMA, open participation for any national entity or authority

from the three countries in Chapter 28 is a loophole to influence regulations. And there is no need to go through a legislation process because regulation can be changed at the level of executive bureaucracy in alignment with international trade commitments and the decisions of international arbitral tribunals.

Given the influence of large corporations in previous trade negotiations, as explained in chapter Three of this thesis, the combination of CUSMA chapters 14, 28 and 31 can actually enlarge the influence of large corporations and foreign investors on domestic policy. If consultations to change a regulation do not provide the desired outcome expected by a large corporation or foreign investor, any CUSMA country pushed by such a large corporation or foreign investor can challenge it. The expansion of neoliberalism in CUSMA has a more relevant reach than the one in the ISDS mechanism of NAFTA Chapter 11. CUSMA intensifies the absence of provincial influence in international trade policy and the bypassing of domestic processes including debates in provincial legislatures. No regulation under CUSMA chapter 28 has been challenged yet, but when disputes arise, international arbitrators will set the precedents and the new jurisprudence of the expected level of compatibility between the CUSMA and provincial legislation.

Interestingly, the CFTA is explicitly withdrawn from CUSMA in chapter 28 (Annex 28-A of CUSMA, “Additional provisions concerning the scope of regulations” and “Regulatory authorities”), which means that CUSMA does not cover CFTA. In contrast, CFTA is influenced by CETA. The decision to exclude CFTA from CUSMA raises concerns about whether federal authorities deliberately established two harmonization mechanisms to further restrain provincial jurisdiction. CUSMA chapter 28

and CFTA represent two separate, overlapping efforts towards regulatory harmonization. This can be illustrated in the case of provincial jurisdiction in environmental policy.

CFTA, which excluded CUSMA, incorporates in its Chapter 6 on Environmental Protection, the right of provinces to establish their own environmental priorities and levels of protection within their territories, always maintaining high levels of environmental protection measures (CFTA, 2022). However, if domestic regulations and the environmental standards outlined in CFTA are challenged under CUSMA, an international arbitral tribunal will have the authority to determine the outcome regarding regulatory harmonization. Despite CUSMA's statements about respecting sovereignty, and CFTA's respect for high standards of environmental protection, international arbitral tribunals under CUSMA can decide over the ability of provinces to maintain the environmental regulations and standards. In other words, while CFTA grants provinces the right to determine their environmental priorities and protection levels, if these regulations are challenged under CUSMA, an international tribunal can decide over such regulations. But CFTA is excluded already, so it becomes easier to challenge an environmental regulation.

Holtlander (2018) explains that CUSMA chapter 28 seeks to harmonize regulations among CUSMA countries, but harmonizing regulations on the advice of interested "persons" for the sake of trade fundamentally attacks democracy by replacing the full range of considerations with narrow corporate interests. In contrast, Rodrik (2018) argues that regulatory harmonization is not necessarily harmful, especially when instead of protecting corporate rights, it enforces increased standards, to make them compatible with protecting the environment. Thus, the following section explores the

principles of the Environment chapter 24 of CUSMA and the environmental matters that impact provinces in the context of environmental harmonization.

To protect the environment, CUSMA chapter 24, “Environment,” was accorded by federal negotiators as mandatory for all provinces, despite the devolution of powers to provinces in this sector or federal-provincial shared jurisdiction. CUSMA legally binding chapter 24, “Environment,” incorporates an additional agreement, the parallel Environmental Cooperation Agreement (ECA). The purpose of the ECA is to retain and continue the institutions and the bureaucracy created in 1994 under the North American Agreement on Environmental Cooperation (NAAEC). Article 24.4 of the “Environment” chapter determines that state-to-state disputes subject to Chapter 31, “Dispute settlement,” can be brought only when lowering standards creates a trade or investment advantage. CUSMA chapter 24, explicitly integrates seven Multilateral Investment Agreements (MEAs), which refer to environmental provisions related to eliminating fisheries subsidies and targeting illegal, unreported, and unregulated fisheries; stopping illegal shipments of endangered species of flora and fauna; prohibiting shark finning and the commercial killing of great whales; reducing marine litter; protecting tuna fish; and protecting the ozone layer.

