1. Introduction

In the 21st century, the core disciplines of international economic interactions (i.e., trade, investment and finance), which were hitherto reserved exclusively for state-to-state regulation, have over the years opened up to an ever-increasing array of global administrative actors (international and regional organisations), sub-national actors and non-state actors (civil societies). With the changing dynamics, international and regional organisations have found it relatively easier than sub-national actors and civil societies to gain acceptance as legitimate actors in international relations. The former (international and regional organisations) used the mandate acquired from States as a springboard to progressively gain prominence on the international stage,[1] while the latter (sub-national actors and civil societies) have struggled to break into the fold.[2]

[1] Traditionally, the capacity to act on the international plane was tied to the notion that states were the only recognised actors on the international plane. However, the International Court of Justice (ICJ) in the *Reparation for injuries case,* ventured to posit that international organisations have a distinct legal personality recognisable on the international plane, and that this personality stems from actual or implied deduction that states intend for their creations to be able to exercise the functions and purpose for which it is established and this is only possible by it being clothed with legal powers. The ICJ also stated that the functions of International Organisations evolve to meet the changes and needs of the society. See International Court of Justice. 1949. *The Reparation for Injuries suffered in the service of the United Nations, (Advisory Opinion)*. International Court of Justice (ICJ) Reports, 1949. http://www.icj-cij.org/docket/files/4/1835.pdf. See also N. Blokker, 'International Organisations and Their Members', *International Organisations Law Review* (2004) 144 at 155; N. Blokker, and A. Ramses, 'Editorial: Updating International Organisations', *International Organisations Law Review* (2005) 1.

With regard to sub-national actors in federal setups (which is the focus of this paper),[3] their engagement in international economic relations is deeply grounded in a history of scepticism.[4] However, in recent times, central governments are finding it increasingly

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[2] In the context of international trade law, The World Trade Organization (WTO) conventionally operates on a strictly government-to-government level, and for a long time resisted the entry of non-state actors. However, civil societies, motivated by the growing influence of the WTO, its non-democratic methods and its impact on transnational issues of concern to them have been able to gain access to this heavily fortified policy space. They have achieved this through a number of ways, most notably through the instrumentality of amicus curiae briefs, which they submit during 'WTO dispute cases to influence dispute outcomes and promote more transparent and informed decisions.' See Leah Butler, 2006. 'Effects and Outcomes of Amicus Curiae Briefs at the WTO: An Assessment of NGO Experiences.' May 2006 http://nature.berkeley.edu/classes/es196/projects/2006final/butler.pdf. See also R. Eckersley, 'A Green Public Sphere in the WTO?: The Amicus Curiae Interventions in the Transatlantic Biotech Dispute', *European Journal of International Relations* 13 (3) (2007) 329.

[3] 'Sub-national actors' is used in the context of sub-national governments/regions/provinces and municipalities in countries operating a federal system of government.

[4] For a better part of the 19th and the 20th centuries, the impact of the activities of sub-national actors in federal systems on the conduct of international relations was perceived to be unpredictable and in some instances disruptive of the existing status quo. More so, foreign relations has conventionally been regarded as an area which necessitates singleness of purpose, while federalism as a system of government is premised on the concept of shared and/or divided competences among multiple levels of government. For instance, Wheare in his classic work on federalism averred that 'federalism and a spirited foreign policy go ill together' and 'happy is the federation which has no diplomatic history.' See K. Wheare, *Federal Government* (Oxford: Oxford University Press, 1963) 183. Bernier also points out that international law had initially failed to recognise the peculiar challenges presented by federal systems when designing international law instruments. See I. Bernier, *International Legal Aspects of Federalism* (London: Longman, 1973) 1-6 ff 10-11. See also, the dictum of Justice Taney in the US case of *Holmes v. Jennison* who stated that: 'to allow the states concurrent powers in the

difficult to ignore the input of these actors during implementation and more recently negotiation of international economic agreements.[5] This is because international economic agreements, most notably new styled mega-regional Free trade Agreements (FTAs) have more far reaching effects on societies and their local governance structures than ever before. For instance, It has been well documented in the media that sub-national actors (i.e., different levels of sub-national governments) and non-state actors (individuals and civil societies) around the world are growing increasingly concerned about the impact of mega regional FTAs such as the Trans-Atlantic Trade Partnership (TTP), the Tran-Atlantic Trade and Investment Partnership (TTIP) and the Canada-EU Comprehensive Economic Trade

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area of international relations would not be well calculated to preserve respect abroad or union at home.' See *Holmes v. Jennison* 39 US 570 (1840) at para. 577.

