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Negotiation of Trade Agreements in Federal Countries

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The UK intends to negotiate new free trade agreements following Brexit. These agreements are likely to affect areas within Scottish Parliament competence, although it is unclear what role the Scottish Parliament may play in their negotiation. This briefing examines the representation and influence of provinces/regions/states in federal countries in the negotiation and implementation of such agreements.



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Executive Summary

Once the UK leaves the EU, it will be able to negotiate a series of bi- or multilateral international free trade agreements with its trading partners. The terms of these free trade agreements are likely to affect policy competences currently devolved to the Scottish Parliament and Government. With this in mind, both the Scottish Government and Scottish Parliament may wish to influence the terms and scope of these agreements.

This briefing examines the how trade agreements are negotiated by Canada, Belgium, Germany and the United States. The briefing specifically looks at the way in which sub-state actors have influenced the negotiation and ratification of trade agreements, and how diverging or competing interests are incorporated in the final agreements.

The first country reviewed is **Canada**. Having recently negotiated the Comprehensive Economic and Trade Agreement (CETA) with the European Union, the Canadian Federation has very recent experience of such negotiations. A framework has developed over decades to facilitate dialogue between federal and provincial officials on matters of trade. However, when CETA negotiations commenced in 2009, representatives of the Canadian provinces made up part of the Canadian official delegation for the first time. This direct participation enabled the dynamic incorporation of provincial interests in the pan-Canadian positions put forward to the EU negotiators. This approach is considered to have been very successful by both provincial and federal politicians.

The federal settlement in **Belgium** attracted significant media attention during the completion of the CETA negotiations. In the latter stages of the process, the Walloon Parliament passed a resolution refusing the region's consent to Belgium's signing of the agreement. Responding to public concerns regarding investor-state dispute resolution mechanisms and independent regulation of public services, the Walloon government secured concessions from both the Canadian Governments and the European Commission. In the Belgian federal system there are established mechanisms in place which govern the representation of regional and community interests by federal Belgian ministers and officials at EU level. These mechanisms essentially install federal authorities as facilitators of compromise, whose role it is to represent the consensus position of the regions on the world stage.

In **Germany** and the **United States** the Länder and states have less constitutionally defined authority over matters of trade than their counterparts in the Canadian and Belgian federations. Nevertheless, in both countries there are frameworks in place for the involvement and representation of state interests in international negotiations. Although the manner in which they are elected differs, representatives from the Länder and states make up the membership of the upper chambers of parliament in both cases. These chambers have direct oversight of the federal government's activity in international affairs, and have varying degrees of authority to mandate that activity. In Germany, the relevant chamber is the Bundesrat, and it provides "quasi-binding" advice to the government in such affairs. Meanwhile in the United States, Congress establishes specific objectives for trade negotiations which it permits the President to enter into. In both countries, the upper chambers are also required to ratify such agreements.

The constitutional settlement varies widely in each of the above four countries and none compare directly with the existing devolution settlement in the UK. However aspects of each process may provide some useful context for the situation in the UK.

This briefing draws on conversations with Mr Christos Sirros and Mr Frédéric Tremblay, Delegate-General and Political and Public Affairs Director, respectively, at the Québec Government Office in London, and officials from the High Commission of Canada to the United Kingdom in relation to Canada, and His Excellency Mr Rudolf Huygelen, Belgian Ambassador to the United Kingdom, and officials from the Flemish Government Department of Foreign Affairs in relation to Belgium. We are grateful for their input and insight.

Introduction & Context

Following its withdrawal from the EU, the UK will be able to negotiate a series of free trade agreements with key trading partners. Until that point, as international trade is an EU competence, the European Commission negotiates trade agreements on behalf of the UK and other member states. The Secretary of State for International Trade, the Rt Hon Dr Liam Fox recently set the scene (July 2017) stating that as well as “retaining the ties of commerce” with the EU, the UK “will also set our sights wider, strengthening our ties with new friends and old allies alike, as we seek to build a truly global Britain.”¹

The negotiation of international agreements and trade policy is reserved under Schedule 5 of the Scotland Act. However, [modern trade agreements](#) increasingly focus on a commitment to mutually adopt common rules, for example in food safety and environmental standards. As a result, the UK's future trade agreements are likely to have an effect upon competences devolved to the Scottish, Welsh and Northern Irish Governments (the devolved administrations).

The Secretary of State has reportedly proposed possible approaches towards involving the UK's devolved administrations in any future trade negotiations. The Times reported that those options, outlined in a letter from Dr Fox to cabinet colleagues, included agreeing a shared position between the four governments, keeping the governments informed but not directly consulting them, or declaring trade a reserved matter and proceeding without keeping the devolved governments apprised.² A Department for International Trade spokeswoman told The Times that:

“ We have been very clear that we want a trade policy that is inclusive and transparent and which represents the whole of the UK.”

Coates, 2017²

The Prime Minister echoed that sentiment in a speech delivered in January 2017, in which, referring to the overall Brexit process, she stated:

“ I have also been determined from the start that the devolved administrations should be fully engaged in this process.”

Prime Minister's Office, 2017³

The UK government further committed to consultation with the devolved administrations in its recent position paper on post-Brexit trade, in which it said that it would:

“ seek the input of the devolved administrations to ensure they influence the UK's future trade policy, recognising the role they will have in developing and delivering it.”

Department for International Trade, 2017⁴

In its publication, 'Scotland's Place in Europe', the Scottish Government stated that it:

“ ... will need to take part in trade negotiations that impact on devolved competences. It will also need the ability to speak in international forums and to secure agreements with other countries.”

Scottish Government, 2016⁵

The Scottish Parliament's Culture, Tourism, Europe and External Relations Committee noted that the Cabinet Secretary for the Economy, Jobs and Fair Work had referred to working "in conjunction" with the UK Government on future trade agreements with third countries.⁶

There is significant interest in the role that the Scottish Government and Scottish Parliament might play in the negotiation, ratification and implementation of any future trade agreements. This briefing seeks to examine examples of how countries with autonomous regions or federated states have handled trade negotiations in the past.