The CUSMA Environmental chapter does not offer protection if large corporations perceive a provincial regulation impacts their operations negatively and falls outside the scope of the MEAs, such as restrictions on bulk water allocation, chemical usage, environmental performance requirements, fracking, or softwood lumber. As such, these investors can still turn to chapters 14, "Investment," and 28, "GRP" to potentially benefit from alleged discriminatory treatment and promote regulatory harmonization in

provinces. The application of provincial measures, such as carbon taxes, in relation to environmental matters has also become a subject of interest for regulatory harmonization, as illustrated by the CUSMA "legacy clause" case. Issues concerning natural resources and the environment fall under provincial jurisdiction. Still, they are also subject to international trade commitments, further undermining provincial powers through chapter 14, "Investment," or chapter 28, "GRP." Hence, chapter 28 is a tool to develop compatible regulatory approaches and eliminate divergent regulations inherent to provincial powers in decentralized federalism.

The politics of regulatory harmonization mechanisms

Under federalism, provinces have the authority to shape their regulations. This autonomy given to provinces has resulted in conflicts and discrepancies when it comes to implementing "locked-in" FTAs like NAFTA and CUSMA. As the NAFTA-ISDS cases and the CUSMA stipulations under chapter 28 show, provincial regulatory inconsistencies imply that provinces are required to align their regulations with the provisions of "locked-in" NAFTA and CUSMA, ensuring a harmonized regulatory environment and more liberalization. While NAFTA's ISDS triggered indirect regulatory harmonization, CUSMA stipulates a direct regulatory harmonization. Provincial autonomy to regulate and the depoliticized international trade policy find a common ground under the regulatory harmonization, which will be illustrated in the following chapter with the New Brunswick case.

Chapter Five

The Atlantic region in NAFTA and CUSMA: the case of New Brunswick

This chapter explores the impacts of the North American Free Trade Agreement (NAFTA) and the Canada-United States Agreement (CUSMA) on New Brunswick. This analysis focuses on New Brunswick to analyze the specific impacts of NAFTA and CUSMA on matters under provincial jurisdiction and issues that interest the Legislative Assembly and their constituencies. Also, this case study explores the NAFTA-CUSMA impacts on the dairy sector. First, this chapter shows concretely how the depoliticized NAFTA and CUSMA frameworks were negotiated without provincial influence, hence without the democratic debates inside and outside the Legislative Assembly. This case study sheds light on the “locked-in” FTAs restraining provincial jurisdictions in their power to regulate autonomously in certain areas. Second, the chapter provides a thoroughly analysis of the dairy sector negotiations under CUSMA led by the authorities of the executive branch, the outcome of the first state-to-state dispute against Canada in this sector, and the impacts of free trade on local dairy farmers. Third, the case study shows how provinces have to follow regulatory harmonization set by CUSMA.

New Brunswick and international trade policy

International trade policy at Global Affairs Canada comprises three federal ministers involved in FTA negotiations: the Minister of Foreign Affairs; the Minister of International Trade, Export Promotion, Small Business, and Economic Development; and the Minister of International Development and the Minister responsible for the Pacific Economic Development Agency of Canada. In addition, the Federal-Provincial-Territorial Trade Committee (C-TRADE Committee) is the entity that includes provinces

and territories in the negotiations of FTAs. Through this mechanism, provinces and all stakeholders voice their concerns and interests to Global Affairs (Questions ACEUM-CUSMA Inquiry (2022, December 16) Invitation to participate in research [email]).

Official documents at the provincial level explaining the international trade policy in New Brunswick are difficult to find. The most recent publicly accessible information from the province on international trade policy dates from 2012. The New Brunswick “2011-2012 Annual Report, Department of Intergovernmental Affairs” (IGA, 2012), underlines the activities and accomplishments of New Brunswick regarding North American relations, trade policy, and international relations (including francophonie). According to this official Report, the province coordinates relationships between provincial, territorial, federal, and other international authorities (2011-2012 Annual Report, Department of Intergovernmental Affairs, 2012, pp.13). This document issued more than ten years ago, shows the absence of an updated public debate on the matter, and therefore, documents that allow us to understand the province’s position and activities in international trade policy are lacking. For that reason, interviews with government authorities in New Brunswick were central to this chapter.

New Brunswick (and each Canadian province) has a trade policy branch to follow international trade commitments, but as explained in chapter Three of this thesis, these branches exist without the power to decide international trade negotiations. This is more evident when federal negotiators directly address large corporations and foreign investors, leaving aside the province’s view. In this regard, interviewees explained that consultations under the C-TRADE Committee take place with no unified criteria. Some federal authorities make open consultations with provinces by asking for an opinion, and

others do not. Some federal authorities, without a unified procedure, “only check a box on consultation” with provinces because the decision is ultimately taken at the federal level (Personal communication, February 17, 2023).