[5] Ordinarily, it is not surprising to find sub-national governments being solely responsible for or involved in the implementation of international obligations within a federal system because, sub-national governments are closest to the grassroots where implementation of policy usually takes place. However, what is considered abnormal is when sub-national governments become involved in negotiation of, and or sign international economic agreements. Interestingly, during the negotiation process for the recently concluded Canada-EU Comprehensive Economic Trade Agreement (CETA), Canadian provinces where allowed to directly participate in parts of the negotiation process between Canada and the EU. Although commentators have hailed this development, as ground breaking in the history of international trade negotiations in Canada, there is still scepticism as to whether this would become the norm in future trade negotiations. See Christopher Kukucha, 2011. 'Provincial Pitfalls: Canadian Provinces and the Canada-EU Trade Negotiations.' p. 5. 2011. Retrieved 2 March 2017, https://www.cpsa-acsp.ca/papers-2010/Kukucha.pdf. See also C. Kukucha, 'Canadian sub-federal governments and CETA: Overarching themes and future trends', *International Journal* 68 (4) (2013) 528 at 534; Patricia Goff, 2016. 'Canadian Trade Negotiations in an era of deep integration.' CIGI Papers No. 88, p. 8. February 2016. https://www.cigionline.org/sites/default/files/cigi_paper_no.88_web_0.pdf and S. Paquin, 'Federalism and the governance of trade negotiations in Canada: Comparing CUSFTA with CETA', *International Journal* 68 (4) (2013) 545 at 551.

Agreement (CETA). As such, there has been sustained criticism and activism against the negotiation and implementation of these economic agreements.[6] These protests took on a remarkable constitutional dimension in 2017, in relation to the Canada-EU CETA ratification process within the EU.[7]

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[6] See Par Roosevelt Namur. 2016. 'Good news! The war on TTIP and CETA can be won.' Pour Écrire la Liberté.10 May. Retrieved 21 September 2016 http://www.pour.press/good-news-the-war-on-ttip-and-ceta-can-be-won/.; Helena Spongenberg. 2016. 'European cities and regions rally to stop TTIP.' Euro Observer. 25 April. Retrieved 15 September 2016 https://euobserver.com/regions/133173. The central grouse in these publications is that sub-national governments and civil societies are concerned that new mega regional FTAs are not being negotiated transparently and that there is lack of clarity on the scope of powers that these agreements would give to international corporations at the expense of small and medium-sized businesses. See also Trew, who examines the impact of non-governmental (civil societies) actors during the EU-Canada CETA negotiations. S. Trew, 'Correcting the democratic deficit in the CETA negotiations: Civil society engagement in the provinces, municipalities, and Europe', *International Journal* 68 (4) (2013) 568. He argues that the critical views of these actors show an inherent democratic deficit that privileges corporate insiders at the expense of civil society, the public, and even elected officials (569). He however points out that these actors (civil societies) recorded considerable success by forging new linkages with provincial governments, municipalities, European decision makers, and other non-governmental groups in Canada and Europe, which may thrive even after the competition of the Canada –EU CETA process (574-575).