Modern Free Trade Agreements

The first formal, international Free Trade Agreement (FTA) signed was the General Agreement on Tariffs and Trade (GATT). GATT was signed in 1948 and provided for a reduction in customs tariffs on goods traded between signatory countries.⁷ The World Trade Organisation was subsequently established in 1995 and successive rounds of negotiations have liberalised various aspects of trade between signatory countries.⁸ FTAs have also been negotiated on a bi- or multilateral basis by countries and trading blocs. Examples include the North American Free Trade Agreement (NAFTA) and the EU-Korea Free Trade Agreement. The terms and scope of these agreements have changed and evolved over the years and they are now considered to be more wide reaching in their provisions. The Comprehensive Economic and Trade Agreement (CETA) recently negotiated between Canada and the EU is an example of what is known as a "second generation" FTA. These new generation agreements cover so called "non-tariff barriers" to trade by introducing mutually agreed frameworks and regulatory mechanisms for product and food safety, and environmental standards, for example, and provide protections for intellectual property. These measures are intended to reduce bureaucratic barriers to international trade. The agreement additionally provides for mutual recognition of qualifications issued in Canada and in EU Member States, and includes some clauses aimed at allowing mobility of professionals between the two signatories.⁹

CETA is widely regarded to be indicative of the future format for international FTAs. In evidence provided to the Scottish Parliament's Europe and External Relations Committee in February 2015, then UK Minister of State for Trade and Investment Lord Livingston of Parkhead referred to the CETA agreement as "state of the art."¹⁰ With this in mind, CETA provides a good case study for what is likely to be covered by future agreements to be negotiated by the UK.

Implications for Scotland

Schedule 5 of the Scotland Act 1998¹¹ reserves matters pertaining to the regulation of international trade to the UK Government. However, the CETA agreement includes provision for the trade of agricultural goods and food and drink, as well as public procurement. These areas impact upon devolved policy, within the competence of the Scottish Government and Scottish Parliament.

Many of the policy areas concerned have been legislated for at European level. As the UK leaves the EU, these powers will return to the UK, where under proposals included in the

European Union (Withdrawal) Bill as introduced the powers will initially be retained at UK level ([see SPICe Briefing on the European Union \(Withdrawal\) Bill](#)). There has also been discussion of the need for common frameworks to be developed across the UK in areas such as agriculture. Such common frameworks would make it easier for the UK Government to negotiate new international trade agreements. First Secretary of State Damian Green recently commented on the need to avoid “subsidy wars” between the UK’s devolved nations. In an interview with Politico, Mr Green stated that:

“ We must ensure the benefits of free trade around the UK, which we've all taken for granted as we are one country, are preserved after Brexit.”

McTague, 2017¹²

However, Scotland's First Minister, Nicola Sturgeon has expressed concern about the recentralisation of such powers, stating:

“ The UK Government wants to take that approach in order to restrict the freedom of decision and manoeuvre of this Parliament in devolved areas.”

Scottish Parliament, 2017¹³

On common frameworks, the Scottish Government Minister for UK Negotiations on Scotland’s Place in Europe commented in evidence to the Scottish Parliament's Finance and Constitution Committee:

“ the Scottish Government accepts that there may be a need for a common approach across the UK to some matters. Those must be agreed, not imposed.”

Finance & Constitution Committee, 2017¹⁴

Co-operation between the UK government and devolved governments and legislatures may enable the agreement of such frameworks.

Canada & the Provinces

Introduction & Constitutional Context

The Constitution Act of 1867 established Canada as a federation and formally distributed powers between the Parliament of Canada and the provincial legislatures. In the 10 provinces of Canada, the provincial governments and parliaments are responsible for policy areas including education, health care and agriculture,¹⁵ and they feed directly into federal policy on immigration to "address unique needs and priorities."¹⁶ They can also raise revenue through taxation, borrow on behalf of the Province and license certain establishments. Meanwhile, the federal government and the Parliament of Canada retain authority over defence, foreign policy, the postal service, and trade and commerce, among other areas.¹⁵

While the provinces have no direct competence in foreign policy, some, including Québec, Ontario and Alberta, have established offices abroad. The Québec Government Office in London "represents the Québec government in the United Kingdom, Republic of Ireland and the Nordic Countries." It promotes Québec's culture and trade with Québec in the territories covered.¹⁷ In evidence provided to the Scottish Parliament's Culture, Tourism, Europe and External Relations Committee, the Québec Delegate General in London, Christos Sirros, said:

"As a ministry of international relations, we do not seek to create or enact foreign policy but rather to ensure Québec's international intergovernmental relations in areas of our own jurisdiction."

European and External Relations Committee, 2016¹⁸

Constitutionally, the federal government and parliament have the authority to negotiate and introduce an FTA without consulting or including the provinces. However, through the course of the negotiations for the Canada-United States FTA in the 1980s, there was an expectation that areas of provincial competence would be included in the agreement. As such, regular meetings were held between the federal Prime Minister and the provincial Premiers to discuss the progress of the talks. Following the conclusion of the agreement, the Continuing Committee on Trade Negotiations was established as a bilateral forum for relevant federal and provincial ministers to discuss trade matters. The committee, which has evolved into the Federal-Provincial-Territorial Committee on Trade, or 'C-Trade,' in the 21st century, meets up to four times a year.¹⁹ According to a Canadian government source, the C-Trade committee's role is as follows:

“ It provides an opportunity to discuss a variety of trade related issues that sometimes go beyond international trade discussions. While the federal government has the authority to negotiate international agreements for Canada, it turns to the provincial governments for information on regional and sectoral interests – and how these might be advanced – as well as for cooperation in honouring commitments in areas of provincial and territorial responsibility. C-Trade involves quarterly face-to-face meetings and more frequent teleconferences. Subjects of discussion include updates on negotiating issues, on trade disputes, and higher level analysis of trade patterns and issues. These meetings provide provinces and territories direct access to federal technical experts and/or lead negotiators. ”

Personal Communication with the High Commission of Canada to the United Kingdom, 2017²⁰

Provincial Influence over CETA Negotiations

Looking specifically at the CETA negotiations, European negotiators requested as a pre-requisite the direct involvement in proceedings of representatives from Canada's provinces. They did so in acknowledgement of the responsibility that provincial legislatures would have in implementing the final agreement, due to the inclusion of policy areas under their jurisdiction.¹⁹ According to Christos Sirros, Delegate General at the Québec Government Office in London, the EU's request for provincial involvement followed significant lobbying by Québec.²¹