Federal authorities have a closer and more immediate relationship with large corporations and foreign investors involved in international trade issues than with provincial authorities. One interviewee mentioned that federal authorities have complete power to decide international trade policy (Personal communication, February 17, 2023). This influence illustrates how the executive branch concentrates power around FTAs negotiations, considering mostly large corporations and foreign investors as key stakeholders, rather than provinces. Interviewees explained that FTAs have expanded into areas which constitutionally belong to provinces such as government procurement, trade in services or the environment. A conundrum arises from the process of negotiating and signing FTAs by federal authorities on behalf of provinces because provinces hold the constitutional authority to administer, manage, or legislate specific sectors. While the federal authorities negotiate and sign FTAs, the provinces are responsible for implementing and managing policies in these areas. Hence, the provinces themselves ultimately bear the consequences of non-compliance, and there would be no way for them to avoid facing these consequences (Personal communication, February 17, 2023).

The interviewees noted that there are no formal instances and no conference or table of ministers when it comes to international trade policy. For international trade matters, ministers meet once in a while, and even virtually (after the pandemic of COVID-19). For the federal-provincial interaction in international trade policy, the C-

TRADE Committee works at the level of officials, rather than ministers. Federal negotiators meet with provincial authorities on a quarterly basis and provide them with updates (Personal communication, February 17, 2023).

In CETA negotiations, interviewees said that the federal authorities found a way to make provinces get on board with international trade commitments by giving them a seat at the table of negotiations as observers. For CUSMA negotiations, provincial participation was not the case, and provinces only received updates on federal decisions. Interviewees added that smaller provinces are subordinated to Quebec and Ontario because the latter have a lot of resources (this is linked with the influence of large corporations and foreign investors leading provincial interests, explained in chapter Three of this thesis). Smaller provinces have fewer resources, territories even less so (Personal communication, February 17, 2023). This aspect is relevant because smaller provinces do not have the same technical capacity in comparison to the federal negotiators to analyze each trade discipline. And when it comes to smaller provinces, the capacity gaps to analyze all trade disciplines are lacking, for instance, in areas that require much more expertise, like telecommunications or digital trade chapters (Personal communication, February 17, 2023).

Regarding provincial jurisdictional powers, interviewees added that within Canada, the public expectation is that everybody should honor other province's regulations (Personal communication, February 17, 2023). Interviewees explained that even if efforts are made to harmonize regulations, each province still retains the right to regulate independently. Even if efforts are made to harmonize regulations across provinces, the system can still become disjointed if a province decides to increase or

decrease regulations for any reason (Personal communication, February 17, 2023). These statements reflect an optimistic point of view that highlights the importance of federalism. However, they also demonstrate a lack of consideration for the impacts of the "locked-in" NAFTA and CUSMA norms on provinces. In line with this optimistic point of view, interviewees raised the question of why not consider questioning the entire federal Confederation system and instead opt for a single federal government if provinces are unable to change their regulations for any reason (Personal communication, February 17, 2023).

New Brunswick (and all provinces) is bound to implement international trade and investment commitments and regulatory harmonization despite its lack of participation in international trade negotiations and the provincial right to regulate autonomously. As part of the implementation, interviewees emphasized that the federal approach in international trade policy overshadowed the needs of New Brunswick, leading to a less favorable outcome for the province in this the softwood lumber industry, for example. The province's specific concerns and interests did not consider how the disputes in softwood lumber initially emerged, how they persisted over time, and how they were eventually resolved with restrictions on New Brunswick. Interviewees added that federal negotiators in charge of international trade policy, make decisions based on the impact of what might be a small volume in compared to a bigger province but a very strategic volume in the overall economy of the province's size (Personal communication, March 28, 2023).

Interviewees mentioned that comparing the size of New Brunswick with provinces like Ontario and Quebec and then further west in British Columbia, show that

an alignment in international trade policy is very helpful, (Personal communication, March, 28 2023). Nevertheless, the alignment has its costs:

So what became an issue is that when the federal authority negotiates an international deal (in softwood lumber), they're trying to say, okay, does this match up with all of Canada? Well, there is a very different situation in British Columbia and their lumber business in comparison to here in New Brunswick. But we could not separate the two. We got to have a national policy here! We negotiate with the federal government, and we are saying no, we have had an Eastern policy that is worth just fine for decades. So that has been an ongoing issue, and we cannot isolate our situation, of course, (Personal communication, March, 28 2023).