[7] After years of painstaking negotiations between Canada and the EU, Wallonia one of the French speaking regions (a sub-national government) in southern Belgium, objected to the national ratification of the Canada-EU CETA deal within the EU. Wallonia was able to affect the ratification of the Canada-EU CETA because the European Commission had put forward the agreement as a 'mixed agreement' rather than as an 'EU-only' agreement. As a mixed agreement, CETA must be ratified by each EU Member State and must receive the European Parliament's consent. As such, Belgium could not assent to the Canada-EU CETA without backing from its 5 sub-federal administrations. However, There is still uncertainty as to whether the Canada-EU CETA will eventually be classified as a 'mixed agreement' or an 'EU Agreement'. According to a European Parliament

In view of these changing protocols, there has been a noticeable shift in the perception of central governments and global administrative organisations about sub-national engagement in foreign economic activities. For instance, referring back to the Canada-EU CETA, it is clear that the Canadian provinces where invited by Ottawa to the negotiating table for the first time because of the insistence by the EU that they should be part of the negotiations.[8] Although this changing paradigm is still at its infancy, it is gaining traction among federal countries. Notably, established federal systems such as Canada, Belgium, India, Argentina

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Press release in July 2016, the Commission was faced with a dilemma because although it favoured presenting CETA as an 'EU-only' agreement, in contrast, many Member States argued for the agreement to be a mixed agreement. Specially, in a letter to the European Commission signed in June 2014 by 21 chairs of relevant committees in national parliaments, there was a demand for CETA, and even the future Transatlantic Trade and Investment Partnership (TTIP), to be considered as mixed agreements, since both agreements contain provisions that concern policy areas which are within the competences of the Member States. See European Parliament Research Service. 2016. 'Is CETA a mixed agreement?.' 1 July. Retrieved 9 March 2016 http://www.europarl.europa.eu/RegData/etudes/ATAG/2016/586597/EPRS_ATA(2016)586597_EN.pdf.

[8] The EU insisted on the Canadian provinces being part of the negotiation process because a number of important topics covered by the Canada-EU CETA such as government procurement and agriculture fall within the jurisdiction of the provinces. See Goff, 'Canadian Trade Negotiations in an era of deep integration' (n 5) 2. There are also suggestions that the EU was keen on provincial involvement during the CETA negotiations in a bid to avoid a repeat of the problems which arose during the Trade and Investment Enhancement Agreement (TIEA) negotiations between Canada and the EU in 2006. Specifically, Woolock argues that: during the TIEA negotiations, which was a precursor to the CETA, talks were derailed precisely because the EU required broad reciprocity from Canada on deep liberalization measures which the Canadian federal government could not deliver without provincial support. See S. Woolcock, 'European Union trade policy: The Canada-EU Comprehensive Economic and Trade Agreement (CETA) towards a new generation of FTAs?', in: Kurt Hübner (ed), *Europe, Canada and the Comprehensive Economic and Trade Agreement* (New York: Routledge, 2011) 21 at 27. See also, V. D'Erman, 'Comparative Intergovernmental Politics: CETA Negotiations between Canada and the EU', *Politics and governance* 4 (3) (2016) 90 at 94.

and the USA out of necessity and/or pragmatism are adapting their international economic regimes to accommodate the input of these stakeholders (albeit to varying degrees, using different institutional mechanisms).[9]

Interestingly, even with more States making accommodation for sub-national actors in their international trade processes, there is still ambivalence in the way these actors are conceptualised in international economic law. This is mainly because there remains a dichotomy between the recognition of these actors within the applicable laws in the international fora (i.e., international conventions, multilateral and regional trade agreements) and the emerging constitutional frameworks for accommodating their interests within domestic national law.[10] This has led to distinct variations in the methods and scope of

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[9] For example, the Forum of Federations conducted a comprehensive comparative study of the changing constitutional and institutional role of sub-national governments in foreign interactions of federal systems in 2007. This study selected 12 federal systems for appraisal. This study was part of a series themed 'A Global Dialogue on Federalism.' The countries selected for appraisal on the topic of foreign relations were Argentina, Australia, Austria, Belgium, Canada, Germany, India, Malaysia, South Africa, Spain, Switzerland, and the United States. The study focused mainly on outlining the scope of sub-national foreign economic engagement in these 12 federal systems based on the constitutional contexts in which they are conducted. See H. Michelmann (ed), *A Global Dialogue on Federalism: Foreign Relations in Federal Countries* (Ontario: McGill-Queen's University Press, 2006).