Following the collapse of previous FTA negotiations between Canada and the EU, Mr Sirros, then Delegate General in Belgium, lobbied governments and trade bodies across the continent on the importance of including a provincial perspective in any future talks. The Québec government and its officials also lobbied at home, encouraging the other provinces to recognise the merits of a future FTA with Europe. These efforts culminated in a resolution at the Council of the Federation - a forum for the Canadian provinces - that supported the idea of restarting trade talks with the EU. Following a meeting between the Québec and Ontario trade ministers and the then EU Commissioner for Trade, Peter Mandelson, and the collapse of WTO talks in Doha, the federal Canadian government agreed to pursue a further round of negotiations. CETA talks soon began.²¹

What follows is an account of provincial involvement in the pre-negotiation, negotiation, ratification and implementation of the CETA agreement. A particular focus is given to the experience of Québec, as it was acknowledged by Canada's chief negotiator and government officials that Québec had played a significant role in influencing the negotiations.²²

Pre-Negotiation & Negotiation

Prior to the commencement of the CETA negotiations, the provinces expressed varying levels of interest in direct involvement of their officials in the process. Some reportedly worried that the bureaucratic demands of any direct input would outstrip their resource. As such, the provinces were not involved in the selection of the Canadian chief negotiator, Steve Verheul. The mandate for negotiations was drafted with provincial input, however.²³ Specifically, the provincial governments were consulted within their areas of interest and expertise.²² The provinces nominated their own chief negotiators and representatives,

who joined the Canadian delegation.¹⁹ Québec nominated Pierre-Marc Johnson, an ex-Premier with significant experience of international free trade negotiations.²¹

As the negotiations proceeded, representation for the provinces occurred at two levels. Provincial officials and chief negotiators were present during bilateral discussions with the EU. Additionally, regular meetings of the Canadian 'C-Trade' committee brought provincial and federal negotiators together to enable behind-the-scenes setting of common Canadian positions.¹⁹ C-Trade meetings before each successive negotiation round allowed for the updating of the mandates set by the provinces in their areas of jurisdiction.²¹

In the course of a 2016 research project which sought to investigate the provinces' influence over Canada's position in the negotiations, Professor Christopher Kukucha interviewed a number of federal and provincial representatives. According to his interviewees, the role of the provincial government officials evolved as the negotiations proceeded. Through the process, 20 interest areas were identified, and the provinces were involved in talks relating to areas of their competence (which, according to a Government of Canada source included environment and labour²⁰). The degree to which they took part in discussions varied though. The provincial representatives only spoke in formal talks if invited by the federal negotiator at the table in a given session. On some occasions where discussions referred to areas of obvious provincial authority, provincial negotiators were invited to the negotiating table itself but these instances occurred infrequently. More generally, the role for the provincial representatives was described as "consultative" and "advisory." The federal negotiators were in fact known to pause talks to take a walk with the relevant provincial official(s) in order to agree a 'pan-Canadian' position.²⁴

With representatives from the provinces present, the Canadian delegation consistently and significantly outnumbered that of their European counterparts - with occasions where two or three EU representatives found themselves sat opposite 20-30 'Team Canada' officials. This imbalance led to a convention where official negotiations, conducted by small groups of Canadian negotiators, were preceded by comparatively informal discussions with larger subsets of the Canadian delegation. Although provincial officials contributed to the small group meetings where appropriate, this meant that the majority of the province's direct influence on the negotiations occurred informally. Some of the larger provinces, notably Québec, also pursued bilateral talks with EU negotiators outwith the official programme of negotiations.²³ Pierre-Marc Johnson met with the EU's chief negotiator, Mauro Petriccione on a number of occasions. These meetings allowed for cross-referencing throughout the process, and for clarifying the province's position. Mr Sirros believes that these meetings assisted EU negotiators, too:

“ For the Europeans it was important because, well, Quebec represents one quarter of the Canadian economy. They could test whether they would have an ally, and on what.”

Personal Interview with Delegate General to the United Kingdom Christos Sirros and Director of Political Affairs Frédéric Tremblay, Québec Government Office in London, 2017²¹

Provincial priorities were otherwise pursued behind the scenes in C-Trade committee meetings and other *ad hoc* fora convened to agree 'pan-Canadian' positions. The C-Trade committee is convened by the federal government to facilitate dialogue on Canadian trade policy with provincial officials on an ongoing basis. These intergovernmental meetings are not institutionalised and their proceedings are held in strict confidence. According to Mr

Sirros, the committee was used throughout the CETA process to establish updated consensus Canadian positions:

“ Before the negotiating sessions, we would meet in the C-Trade committee, in Ottawa, and Canadian positions would be put forward by the federal government and there would be reaction from the provinces. ”

Personal Interview with Delegate General to the United Kingdom Christos Sirros and Director of Political Affairs Frédéric Tremblay, Québec Government Office in London, 2017²¹

There had been upfront agreement between all parties to share information as freely as possible throughout the process²³ and negotiation documents were made readily available to the provincial representatives. Some of the provinces prepared position papers on issues of particular significance, with Québec notably publishing 150 of these²² and they collaborated to press the federal team on areas of shared interest.²³ In total, more than 275 meetings²² were held between provincial and federal negotiating teams before and after negotiating rounds, and in the mornings and evenings on negotiation days.²³

Ratification

Now that the CETA agreement has been agreed in principle, and indeed provisionally entered into effect as of 21 September 2017, it must be ratified by the parties concerned. In the EU, the agreement must be ratified by each member state, according to its constitutional arrangements, as it has been by the European Parliament.²⁵ Ratification is simpler in Canada, where the constitution dictates that only the federal parliament must formally ratify the agreement. It duly did so on 16 May 2017.²⁵

Québec is unique in that it is the only province which requires parliamentary approval for the provincial government to assent to the adoption of an FTA or treaty. The Minister of International Affairs deposits the agreement, and any explanatory notes, in the Québec Assembly and proposes a motion recommending the adoption or rejection of the agreement. The merits of the agreement are then debated by Québécois parliamentarians, who vote on the Minister's motion. Significantly, this debate occurs after the federal government has ratified the agreement so even if the Assembly reject the agreement, they cannot block its adoption nation-wide. A rejection in the Québec Assembly amounts to a refusal to adopt the provisions of the agreement within the areas of the province's jurisdiction, within its territory. There are precedents for such rejections of international treaties but they are rare.²² It is likely that such a decision would necessitate the renegotiation of aspects of any such agreement.