The following section shows the CUSMA limitations imposed on local producers and the restraints on economic decision-making through the Legislative Assembly and public consultations on matters central to provincial economic development, as will be illustrated with the dairy sector. Regulatory harmonization and more liberalization show the impacts on provincial jurisdiction and local producers.

Got milk? International trade, disputes and local development

In Canada, the dairy sector operates under a supply management system based on production quotas, administered pricing schemes, and product import tariffs (Baylis and Furtan, 2003; Government of Canada, 2022). Federal authorities control the sector and set overarching policies and regulations, while provinces subordinate to these regulations. Because these regulations create sizeable economic rents for producers, dairy farmers seek to maintain these programs. Still, consumer and dairy processor groups, mostly large corporations and foreign investors, push for the elimination of these policies (Baylis and Furtan, 2003). The distinction between producers and processors is significant in the context of international trade. This was particularly evident in 2021 when the first state-to-state dispute under Chapter 31, "Dispute Settlement," of CUSMA challenged this

differentiation. As a result, in the first CUSMA state-to-state dispute against Canada, the country had to allow market access to international processors by removing federal regulatory barriers. The decision of the international arbitral tribunal impacts provinces subordinated to federal regulations on the sector, but most importantly, CUSMA and its arbitral decisions, impact local producers.

To provide a general overview of the domestic dairy industry in Canada, it is worth explaining how the industry was organized after World War II to help stabilize the local economy, reflecting the welfare state policies at the time. The federal authorities addressed farmers' issues through supply management as a means to regulate pricing and ensure stable revenue, setting the national quantity of milk produced at the federal level (Muirhead, 2014). The total fluid or fresh milk production quota is allocated to the provinces based on the provincial population; thus, the share is non-negotiable. All dairy farmers belong to marketing boards at the provincial level to follow the regulations dictated from federal regulations. The supply management system seeks to safeguard the domestic dairy industry by imposing substantial border tariffs, sometimes reaching up to 300 percent, on imported dairy products. Additionally, the system establishes production quotas for Canadian farms and ensures a minimum price for the milk they sell, effectively shielding the industry from international competition (Stuart and Hill, 2022). Under this scheme, the bulk of industrial milk is produced in Quebec and Ontario, with 70% of the national production (Beaulieu and Venkatachalam, 2018).

Interviewees noted that in the negotiations around the dairy sector in CUSMA, mostly those in Central and Eastern Canada, stakeholders and provincial officials defended the existing supply management because it is beneficial to farmers (Personal

communication, February 17, 2023). In the CUSMA C-TRADE Committee consultation process, provinces did not want to grant concessions. Still, Canada allowed American farmers to export about \$560 million worth of dairy products within CUSMA (Beaulieu and Klemen, 2020). Additionally, Canada will grant the US increased access to its dairy import quotas by 500% in the CUSMA's sixth year, and then provide a one percent annual increase thereafter until the 19th year (Heminthavog, 2018). As compensation to domestic dairy producers federal state authorities pay income support to maintain the farmers' value of production quotas over 15 years (Beaulieu and Venkatachalam, 2018). An interviewee mentioned that all provinces were disappointed with the accorded level of concessions (Personal communication, February 17, 2023). Perezcano (2019) explains that one of Canadian dairy producers' main concerns about opening their market more to US imports is an oversupply in the US market resulting from farm subsidies.

During the discussion sessions in 2020 at the House of Commons to pass CUSMA Implementation Act, Members of Parliament referred to New Brunswick when highlighting the impacts on the dairy sector. The first references in the debates related to the dairy sector in New Brunswick (and other provinces) were presented by MP Gerald Soroka from the Conservative Party who highlighted:

Pierre Lampron, president of Dairy Farmers of Canada, said the following: The signing of the Canada-United States-Mexico Agreement (CUSMA) is a sad chapter in Canada's dairy industry and for Canadian exporters. The access to our country's dairy market given to the U.S. represents a significant loss, the equivalent of the combined dairy production of New Brunswick and Nova Scotia. Market access is only the tip of the iceberg. Concessions include an oversight clause that gives the U.S. the ability to intervene in the administration of our domestic system. The concessions also give the U.S. the ability to impose the equivalent of a cap on global dairy exports, which will limit Canada's ability to export dairy products. Would the U.S. ever accept such terms? (House of

Commons Debates. January 30th, 2020. MP Mr. Gerald Soroka, province of Alberta, pp. 741).