[10] Conventionally, strict vicarious liability is imposed on central governments (in both federal and non-federal states alike) under international law. For instance, The International Law Commission's (ILC) Draft Articles on State Responsibility provides that the conduct of any State agency shall be considered an act of that State under international law. See United Nations. 2001. 'Draft articles on Responsibility of States for Internationally Wrongful Acts, (with commentaries).' U.N. Doc. A/56/10. pp. 31-35. Retrieved 9 March 2017, http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf. See also, Art. 27 of the Vienna Convention on the Law of Treaties (1969) which is to the effect that a State may not invoke the provisions of its

domestic accommodation for sub-national engagement in foreign economic activities within different federal systems.[11] Ordinarily the existence of variations in domestic accommodation

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internal law as justification for its failure to perform a treaty obligation. See United Nations. 1969. Vienna Convention on the Law of Treaties.' UN Doc A/CONF 39/27. Retrieved 9 March 2017, https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf. This stance is also replicated in several other international economic law instruments such as the World Trade Organisation's General Agreement on Tariffs and Trade (GATT) which provides in art XXIV: 12 that 'Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories.' Art. 105 of the North American Free Trade Agreement (NAFTA) mirrors XXIV: 12 of the GATT.

[11] See B. Opeskin, 'Federal States in the International Legal Order', *Netherlands International Law Review* 43 (3) (1996) 353 at 354-355. Furthermore, some federal systems such as the USA, Nigeria, South Africa, Malaysia etc., have adopted strict constitutional positions where sub-national governments have very limited powers to act in the area of international relations. Even in situations where a sub-national government has a legitimate stake in a matter that has foreign affairs implications, the central government enjoys constitutional pre-eminence over the sub-national government on that matter. These can loosely be classified a 'central exclusivist' position in foreign affairs federalism. This terminology has been adopted from the work of Spiro. See P. Spiro, 'Federalism and Immigration: Models and Trends', *International Social Science Journal* 53 (167) (2001) 67 at 71. This concept is also referred to as as 'foreign affairs exceptionalism.' See M. Schafer, 'Federal States in the Broader World', Canada-USA Law Journal 27 (2001) 35 at 36. On the other side of the spectrum, some federal systems such as Canada, Belgium, Austria, and Germany etc. have adopted a less-stricter constitutional position (in relation sub-national participation in foreign affairs), which ranges from 'revisionist' (the concept of revisionism has been utilised as an umbrella term for any critical re-examination of conventional theories and historical accounts of world affairs. For in-depth discussions on the origin, scope and application of revisionism see generally, D. Morgan, 'The Father of Revisionism Revisited: Eduard Bernstein', *Journal of Modern History* 51 (3)(1979) 525; S. Fitzpatrick, 'Revisionism in Retrospect: A Personal View', *Slavic Review* 67 (3) (2008) 682); to more 'co-operative approaches for accommodating central and non-central governments in the design and implementation of foreign economic policies. For the 'revisionists', foreign affairs is conceptualised as a

mechanisms is expected due to the differences in the way each country is politically set up. However, the challenge with this approach is that there is the propensity to isolate these occurrences as purely domestic measures that have no implications or connections with what happens on the international scene.[12] With such a perception, there is a danger of assuming that the status quo in international law where sub-national actors have no business in foreign activities remains unchallenged. In theory, the existing international rules have not undergone

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shared domain where the foreign relation powers given to a central government does not 'impose new limitations on the states or purport to bar states from participating in all foreign relations-related functions'. See J. Goldsmith, 'Federal Courts, Foreign Affairs and Federalism', *Vanderbilt Law Review* (1997) 83 (8) 617 at 1643 – 1644. See also, P. Spiro, 'Foreign Relations Federalism', *University of Colorado Law Review* 70 (1999) 1223 and C. Bradley, 'A New American Foreign Affairs Law?', *University of Colorado Law Review* 70 (1999) 1089. For the co-operative approach, there are a number of variations among practicing federal countries, which range from formally constitutionalised co-operation mechanisms (e.g. Belgium) to flexible non-constitutionalised co-operation mechanisms (e.g. Canada). See generally, S. Paquin, 'Federalism and Compliance with International Agreements: Belgium and Canada Compared', *Hague Journal of Diplomacy* 5 (2010) 173. It is within this second category, that this paper will attempt to identify common patterns within the domestic framework of 2 dissimilar co-operative inclined federal systems: Canada and Belgium.