Implementation

The role of incorporating FTA provisions into local law falls to the provinces in the areas under their jurisdiction. They can do so either by executive order, or through parliamentary legislation, as is required in Québec and Ontario.²⁶

With the provinces having competence for areas such as health, education and public infrastructure within their territories, the majority of the public markets opened up for European access by CETA are under their jurisdiction.

Summary

- Legislative power is strictly divided between federal and provincial legislatures according to the Canadian constitution.
- The federal government has competence for international affairs and trade.
- With trade agreements now including policy areas within the competence of provincial legislatures, provincial representatives have been involved in establishing Canadian positions for FTAs that the country is negotiating.
- During CETA proceedings, this involved the nomination of chief negotiators for each province and provincial teams made up part of the delegation which negotiated directly with the EU.
- CETA was ratified by the federal parliament, the sole signatory to Canada's end of the agreement.

Impact & Outlook

Particular priorities for Québec in the negotiations included protecting agriculture (specifically dairy) markets and restricting access to public sector contracts in culture. As a result of Québécois action, the federal government agreed to compensate any Québécois farmers negatively impacted by the lifting of tariffs and quotas on dairy imports from the EU.²⁷ In culture, broad exemption was secured for any public procurement “with respect to cultural industries” applied specifically and exclusively to Québec.²⁸ These concessions demonstrate Québec’s influence on the negotiation of the agreement.

Alongside the finalisation of the CETA agreement, re-negotiation of the North American Free Trade Agreement between the United States, Canada and Mexico has begun. Provincial representatives have once again been included in the Canadian delegation, with Québec reportedly aiming to “replicate the experience” of its influence over CETA.²⁹

Belgium & the Regions

Introduction & Constitutional Context

The modern Belgian constitution evolved over the course of a series of reforms between 1970 and 1993. Now, the country has a three tiered legislative structure consisting of the federal government and parliament, regional parliaments and governments and community parliaments and governments.³⁰ The federal institutions are responsible for defence, foreign policy, justice, finance and social security for the whole Belgian territory.³¹ The regions and communities are divided by language and geography. The Flemish region, the Walloon region and the Brussels-Capital region are competent for welfare, agriculture, housing, infrastructure, tourism and health, among other areas, within their respective territories.³² The Flemish Community, the French Community and the German-speaking Community are responsible for linguistic and cultural matters within their respective communities.³³ The regions and communities also have authority in international affairs which affect areas under their jurisdiction. It is important to note that these constitutional arrangements are non-hierarchical, and that the relevant legislature has sovereignty within its competence.³⁴

Regional Influence over CETA Negotiations

Constitutional reform in the Belgian Federation in 2001 made the regions constitutionally responsible for trade policy. As an EU member state, Belgium's influence over FTA negotiations, including CETA, is exerted through EU channels as international trade is an EU competence. Belgian regional and community governments are represented at EU level under the framework outlined below, and may additionally make direct representations to the Council of the EU in areas of their competence.³⁵ However, co-operation with international multilateral organisations remains within the competence of the federal government.

The constitutional arrangements assigning legislative powers across various levels in the Belgian Federation are relatively complex. This results in “fragmented”³⁶ expertise and knowledge in administering the country's participation and representation in EU institutions. The 'Cooperation Agreement between the Federal State, the Communities and the Regions on the Representation of the Kingdom of Belgium in the Council of Ministers of the European Union' was signed in 1994.³⁷ This agreement provides for the coordination of Belgium's representation by the Directorate-General for Coordination and European Affairs. It further outlines the parameters for the participation of representatives from the various authorities in sub-committees appropriate to their areas of competence. There are six categories for the policy areas covered by the Directorate-General, divided according to the legislative authority responsible for those areas. For example, Category II covers policy areas such as energy, transport and public health, and representations in this category are under the purview of federal officials, with input from the federated entities. Category IV, however, includes culture and audio-visuals, sport, and tourism, and in these areas the regions/communities hold sole authority. Category V deals with

fisheries, which is wholly within the competence of the appropriate Flemish minister due to the country's coast being exclusively within the Flemish territory.³⁷

The Directorate-General brings together federal, regional and community representatives to discuss and agree the Belgian position on upcoming and ongoing debates within the categories of competence outlined above.³⁶ According to the Belgian Ambassador to the United Kingdom, Rudolf Huygelen, these meetings are held informally at least once per week and formally once per month. These meetings, convened by the federal ministry of Foreign Affairs provide a forum for the federated entities to put forward their positions such that a compromise - if necessary - can be reached to establish the pan-Belgian position. These meetings are closed and their proceedings are non-public, with the respective parliaments exercising scrutiny upon the relevant competent ministers. In terms of decision making, unanimity is required. Ambassador Huygelen commented:

“ There is no kind of majority voting, no. It has to be unanimous, which in 99% of cases is not a problem. If it is a problem, then we abstain.”

Personal Interview with Belgian Ambassador to the United Kingdom, Rudolf Huygelen, 2017³⁵

A Flemish Government Policy Officer for International Affairs agreed that these mechanisms provide for effective representation of regional/community interests.³⁸ He reiterated the legal need for consensus and when asked about how compromise is reached when regions may have differing interests, he commented that:

“ we will always strive for a common approach and visit the negotiators and Directorate Generals of the European Commission jointly, expressing our stances and reminding them a Belgian vote consists of 7 parliamentary majority votes.”

Personal Communication with Flemish Government Department of Foreign Affairs, 2017³⁹

The agreed Belgian position - whether a mandate for negotiations or a vote on a treaty - is ultimately communicated to the European Council of Ministers by the federal Minister of Foreign Affairs.³⁷

Pre-Negotiation & Negotiation

The mandate and Belgian negotiating position is deliberated and established through the Directorate-General for Coordination and European Affairs, as outlined above. As mentioned, these deliberations involve the participation of regional and community representatives and unanimous consensus must be reached.