In a different session at the House of Commons on CUSMA debates, MP Brad Vis from the Conservative Party mentioned that Mr. Dykstra, a dairy farmer from New Brunswick, expressed his concerns regarding the compensation package promised and partially delivered. According to MP Brad Vis, Mr. Dykstra mentioned that he had not received any information about the remaining years or how the compensation will be paid out. While many farmers, including Mr. Dykstra, received payment in December of the previous year for concessions made in previous trade agreements, there is no clear timeline for future payments. Dairy farmers relied on earning their income solely from selling their products the marketplace. “The government trading away excess and then offering compensation is not what they desire” (House of Commons Debates. March 11th, 2020. MP Mr. Brad Vis, province of British Columbia, pp. 1957).

Their concerns were echoed within the Legislative Assembly in New Brunswick. The impacts on the CUSMA dairy sector were discussed at the Legislative Assembly only in November 2018. MLA Ross Wetmore from the Progressive Conservative Party debated about the impacts of CUSMA in the dairy sector:

We have a number of new businesses that are starting in the riding. I would like to speak about farmer Ron Beckwith. Ron is spending \$6.5 million to establish a new dairy farm in the riding of Gagetown-Petitcodiac. I have been speaking with Mr. Beckwith, and he certainly had concerns on the USMCA that was signed by the federal Liberal government. We are starting to see the erosion of supply management in the dairy industry. The 3.5% that the federal Liberal government has given up to the United States certainly can have staggering impacts on our agriculture and dairy supply-managed systems in New Brunswick. What we have to realize is that farmers do not want government handouts. They want to be able to do business. Unfortunately, the federal government has decided to leave the farmers behind. (Hon. Mr. Ross Wetmore. November 23rd, 2018. Journal of debates. Legislative Assembly of New Brunswick, pp.69)

In addition, interviewees referred that after all the CUSMA dairy market access concessions granted in CUSMA, the federal authorities attempted to mitigate the impacts. An interviewee explained that supply management is a system to make the dairy sector functional; now, with compensations to dairy farmers agreed upon after CUSMA, Canada is entering a similar system of subsidies as in the US implemented through regulatory harmonization in the sector (Personal communication, March 17, 2023). Subsidies lead to a harmonization that impacts provinces and local producers. The impacts on the dairy supply management system affect mostly local producers who voice their concerns at the provincial level, as seen in previous examples. Yet, their own local conditions are disregarded by federal authorities when they bypass provincial discussions in international trade policy.

In 2021, Canada faced the first state-to-state CUSMA dispute and lost. In this case, an international panel decided on the domestic allocation methodology of dairy products. More specifically, this international panel decided over a Canadian federal regulation impacting provinces and local producers. This precedent shows the capacity of CUSMA to deregulate and unleash market access with impacts at the federal level, and at the provincial level affecting the supply management system local producers, and more regulatory harmonization. The international arbitral tribunal decided whether Canada's reserving 85 to 100% of 14 separate dairy tariff rate quotas (TRQs) for "processors and further processors" was inconsistent with its obligations under CUSMA by reserving the quotas to Canadian processors. (Canada-Dairy TRQ allocation measures, Final panel report, 2021).

A "tariff-rate quota" (TRQs) is a system that applies a lower customs duty rate to imports of a specific product from a particular origin country up to a set amount, known as the in-quota quantity, and a different rate to imports of that product that exceed that amount. Therefore, Canada has the right to allocate TRQs amounts according to an established mechanism, (Canada-Dairy TRQ allocation measures, Final panel report, 2021). Under CUSMA, Canada has the right to maintain 14 TRQs on the following dairy products: milk, cream, skim milk powder, butter, and cream powder, industrial cheeses, cheeses of all types, milk powders, concentrated or condensed milk, yogurt and buttermilk, powdered buttermilk, whey powder, products consisting of natural milk constituents, ice cream, and ice cream mixes, and another dairy. (Canada-Dairy TRQ allocation measures, Final panel report, 2021).

It is worth noting that the arbitral tribunal did not decide on the right to set tariffs but rather, on the allocation methodology in Canadian domestic regulations.

The panel explained:

“...it is the inflexible pool system Canada has designed here that is objectionable, not Canada’s general ability to allocate its TRQs in the manner it desires. For the reasons set forth above, the Panel finds that Canada’s practice of reserving TRQ pools exclusively for the use of processors is inconsistent with Canada’s commitment....” (Canada-Dairy TRQ allocation measures, Final panel report, 2021).