[12] Meyer is opposed to a continued adherence to the strict vicarious liability position under international law (see n 10) because he feels it does not recognise the important role that sub-national governments play in international affairs today. He further argues that 'Strict vicarious liability pretends that we continue to live in a world in which actions with global consequences originate primarily in national capitals. Yet the nation-state's role has receded in favour of both supranational and sub-national action.' Timothy Meyer, 2016. 'Local Liability.' (2016) Vanderbilt University Law School, Public Law and Legal Theory, Working Paper Number 16-33 2016. 1 at 10.

any significant changes to accommodate sub-national actors, but in reality the impact of sub-national policy on international law are more pronounced than ever.[13]

As such, this paper is seeking to investigate: *if in the multiplicity of domestic accommodation mechanisms emerging in different federal systems there are commonalities discernible in the patterns of engagement by sub-national actors in international economic relations.*

To answer this research question, this paper evaluates the current status of sub-national actors in the international trade interactions of 2 federal systems - Belgium and Canada. These 2 countries have been selected for appraisal because they are both federal countries, which have adopted distinctively dissimilar models for assimilating the participation of sub-national actors into their international trade interactions. Canada is very informal and flexible; on the other hand Belgium is more formal and institutionalised. Thus, it would be interesting to see if there are any commonalities that link both countries, which in turn can be projected as distinct themes that can help with broader interpretations and understanding of the phenomenon.

The working hypothesis of this paper is that in the emerging discourse on sub-national participation in international economic interactions of federal systems, there are areas of commonality discernible, irrespective of the differing domestic constitutional settings in which sub-national actors are operating in these 2 countries. The analysis in this paper would show that even though the experiences in Canada and Belgium may be different (especially in

[13] As Hocking points out, there is there is keen interest among commentators across different disciplines to understand and explain a growing intersection emerging '…between sub-national, national and international political arenas… which comprise of complex issues that embrace a wide variety of actors and interests in disparate geographical settings.' See B. Hocking, 'Bridging Boundaries: Creating Linkages: Non-Central Governments and Multi-layered Policy Environments', *WeltTrends Nr* 11 (1996) 36.

terms of the levels of formalism associated with sub-national activity in international trade interactions), their areas of commonality, should not go unnoticed because they are crucial to a holistic conceptualisation of the evolving role of these actors in the 21st century international trade process.

2. Contextualising the analysis: Federal countries and the conventional norm on sub-national engagement in international relations

Federal systems have always been at the forefront of the controversies surrounding sub-national participation in international relations.[14] This is because historically, international law responded to the appearance of federal states by ignoring their constitutional peculiarities and sought to treat them like other sovereign states.[15] In line with this approach, the general rule which has existed in international law for the better part of the Westphalian era of statehood is that federal systems have a responsibility to ensure that the acts or omissions of their sub-national governments do not infringe on international law obligations which the

[14] Bernier aptly describes the nature of this relationship as one of 'attraction-repulsion.' See Bernier, *International Legal Aspects of Federalism* (n 4) 1-6. See also S. Karagiannis, 1969 Vienna Convention: Article 29 Territorial Scope of Treaties in: O. Corten, and P. Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary, Volume 1* (Oxford: Oxford University Press, 2011) 731 at 745-746.

[15] ibid 1.

State is subject to.[16] This responsibility as a default rule is not negated even in situations where the internal law of a federal system does not give the central government powers to compel its sub-national actors.[17] This obligation applies as the default rule unless a contrary intention is evidenced in the text of an international treaty.[18] In some instances, international treaties have 'opt out' clauses negotiated into them.[19] This can operate by way of federal state clauses,[20] which make it possible for federal systems to expressly escape liability if their sub-national units do not comply with the requirements of a treaty in areas where they have constitutional competence to act.[21]

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[16] ibid 6. See also Meyer, Local Liability, (n 12) 10-11 and E. Hayes, 'Changing Notions of Sovereignty and Federalism in the International Economic System: A Reassessment of WTO Regulation of Federal States and the Regional and Local Governments within their Territories', *North Western Journal of International Law and Business* 25(1) (2004) 1 at 20. See also Art. 27 – 29, Vienna Convention on the Law of Treaties 1969 UN Doc A/CONF 39/27.