Referring specifically to CETA, although the process began in earnest in 2009, public (and parliamentary) interest in the negotiations – and those for the Transatlantic Trade and Investment Partnership (the proposed trade agreement between the EU and the USA) – was limited prior to 2014. A 2016 study on parliamentary scrutiny of European trade agreements in Belgium found an unprecedented level of attention following protests in 2014 against the agreements.³⁴ That study found that three times as many questions were asked in the Walloon Parliament referring to free trade agreements in 2016 than in 2013. Prior to this development, the study found that the regional parliaments had essentially “rubber stamped” previous agreements. With this in mind, there is limited reference to practical experience of regional influence over the co-establishment of the Belgian position.

Ratification

Treaties or agreements which encroach upon member state competence are deemed "mixed" by the EU, and these agreements require ratification in each member state. The Belgian Federation also defines treaties and agreements as "mixed" if they include areas under the jurisdiction of various federated entities. Ambassador Huygelen outlined the approach taken in Belgium when dealing with such agreements:

“ In the case of a draft EU mixed trade agreement, which, like in the case of CETA, has been deemed mixed at a Belgian level, the competent levels of power must give their signature before the Belgian Minister can sign on behalf of the country. For the ratification process, the respective parliaments of competent levels of power in Belgium all need to approve EU mixed trade agreements before Belgium can notify its ratification to the Council of the EU.”

Personal Interview with Belgian Ambassador to the United Kingdom, Rudolf Huygelen, 2017³⁵

During the latter stages of the CETA negotiations, Wallonia, one of Belgium's regions, garnered significant media attention due to its so called "veto" of the agreement. The Walloon Parliament exercised its constitutional right to refuse to consent to Belgium's assent to the agreement in October 2016. Writing in the Guardian, the region's president cited concerns among citizens regarding the adoption of investor-state dispute resolution mechanisms in the agreement. These mechanisms originally sought to establish a closed tribunal system to handle complaints from investors who felt that national government actions in regulation or procurement had risked or damaged their investments. Following internal Belgian negotiations, and others with Canadian and EU representatives, the Walloon government agreed a memorandum which clarified the arbitration procedure. The Walloon Parliament subsequently gave consent for the Belgian Foreign Minister to give approval for the European Commission to sign the agreement. Nonetheless, what Paul Magnette, Wallonia's President has referred to as a "soap opera involving a small region of Belgium,"⁴⁰ proved to be of significant interest to the international community.

As part of the memorandum negotiated between Wallonia and the other parties, the Canadian government and the European Commission agreed to issue a joint interpretative instrument which clarified the parties' interpretation of the agreement. Issued on 27 October 2016, this statement reiterates the intended aims of the agreement. Further, it clarifies the protections enshrined into the agreement for the respective governments' right to regulate in their public's interest and commits Canada and the EU to seek to ever increase and improve upon their labour and environmental regulation standards. The instrument also clarifies the terms of the investor-state dispute resolution procedures incorporated into the agreement and recognises the right for governments in the EU and Canada to exempt their public services and, specifically, social security services from procurement under the agreement.⁴¹

Additionally, the Belgian Foreign Minister was required to request an opinion from the European Court of Justice (ECJ) on the legality of the proposed investor-state dispute processes under EU law. A request was submitted to the ECJ in September 2017 and the agreement cannot be fully implemented until the court has delivered its verdict.⁴² Ratification of the agreement by the Walloon Parliament, as required by the Belgian constitution, will also depend upon the response from the ECJ.³⁴

Implementation

Aspects of the agreement which enter into regional and community competence will require to be implemented by the relevant legislatures. In terms of enforcing the implementation, Ambassador Huygelen commented that:

“ The implementation of trade agreements is an obligation of all EU member states, Belgium included. Failure to implement [it] would be a matter for the European Court of Justice.”

Personal Interview with Belgian Ambassador to the United Kingdom, Rudolf Huygelen, 2017³⁵

Summary

- Legislative power is divided across three categories in the Belgian Federation, with central federal authorities responsible for foreign affairs. Regional legislatures have competence in trade, however. The constitution dictates that the legislatures are arranged horizontally, with neither taking precedence over another.
- The Directorate-General for Coordination and European Affairs brings together federal, regional and community representatives to establish common Belgian positions on trade negotiations underway at European level. These are fed back to the EU by the federal Minister of Foreign Affairs.
- Under the Kingdom's constitution, the regions must give consent to the federal ministry before Belgian assent can be given to any European mixed agreement.
- Regional parliaments must also ratify any given agreement under the constitution.
- Implementation of any international agreements would involve all three levels of government, due to the division of powers.

Impact & Outlook

Due to the non-hierarchical distribution of powers under the Belgian constitution, it is difficult to characterise the impact of the regions' influence over trade negotiation. Rather than 'influencing' the federal government, the regions and communities have sovereign authority in establishing the Belgian position in areas which are under their competence. The Belgian position must reflect a compromise reached between the governments at the competent level, which has been reached by consensus. Ambassador Huygelen agreed that for matters within regional or community competence, the role for the federal government in international affairs is to facilitate the reaching of this compromise, and to communicate that consensus position externally as required. ³⁵

Germany & the Länder

Introduction & Constitutional Context

The 'Grundgesetz,' or 'Basic Law,' distributes power between the federal government and the 16 Länder (states) of the German federation. The Basic Law states that federal law supersedes state law and that state law only applies within the relevant state. Articles 71 to 75 of the Basic Law establish the areas within which the federal government has competence. This includes all foreign policy issues, defence, including the protection of the civil population, citizenship, currency and money and the unity of the customs and trading area. All other areas fall under the jurisdiction of the states.⁴³ The multilevel system of government established in the federation allows for representation for the Länder governments in the Bundesrat, the upper chamber of the federal parliament. The Länder are allocated seats (from a total of 69) according to their respective populations. These seats are taken by ministers from the Länder governments, who hold a "dual role;" they hold office in their given Land and also represent the interests of that Land within the federal legislature. The members vote in blocks, representing the position of their respective governments (meaning for example that all six of Bavaria's members must vote the same way for a given issue).⁴⁴ In addition to representation in the Bundesrat, following reform in 2006, the Länder are able to represent themselves directly at EU level on matters which fall exclusively under their competence.⁴⁵