The international panel’s decision weakens the supply management system in Canada under the control of federal authorities and moves toward dismantling it, through more liberalization and regulatory harmonization, without taking in account contestation and debate with Parliament and Legislative Assemblies. The international panel decided

that the controversy was not about Canada's right to impose tariffs but inflexible domestic regulation incompatible with CUSMA. This case shows how the international dispute mechanisms within CUSMA trigger regulatory harmonization.

Interviewees noted that provinces experienced a significant setback in the dairy sector when Canada lost the first state-to-state dispute under CUSMA against the US. This state-to-state dispute resulted in the elimination of a regulation established by federal authorities to safeguard local dairy processors. Interviewees explained that as a response to the ruling made by the international arbitral panel, the federal authority has now decided to provide compensation to processors affected by the decision (Personal communication, March 17, 2023). Additionally, interviewees emphasized that the impacts of CUSMA extend not only to New Brunswick, but to all provinces. Despite certain provinces producing more dairy products than others, the market and revenues are shared among all provinces. CUSMA's dairy sector harmonization to international standards and the decision from the panel tribunal in the first state-to state case, bypassed debate and political contestation within the Parliament and Legislative Assemblies. The depoliticized Canadian international trade policy centered in the national executive branch does not provide provinces with any role or influence to shape international trade outcomes.

Most of New Brunswick's dairy farmers did not accept to participate in an interview, but they were always open to answering telephone calls and informally speaking (Personal communication, March 14, 2023). Some potential interviewees that I contacted referred me to Dairy Farmers of New Brunswick (DFNB) as the source to obtain a position on the topic or information. DFNB is the organization through which

New Brunswick's dairy farmers collectively market their raw milk (DFNB, 2023). Most of the dairy farmers in the province mentioned that by declining their participation in an interview, they wanted to keep their distance from politics. One interviewee said that dairy farmers have to deal with the burden of FTAs, "which is annoying," (Personal communication, March 14, 2023). The fact that most dairy farmers declined to participate in interviews shows a general sense that their views are not taken into consideration when it comes to the negotiation of FTAs.

Interviewees mentioned that the two most significant impacts of NAFTA and CUSMA are the loss of domestic market growth and the damage to supply management. Supply management is a benefit not only in the dairy sector but in all Canadian commodities under this scheme because it costs more to make food in Canada due to climate (Personal communication, March 17, 2023). Interviewees explained that the surplus is what is exported once the domestic market is complete. Opening the market in FTAs has affected local development because Canada imports more dairy products than it exports, creating a market disruption, and displacing Canadian products (Personal communication, March 17, 2023).

Interviewees explained that the dairy sector, as well as the international trade policy pertaining to the dairy sector, are under the control of federal authorities. They pointed out that this control does not grant any influence to provinces or local producers in shaping international trade commitments. Despite the lack of provincial voice and influence, provincial dairy farmers support the provincial marketing board DFNB who works collaboratively with the federal organization "Dairy Farmers of Canada." "Dairy Farmers of Canada" represents provinces at the federal level and works as the country's

lobbying voice for provincial dairy farmers. For example, during CUSMA negotiations, in 2020 by the “Dairy Farmers of Canada” prepared a position paper that was presented at the House of Commons to pass the CUSMA Implementation Act. This document explains that Canadian dairy farmers have faced negative consequences due to the last trade agreements, including CUSMA. The impact of CUSMA negotiations extends beyond granting access to the dairy market, which accounted for only 3.9% of Canada's dairy production in 2017. Furthermore, the position paper states that CUSMA mandates to consult the US regarding any changes to Canada's supply-managed dairy system administration. This requirement sets a concerning precedent, as a trade agreement demanding consultation with a competitor in another country undermines Canada's sovereignty and control over its national administrative decisions (Study of the subject matter of Bill C-4, CUSMA, Dairy Farmers of Canada, pp 2). Interviewees added that the “Dairy Farmers of Canada” is not at the table of negotiations during FTAs. However, interviewees explained that the outcome and the levels of concessions in CUSMA could have been worse without “Dairy Farmers of Canada’s” representing provincial market boards and local dairy farmers (Personal communication, March 17, 2023). The position paper of the "Dairy Farmers of Canada" illustrates how this national body collaborates with provincial marketing boards, such as DFNB, in coordinated efforts to provide their points of view through written submissions and technical documents. Their aim is to prevent domestic displacements in international trade policy and to support the supply management system. However, despite these efforts, their voices are not taken into account during the negotiation of FTAs.