[17] See Meyer, 'Local Liability' (n 16)13-14 ff 17.

[18] Hayes, 'Changing Notions of Sovereignty and Federalism in the International Economic System: A Reassessment of WTO Regulation of Federal States and the Regional and Local Governments within their Territories' (n 16) 20.

[19] Meyer defines this position as 'immunity', which he describes as a local liability rule used by States in international law '…under which neither the national nor local government can be held responsible for otherwise unlawful discriminatory acts.' See Meyer, 'Local Liability' (n 17) 7. See also Bernier, *International Legal Aspects of Federalism* (n 16) 171.

[20] Bernier, *International Legal Aspects of Federalism* (n 19 above) 171.

[21] Hayes opines that the first question to ask when examining international regulation of federal nation/states is whether the treaty language evidences an intention to 'opt out' of the default rule of nation/state responsibility

2.2. Sub-national compliance under the General Agreement on Tariffs and Trade (GATT)

In the context of the multilateral framework for international trade, the General Agreement on Tariffs and Trade (GATT) and subsequently the World Trade Organization (WTO) practices have over the years attempted to fill the gap left by the absence of a general customary international law rule specifying the required measures for central governments to ensure the compliance of their sub-national divisions.[22]

Tracing the GATT/WTO practices to the early years of the post-WW2 era, Brenier points out that at the inception of multilateral co-operation in international relations, the scope of international law was widening and the emerging international instruments during this period were perceptive of the peculiar challenges posed by federal systems.[23] Thus, the potential conflict arising from the possibility that sub-national actors in federal systems could act at

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for sub-national governments. See Hayes, 'Changing Notions of Sovereignty and Federalism in the International Economic System: A Reassessment of WTO Regulation of Federal States and the Regional and Local Governments within their Territories' (n 18) 20. See generally R. Looper, ''Federal State' Clauses in Multilateral Instruments', *British Year Book of International Law* 32 (1955-1956) 162.; Y. Liang, 'Colonial Clauses and Federal Clauses in United Nations Multilateral Instruments', *American Journal of International Law* 45 (1951) 108.

[22] Interestingly, although customary international law imposes this default obligation on federal systems, there is no general customary international law rule, which stipulates what measure(s), if any; central governments must take to seek compliance of its sub-national governments at the local level.

[23] Bernier, *International Legal Aspects of Federalism* (n 20) 1.

cross purposes with treaty obligations of federal system was foreseen during the negotiation process for the new multilateral trade order in the aftermath of WW2.[24] During the 1946 GATT and ITO preparatory session within the UN, the challenge posed by federal systems on compliance with the proposed GATT was apparent because a number of proposals were put forward by negotiating parties such as Australia and the US, seeking to ensure that compliance by federal systems was guaranteed.[25]

Hayes reports that:

> *…in response to these concerns, the [UN] technical subcommittee recommended the addition of a clause to the National Treatment article [of the proposed GATT] requiring contracting parties to take 'all measures' open to them to ensure that taxes and other regulations by subsidiary governments within their territories did not impair the objectives of the national treatment article.*[26]

The reference to 'all measures' in the proposal of the technical committee was later modified *'to require each government to "take such reasonable measures as may be available to it" to*

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[24] Hayes, 'Changing Notions of Sovereignty and Federalism in the International Economic System: A Reassessment of WTO Regulation of Federal States and the Regional and Local Governments within their Territories' (n 21) 20.

[25] See U.N. Doc. EPCT/C.115, (1946) at 1 and U.N. Doc. EPCT/C.II/27, (1946) at 1 both cited in Hayes, 'Changing Notions of Sovereignty and Federalism in the International Economic System: A Reassessment of WTO Regulation of Federal States and the Regional and Local Governments within their Territories' (n 24 above) 21.