Länder Influence over FTA Negotiations

Trade is an area of competence for the federal government and the Bundestag (the lower chamber of the German parliament). With trade policy being an EU competence, however, the more important consideration is how German trade interests are represented at the European level. The federal Ministry for Economic Affairs and Energy is responsible for communicating pan-German positions to the European institutions. However, there are certain provisions in the Basic Law and additional rulings which allow for representation of the Länder internationally, and, in particular, at EU level. Article 23 of the Basic Law - the 'Europe Article' - and the 2009 Act on Cooperation between the Federation and the Länder in European Union Affairs govern these representations.⁴⁶

Firstly, these regulations require that the federal government and federal German Permanent Representation to the EU forward to the Bundesrat all reports submitted to the Bundestag relating to EU affairs. The government must also inform the Bundesrat in writing of all EU proposals.

In representation and participation within EU level proceedings, there are clear rules governing the Länder's involvement depending on the extent to which their competence is involved in the matter under consideration. There are essentially three tiers of involvement for the Länder ranging from consultation through to direct participation. These are described by the Auswärtiges Amt (Foreign Office) as follows:

“

- participation in consultations aimed at determining Germany's negotiating position, if the Bundesrat would have to be involved in a corresponding domestic-policy measure or if the Länder would be competent nationally;”
- participation by Länder representatives in negotiations, if essential Länder interests are involved;”
- transfer of negotiating powers to Länder representatives in the case of EU proposals which affect exclusive Länder legislative powers (i.e. education, cultural affairs, radio and television).”

Auswärtiges Amt, 2010⁴⁶

The federal government is mandated to consider Bundesrat conclusions and resolutions when pursuing pan-German positions. Indeed, the Bundesrat position must be given the "greatest possible respect" if the matter under consideration at EU level primarily concerns an area for which the Länder have primary legislative competence.

Focussing specifically on treaty making and international agreements, there are further relevant provisions in the Basic Law under Article 32. Article 32 requires that the federal government consult Länder authorities "in sufficient time" ahead of the conclusion of any agreement which affects areas within Länder competence. Additionally, the Länder can conclude their own international agreements provided that they only refer to Länder competence, and that they have consent from the federal government to do so. The latter provision has given rise to significant legal debate within the German republic as it can be interpreted in different ways. Some schools of thought suggest that the clause gives the Länder sovereignty over treaty making if the agreement exclusively relates to matters within their competence. Another school remains clear that the federal government has sole competence for the legal act of treaty making. An attempt to address this ambiguity was made in the so called Lindauer Abkommen - the Lindau Agreement - of 1957. The agreement officially cedes treaty making authority to the federal legislatures but requires that the Länder be consulted to the degree appropriate to the level of their competence affected (as per the above framework).⁴⁷

The Permanent Treaty Commission of the Länder was also established in 1957.⁴⁸ The Commission meets once per month to bring together officials from each of the Länder to discuss any treaties in negotiation or pending ratification. This intergovernmental forum is used to discuss Länder negotiating priorities, which are subsequently communicated to federal authorities. Additionally, consensus must be reached within the Commission prior to the support of the Länder for any given agreement being conveyed to the federal authorities.⁴⁹ Typically, this approval is a prerequisite step completed prior to the ratification of any treaty or agreement by the parliaments.⁵⁰ Uwe Leonardy, a former senior legal adviser to the Land government of Lower Saxony and a scholar of federalism and intergovernmental relations, commented on the legal basis for this in a 2003 analysis. He described the convention as follows:

“ There is a gentlemen's agreement (not formally established in legal terms) between the Federation and the Länder that the former will not internationally deposit the document of ratification, if and as long as the latter have not signalled their consent on the advice of the Treaty Commission.”

Leonardy, 2003⁴⁸

Once the Treaty Commission has communicated approval for a treaty, it can be laid before the Bundesrat and Bundestag for formal ratification through majority voting.

Summary

- The federal German government has exclusive authority for foreign affairs and trade.
- The Basic Law and additional judgements provide a framework for involving the Länder in negotiations or in influencing German positions, depending on the extent to which a proposed agreement includes policy areas under Länder jurisdiction.
- An intergovernmental forum, the Permanent Treaty Commission of the Länder, meets to bring Länder government officials together to discuss ongoing negotiations. Conventionally, the Commission must provide its assent prior to the laying of any agreement before the Bundestag and Bundesrat for ratification.

Impact & Outlook

There were public concerns and protests in Germany against some of the provisions included in the CETA agreement. These concerns resulted in a case being brought to the country's constitutional court in Karlsruhe to assess the legality of CETA's provisions under German law. The court ruled that the federal government could provide German assent to the agreement via the EU Council of Ministers, provided that the country could terminate its adherence to the agreement if demanded to do so by any future ruling of the court.⁵¹ This court case was raised against the federal government by citizens, rather than through action of any of the Länder legislatures as was the case in Belgium. In the meantime, some commentators have speculated that the Green Party-led Land government in Baden-Württemberg, and other Land governments in which the party is a coalition partner, might vote against CETA ratification in the Bundesrat.⁵² This speculation demonstrates the influence that the Länder exert through the Bundesrat. The impact of this will no doubt be made clear when the agreement is laid before the chamber.