The depoliticization of international trade policy

The efforts of New Brunswick provincial authorities, stakeholders, and local producers are dismissed by both federal authorities in charge of international trade policy and international arbitral tribunals. Federal authorities in charge of negotiations and international arbitral tribunals push for regulatory harmonization and make decisions on domestic regulations based on the 'locked-in' international trade commitments. Under CUSMA in the dairy sector, an international arbitral panel in the first state-to-state dispute lost by Canada granted a wider liberalization to the supply management system and hence more regulatory harmonization. Therefore, instead of using supply management, federal authorities opted for subsidies to processors. This decision harmonizes regulations to enable open market access while also imposing restraints on regulations that impact the economic development of the sector, thus affecting local producers. The international arbitral panel in the dairy sector pushed for greater liberalization and deregulation, with additional constraints on provincial jurisdictions. This is relevant because constraints to provincial jurisdiction also impact dairy farmers, local processors, and the overall local development on the sector.

Depoliticization of international trade policy under the control of federal authorities without provinces' influence or local producers shows the concentration of power around the Prime Minister's Office. In the CUSMA negotiations, the New Brunswick provincial authority, local producers, or provincial regulating body did not influence the federally negotiated outcome. However, the province and local producers are restrained because of the implementation of these "locked-in" obligations.

Chapter Six

Conclusions on the impacts of NAFTA and CUSMA on Canadian provinces

This thesis follows the critical political economy perspective to show that Canadian provinces do not have a role in shaping international trade policy, specifically in the negotiations of the North American Free Trade Agreement (NAFTA) and, years later, the Canada-United States-Mexico Agreement (CUSMA). This thesis also demonstrates the impacts of NAFTA and CUSMA on Canadian provinces because federal authorities negotiate Free Trade Agreements (FTAs) without provincial influence or political contestation. The absence of provincial involvement in FTA negotiations under the depoliticization of international trade policy means that existing democratic institutions such as provincial legislatures have no input or influence to shape FTAs. As a result, the absence of provincial influence in NAFTA and CUSMA negotiations undermines democratic decision-making in the form of a lack of substantive participation of provincial legislatures and Parliament. Also, these FTAs constrain the provinces' ability to autonomously regulate within the framework of devolved powers which undermines provincial jurisdiction. As such, international trade policy contradicts the Constitutional ruling of decentralized federalism.

Chapter Two of this thesis analyzes mainstream debates in international relations, some including domestic analyzes, to understand the negotiation process and the domestic interaction in the negotiations of NAFTA and CUSMA. The analysis of international debates in this thesis include neorealism, neoliberal institutionalism, and rational choice institutionalism. However, none of these perspectives provide the elements to identify the impacts of NAFTA and CUSMA on provinces. These

perspectives account for the state as a homogeneous and unitary actor, disregarding any forces or actors. In contrast, only the critical political economy perspective employed in this thesis provides the framework to identify the players and social forces in the context of neoliberalism to understand the lack of provincial participation in international trade policy and the impacts on provinces. Also, this perspective facilitates the recognition of the depoliticization of international trade policy and highlights the central role played by the executive branch, particularly the Prime Minister's Office, in the decision-making of NAFTA and CUSMA in alignment with neoliberalism.

Chapter Three analyzes the role of provinces in the negotiation of NAFTA and CUSMA. In the 1980s, "roll-back" neoliberalism with social, economic and political change was implemented in Canada, by eliminating the welfare state and implementing neoliberalism. During the 1990s, the shift in paradigm triggered by NAFTA negotiations solidified a "roll-out" neoliberalism approach, which involved devolving powers to provinces to grant them greater autonomy with fewer resources to intensify local competition to offer better investment conditions. However, this devolution was accompanied by reduced budgets to further expand neoliberal policies. In this regard, the Constitution rules that federal powers cannot impose international trade policy on provinces because provinces have the authority to rule in certain areas autonomously. This historical account also reveals that international trade policy in Canada does not provide a role to provinces to influence decisions. Provinces subordinate to the obligations of "locked-in" FTAs, even in areas that fall within their jurisdictional power. This subordination occurs without political contestation or provincial public debate

within the existing democratic institutions, such as provincial legislatures, to influence FTAs.