[26] ibid 22.

ensure observance by subsidiary governments.'[27] Furthermore, the 'federal clause' was an add note to a general miscellaneous Article presumably in view of the fact that the issue of federal compliance with the proposed multilateral trade agreement affected not only the National Treatment provision but also other substantive provisions of the then proposed GATT.[28]

2.3 The extant position under Article XXIV: 12 of the GATT

The extant position on federal compliance with the WTO/GATT system is expressed in Article XXIV: 12 of the GATT. It provides that *'each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories.'*[29] Jackson and Hayes identify that *'the language of Article XXIV: 12 descended directly from language in the draft ITO Charter.'*[30]In addition to Article XXIV: 12, there are similar provisions across the GATT/WTO agreements which are modelled after Article XXIV: 12.[31]

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[27] ibid.

[28] J. Jackson, 'The General Agreement on Tariffs and Trade in United States Domestic Law', *Michigan Law Review* 66 (2) (1967) 249 at 304-306.

[29] ibid.

[30] Hayes, 'Changing Notions of Sovereignty and Federalism in the International Economic System: A Reassessment of WTO Regulation of Federal States and the Regional and Local Governments within their Territories' (n 27) 21; Jackson, 'The General Agreement on Tariffs and Trade in United States Domestic Law' (n 22) 304.

The issues relating to the application and effect of federal systems' compliance with GATT/WTO agreements did not disappear, even with the final agreed version of Article XXIV: 12 which was inserted in the GATT 1947. Rather, the historical evolution of this federal compliance clause was marked by unresolved ambiguities regarding the extent and scope of the obligations imposed on federal nation/states to secure compliance by their sub-national units.[32]

For example, during the GATT years of the multilateral trade system (i.e., before the introduction of the WTO) some interpretations suggested that the effect and scope of 'reasonable measures' under Article XXIV: 12 were not intended to be compelling or mandatory for the contracting parties to the GATT.[33] One interpretation suggested by Jackson was that Article XXIV: 12 did not apply to measures of sub-national actors, which are constitutionally beyond the powers of the central government. As such, the central government was not in breach of its international obligations if a sub-national unit in the exercise of such powers contravened an international obligation, as long as the central government did everything within its power to ensure local observance of GATT.[34] Another

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[31] For example, Art. 2.2 of the Agreement on Subsidies and Countervailing Measures (1994); Art. XVI (4) Marrakesh Agreement Establishing the WTO; Art. 3 Agreement on the Application of Sanitary and Phytosanitary Measures (1994); Arts. 3.1, 3.4 and 3.5 of the Agreement on Technical Barriers to Trade (1994); and Art. 1.3(a) of the General Agreement on Trade in Services (1994).

[32] Hayes, 'Changing Notions of Sovereignty and Federalism in the International Economic System: A Reassessment of WTO Regulation of Federal States and the Regional and Local Governments within their Territories' (n 30) 20-23.

[33] Jackson, 'The General Agreement on Tariffs and Trade in United States Domestic Law' (n 30) 302.

[34] ibid.

interpretation suggested by Jackson was to the effect that the provision of Article XXIV: 12 '*was not intended to apply as a matter of law against local subdivisions at all, and even when the central government has legal power to require local observance of GATT it is not obligated under GATT to do so but merely to take reasonable measures*.'[35]

During the GATT Uruguay Round which cumulated in the introduction of the WTO, negotiating parties sought to clarify the inherent ambiguities in Article XXIV: 12 by adopting an Understanding on the Interpretation of Article XXIV of the GATT 1994. The key point in 'The Understanding' concerning the scope of federal compliance under Article XXIV: 12 is that '*Each Member is fully responsible for the observance of all provisions of the GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory*.'[36] The Understanding also stipulated that the provisions of the Dispute Settlement Understanding (DSU) '*may be invoked in respect of measures affecting its observance by regional or local governments or authorities within the territory of a Member*.'[37]

Hayes argues that inasmuch as the '*Understanding on Article XXIV: 12 clarifies the responsibility of all GATT/WTO federal nation/states for the non-conforming behavior of*

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[35] ibid.