During the Transatlantic Trade and Investment Partnership negotiations between the EU and the US, commentators predicted a fresh debate surrounding the constitutional framework. With media and culture on the agenda for the US negotiators, and wholly within the competence of the Länder, there was scope for a disagreement between a free trade-promoting federal government and comparatively protectionist Länder authorities.⁵³ Within this context, and with ongoing debate surrounding the ratification of CETA, a legal opinion was sought by a Bundestag committee on the constitutionally appropriate manner in which the republic ought to approach a European "mixed" agreement. The representation reminded the federal legislature of the implications of the Lindau Agreement with regards to representing and deferring to the Länder in areas of their competence.⁵⁴ Still further debate regarding the strict definition of Länder competence continues, however. The Minister-President of Mecklenburg-Vorpommern wrote (also on behalf of Baden-Württemberg, Bayern and Hessen) to the Bundesrat president as recently as March 2017 to request clarification of the representation of Länder interests in the ongoing Brexit negotiations.⁵⁵

The United States & its States

Introduction & Constitutional Context

The United States Constitution established three distinct branches of government and divided legislative powers between them.⁵⁶ Congress is the legislative branch of the US government, and it is responsible for making laws. Congress consists of the Senate and the House of Representatives, and Senators and Representatives are elected to represent their respective states. The executive branch of the government consists of the President, the Vice President and Cabinet Members, who are nominated by the President. The nomination of cabinet members must be approved by the Senate. The executive branch of the government is responsible for implementing laws. Finally, the judicial branch of the government, consisting of the Supreme Court and other courts, is responsible for evaluating laws.⁵⁷ According to the Tenth Amendment to the constitution, all powers not delegated to the United States (federal authorities) or prohibited to the states are assigned to the states or the people themselves. The states also have branched systems of government, with governors making up the executive branches and with local courts fulfilling judicial obligations. Each state has a different legislative format, although most have bicameral legislatures.⁵⁸ The states are responsible for health, education and welfare,⁵⁹ and also have some authority over areas of justice, energy, environment and immigration.⁵⁸

Powers concerning the regulation of trade, foreign affairs and the negotiation of international agreements are delegated to the United States. A Cabinet Member is nominated by the President to lead the Office of the United States Trade Representative (USTR). This office, forming part of the executive branch of government, leads on all issues relating to trade, investment and international negotiations on behalf of the whole of the United States.⁶⁰

State Influence over FTA Negotiations

States are not significantly involved in international relations due to the constitutional delegation of powers. They can enter into "agreements" with foreign governments with the approval of Congress and are responsible for some regulatory activity within areas of their jurisdiction but their competence is otherwise limited. With no formal role for state legislatures or governments in policy making within the sphere of international trade, it is helpful to look instead to the alternative fora which are used to make their influence felt.

Influence via the United States Trade Representative (USTR)

The main mechanism for states to directly influence trade policy is through the USTR's Intergovernmental Policy Advisory Committee on Trade (IGPAC).²⁴ According to its charter, the IGPAC's role is to:

“ provide advice concerning trade policy matters that have a significant relationship to the affairs of state and local governments within the jurisdiction of the United States.”

United States Trade Representative, 2014⁶¹

The charter goes on to state that the committee's role is "advisory only." IGPAC members are selected as follows:

“ The Committee shall consist of not more than 35 members, appointed from, and reasonably representative of, the various states and other non-Federal governmental entities within the jurisdiction of the United States. These entities include, but are not limited to, the executive and legislative branches of state, county, and municipal governments. Members may hold elective or appointive office. Members shall be appointed by, and serve at the discretion of, the U.S. Trade Representative. The Chairman of the Committee shall be appointed by the U.S. Trade Representative. Appointments to the Committee shall be made without regard to political affiliation. ”

United States Trade Representative, 2014⁶¹

A study on comparative Canadian and United States sub-federal influence on international trade commented that the IGPAC, as refreshed in 2014 (when the constitution cited above was published) meets less frequently than previously, and they only do so on an *ad hoc* basis. The author also highlighted limitations in IGPAC's operation, noting that the committee's only access to trade negotiation documentation and other resources was through the USTR itself.²⁴

Influence via Congress

The limited scope of IGPAC has encouraged some states to pursue other means of influencing US trade policy. One such route has been through Congress, and specifically through Congressional committees.²⁴ Voters in each state elect members of the House of Representatives (with each state electing a varying number of seats based on its population) and the Senate (with two seats for each state).⁶² Senators are thus frequently considered to directly represent the interests of their states, and the Senate is sometimes described as having a similar role to that of the German Bundesrat.¹⁹

In normal circumstances, Congress must approve international trade agreements and pass the legislation required in order to bring them into force. Congress has frequently passed Trade Promotion Authority (TPA) legislation, however, which limits the scope of congressional scrutiny of any negotiated trade agreements for defined periods of time. TPA, often referred to as a 'fast track,' is intended to promote the adoption of FTAs by making the process quick and easy for the President.⁶³

TPA empowers the President (and the USTR, on the President's behalf) to negotiate trade agreements according to a mandate established by Congress. TPA rules also incorporate a reporting and monitoring framework and require that Congress ratify any agreement concluded with a foreign country with a yes/no vote. No amendments to the agreement or accompanying legislation can be tabled once an agreement has been struck.

At first glance, this 'fast track' procedure seems to disempower the federal legislature and dilute state influence even further. Closer inspection of the negotiation objectives and mandate, and the programme for consultation and monitoring in the TPA legislation,

however, reveals a different picture. The Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (TPA-2015) requires the executive branch to provide the House (of Representatives) Committee on Ways and Means and the Senate Committee on Finance (the so called "revenue committees") with notice of any upcoming trade negotiations which it intends to enter into.⁶⁴ Additionally, the trade objectives established in the act are comprehensive. They are divided into categories, with the first outlining general aims for any negotiations. These include, but are not limited to, the following:

“

- to obtain more open, equitable, and reciprocal market access,”
- to obtain the reduction or elimination of barriers and distortions that are directly related to trade and investment and that decrease market opportunities for United States exports or otherwise distort United States trade,”
- to further strengthen the system of international trade and investment disciplines and procedures, including dispute settlement,”
- to foster economic growth, raise living standards, enhance the competitiveness of the United States, promote full employment in the United States, and enhance the global economy,”
- to ensure that trade and environmental policies are mutually supportive and to seek to protect and preserve the environment and enhance the international means of doing so, while optimizing the use of the world’s resources,”
- to promote respect for worker rights and the rights of children consistent with core labor standards of the ILO (as set out in section 111(7)) and an understanding of the relationship between trade and worker rights,”
- to seek provisions in trade agreements under which parties to those agreements ensure that they do not weaken or reduce the protections afforded in domestic environmental and labor laws as an encouragement for trade,”
- to ensure that trade agreements afford small businesses equal access to international markets, equitable trade benefits, and expanded export market opportunities, and provide for the reduction or elimination of trade and investment barriers that disproportionately impact small businesses.”