This chapter also addresses how international and domestic trade agreements aimed at eliminating barriers, triggering provincial regulatory harmonization. In addition, during the CUSMA negotiation in 2020, federal authorities continued a depoliticized approach to international trade policy relying on pre-existing "locked-in" FTAs and template texts. In CUSMA, federal authorities introduced a mandatory regulatory harmonization mechanism, which extends into areas within provincial jurisdictions.

Chapter Four analyzes the mechanisms implemented in NAFTA and CUSMA to solidify the "locked-in" norms to further the provincial impacts regarding liberalization and regulatory harmonization, a new form of "rolled-out" neoliberalism. The FTAs mechanisms analyzed in this thesis that impact provinces are the NAFTA-ISDS, the CUSMA chapter 28, which mandates regulatory harmonization, and the state-to-state dispute of CUSMA chapter 31. The analysis of NAFTA-ISDS cases, which examined situations where provincial regulations conflicted with NAFTA, highlights the indirect harmonization impact on provinces. These cases demonstrate how provincial jurisdictions and their autonomy to regulate are restrained, limiting their ability to enforce regulations independently. The NAFTA-ISDS cases analyzed show how provincial rights and provincial jurisdictions were subordinated to "locked-in" NAFTA. In CUSMA, the ISDS mechanism between Canada and the US was eliminated. However, a "legacy clause" in CUSMA provides protection for three years after NAFTA. The introduction of the mechanism of Good Regulatory Practices (GRP) in CUSMA enables the continuation of regulatory harmonization obligations that directly affect provinces. Provinces under

CUSMA are bound to the obligations without precedent of regulatory harmonization established in Chapter 28, “GRP.” Chapter 28, GRP, investment obligations, and chapter 31, state-to-state dispute settlement, are the CUSMA mechanisms to modify and undermine provincial regulations.

Chapter Five delves into the case study of New Brunswick within the context of NAFTA and CUSMA. It shows how the province does not participate or influence the final outcome of negotiated FTAs, with the executive branch assuming the central authority to decide international trade commitments through a depoliticized approach. The case study shows how depoliticization narrows down international trade policy to technical aspects, while excluding provincial participation and limiting political contestation. Official documents and stakeholders allow to confirm that the role of the province, (and thus all provinces) in international trade policy is to be an observer and receive updates from federal negotiators on the decisions of international trade commitments.

An understanding on the impacts on provinces with New Brunswick in focus, and the undermined democratic decision-making within the federal system, highlights the need of an alternative approach in the negotiation and implementation of FTAs. The imperative lies in fostering political contestation and facilitating provincial public debate within existing democratic institutions, such as the provincial legislatures, to influence FTAs effectively.

Hence, provinces need to push for a more balanced international trade policy, by seeking an active role in international trade policy through the debate at the provincial level in the existing democratic institutions. This way, federal and provincial authorities,

would have to agree on provincial needs meanwhile respecting provincial powers and decentralized federalism. CUSMA Article 34.7 “Review and Termination” clause which stipulates a joint review of CUSMA in 2026, represents an opportunity for provinces to evaluate the impacts of CUSMA and push for a way to actively modify trade disciplines that continue undermining the right to regulate.

The theoretical contribution of this thesis expands the understanding of neoliberalism and depoliticization of Canadian international trade policy and the impacts on provincial jurisdictions. It contributes on explaining the central authority of the executive branch that negotiates and “locks-in” FTAs, in combination with the “roll-back” and “roll-out” neoliberalism implemented without provincial intervention or contestation from provincial existing democratic institutions. The empirical contribution of this thesis lies on the provincial level as the stage where NAFTA and CUSMA have impacts, and the complex interplay between the lack of provincial influence in shaping international trade policy, the provincial devolution of powers, and the constraints to provincial jurisdictions facing “locked-in” FTAs.

This study has limitations. It does not explore the balance of class forces that influence international trade policy. Another limitation is that indigenous peoples and Canadian territories are exempted from this analysis, also an integral part of the class forces and the imbalance of powers. Further research on this thesis could explore the limitations of this study. Additionally, further research can analyze additional trade obligations and CUSMA chapters that have not been discussed yet. This approach would provide a more comprehensive understanding of the impacts on provinces, encompassing trade disciplines such as cross-border trade in services, digital trade, government

procurement, and competitiveness. In 2026, as explained in chapter Four of this thesis, a joint review by CUSMA counterparts will take place. This represents an opportunity to revisit the role of provinces and federalism in international trade obligations. Expanding this research would raise awareness of the need to include the voice and influence of provinces, one of the closest levels of government of Canadian citizens.

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