Congress of the United States of America, 2015⁶⁵

The second category of objectives - the 'principal objectives' - are more applied. Examples include provisions for challenging the "improper use" of geographical indicators in the "undermining of market access for the United States" and for requiring the United States to "discourage actions that directly or indirectly bring prejudice to US-Israel commercial relations" by seeking to "discourage boycotts and politically-motivated non-tariff barriers on Israeli goods." ⁶³

Congress has significant oversight authority throughout negotiations to monitor the President's (and USTR's) adherence to these objectives. For example, the USTR must meet with any member of Congress upon request, and must provide that member with an update on the progress of relevant negotiations. Upon request, that member must also be furnished with any "pertinent materials," including confidential negotiation documents.

Further, the USTR is expected to attend regular meetings with the revenue committees of the two houses ⁶³, and:

“ should also consult closely and timeously with any committee of the House and the Senate with jurisdiction over laws that could be affected by the negotiations.”

del Monte, 2016⁶³

The USTR must also regularly liaise with 'Designated Congressional Advisers' and 'Congressional Advisory Groups,' which are individuals and groups nominated by congressional committees to feed into and oversee progress on negotiations. ⁶³

As mentioned previously, under TPA, Congress may not propose amendments to any agreements once negotiations are complete. However, Congress must still provide its approval for expedited ratification and implementation in a majority vote in both houses.

Summary

- The federal government and legislature have constitutional authority to negotiate and enact trade agreements on behalf of the whole of the United States. The President nominates a Trade Representative (the USTR) to co-ordinate and conduct negotiations on his or her behalf.
- The means for states to directly influence United States trade policy is through the USTR's intergovernmental committee, IGPAC. IGPAC members, drawn from state legislatures, are selected by USTR officials and their role is to communicate state interests and priorities. Membership of the IGPAC is limited, however, and members only have access to documents and negotiation material at the discretion of the USTR so the independence and influence of the forum is questionable.
- States and their citizens are represented in Congress by Congressmen and women (in the House) and Senators (in the Senate). Congress must ratify trade agreements negotiated by the President and must enact legislation to enable their implementation.
- Currently, a Trade Promotion Act (TPA) is in force which allows the President to conduct trade negotiations and sign agreements with foreign countries which must be ratified (or not) without amendment in Congress. The conditions for the continuation of TPA procedures provide specific objectives for US negotiations and incorporate a framework for congressional oversight of the USTR's activity.

Impact & Outlook

Specific examples of states exerting influence over US trade agreement negotiations are difficult to find. One example included a resolution passed by the California State Assembly in 2010 which called upon the state's congressional representatives to vote against the incorporation of the US-Columbia FTA. Assembly members highlighted public concerns regarding abuses of workers' rights in Columbia as a cause for concern. ⁶⁶ Although the US-Columbia FTA passed, Columbia was required under the agreement to

act to improve labour rights, and in particular to safeguard union leaders in the country under the 'Labor Action Plan.'⁶⁷

The current TPA covers all negotiations completed by 1 July 2018. The act includes provision for extending this period up to 1 July 2021 at the request of the President.⁶³

Summary & Conclusion

Four different approaches to trade negotiations from four different federations have been presented. These are summarised in Table 1.

Table 1: Summary of the approach taken to FTA negotiation in each country. For brevity, 'sub-states' refer to provinces/regions/Länder/states respectively.

Country	Do sub-states have a constitutionally defined role?	Intergovernmental Forum	Is legislative approval from sub-states required for ratification?
Canada	No	C-Trade	Only in Québec
Belgium	Yes	DG Coordination & European Affairs	Yes - from all region and community parliaments
Germany	Yes	Permanent Treaty Commission	Through Bundesrat
United States	No	IGPAC	Through Senate

Between these countries there are significant differences in geography, population, economy and constitutional arrangements, and two of the countries focussed on are EU member states. Regardless, there is a great deal of commonality between the approaches described.

- In each case, intergovernmental forums exist to bring together officials from the state and sub-state governments to discuss, debate, and agree shared positions on issues relating to their federation's approach to international trade agreements.
- In addition, legislative arrangements in each country require the approval either of parliaments in the provinces/regions, or in chambers established to directly represent Länder/state interests at the federal level, before the respective federal governments can formally ratify any agreement.

This two tiered approach to incorporating the interests of the sub-states, although approached differently, appears to result in tangible opportunities for influence for those sub-state legislatures/governments in the instances analysed.

There is a tension in each of the federations studied between the constitutionally defined role (or lack thereof) for the sub-states in these matters, and the prevailing political arrangements.

- In the Canadian case, the constitution does not provide a role for the provinces in foreign affairs, yet there is a realisation that modern free trade agreements will continue to encroach upon areas indisputably within (constitutionally defined) provincial competence. This situation has resulted in the evolution of a clear political case for provincial involvement in negotiations, but how this tension will be managed in the longer term remains to be seen.
- The situation in Belgium is arguably more clear; the federation will not put positions forward on the international stage unless there is consensus among the regions, and the intergovernmental machinery required to reach that consensus is clearly well oiled. That said, there is still scope for unforeseen political pressures to test the capacity for reconciling their differing priorities, as demonstrated by the Walloon case.

- Looking to Germany, there are very robust constitutional arrangements in place to manage the representation of the Länder by the federal apparatus. Yet, apparently ongoing differing interpretations of those arrangements allow for room for political manoeuvre.
- Finally, in the United States, the role for Congress is legally rather than constitutionally defined. The TPA legislation established by Congress is short term in nature, allowing dynamic review and influence of federal trade policy. This seems to remove some of the political charge seen in other countries by simultaneously empowering the President and USTR to strike FTAs, while ensuring that they do so according to the robust mandate established by Congressional representatives.

The impact of sub-state influence is particularly clear in the Canadian and Belgian experiences of the CETA negotiations. The proceedings described in the analysis illustrate that provincial and regional interests were considered at each stage of the process between mandate setting and implementation of the CETA agreement. As a result, it has been suggested by various commentators that the agreement reached more accurately reflected the priorities of the Canadian and Belgian provinces and regions. Having directly incorporated provincial and regional interests during the negotiations, the ratification and, particularly, the subsequent implementation of the CETA agreement in Canada and Belgium is expected to have been simplified significantly.

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