[36] Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, XXIV: 12 13. See also Hayes, 'Changing Notions of Sovereignty and Federalism in the International Economic System: A Reassessment of WTO Regulation of Federal States and the Regional and Local Governments within their Territories' (n 32) 24.

[37] Hayes, 'Changing Notions of Sovereignty and Federalism in the International Economic System: A Reassessment of WTO Regulation of Federal States and the Regional and Local Governments within their Territories' (n 36) 25.

their component units under the GATT/WTO, it leaves open the question of what constitutes 'reasonable measures' to seek compliance.'[38] According to him, '*This is a particularly important question to consider in areas that fall within exclusive regional or local authority*.'[39] Therefore, he is of the view that '*despite the Uruguay Round Understanding on Article XXIV: 12, the extent of federal nation/state obligations under Article XXIV: 12 remains unclear and what constitutes "reasonable measures" to ensure local observance remains ambiguous*.'[40]

From the foregoing, there is evidently a lack of consensus on the interpretation of what measures federal countries should be taking to keep their sub-national divisions from flouting international obligations of the state. More so, it is a reflection of the general intolerance towards sub-national actors interfering with the international trade obligations of States in the international system. It is also an indication that the multilateral trade system was designed in a manner to give room for wide interpretations to States as to how they should handle what is considered a tricky domestic/internal affair. As such, the response of each State towards growing agitations by sub-national divisions for improved engagement with international economic regimes has developed differently. This makes it increasingly difficult to coherently make sense of why and how these actors operate.

In the next section, the scope of sub-national engagement in the international trade process will be examined through the lens of 2 federal case studies – Canada and Belgium.

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[38] ibid 25.

[39] ibid.

[40] ibid 23-24.

3. Sub-national participation in international trade relations: a deviation from the norm

In this section of the paper, the focus would be on the changing dynamics of sub-national participation in the international trade mechanisms of Belgium and Canada. The analysis would highlight areas of constitutional and/or institutional changes that have occurred in the way sub-national actors in these 2 countries engage in the negotiation and implementation of international economic agreements.

However, before proceeding to examine the 2 selected case studies, it is imperative to explain why these 2 federal countries have been selected for appraisal in this paper. With over 25 countries in the international system operating a federal system of government, it is important to explain why Canada and Belgium are suitable for comparative analysis.[41] Ordinarily these 2 countries do not have any unique characteristics, which set them apart from other countries operating a federal system of government. However, these 2 countries are perfect for this analysis in this paper for a number of reasons.

First, the central focus of this paper is on the international economic engagement of sub-national actors in federal systems. As such, the emphasis is on finding patterns discernible from the activities of sub-federal actors, which have direct or indirect impact on the foreign economic engagement of federal systems. Also, the analysis aims to highlight the significant

[41] See http://cs.mcgill.ca/~rwest/wikispeedia/wpcd/wp/l/List_of_countries_by_system_of_government.htm

impact these changing dynamics within federal systems is having on the overall conduct of international economic regulation. In this regard, Canada and Belgium are an excellent choice for a comparative case study because these 2 countries are situated within 2 different continents (North America and Europe) in the western world, which are currently in the forefront of re-shaping the dynamics of international economic integration. Notably, sub-national governments in these two countries have been very active in the recently concluded Canada-EU CETA, playing pivotal roles in the process. While the Canadian provinces where actively involved in the negotiation process, Wallonia a Belgian sub-national government on the other hand, 'gate-crashed' the process at the point of ratification. The role played by sub-national governments on both sides will be considered in-depth later in the paper.

Second, another objective of this paper is to highlight limitations of the international/domestic dichotomy in the conceptualisation of sub-national economic policies within the federalism-foreign affairs literature. In this regard, Canada and Belgium are also excellent for a comparative study because both countries have developed dissimilar domestic constitutional mechanisms for accommodating the interests of their sub-national governments within the state's foreign economic strategy. Although the constitutional models adopted by these 2 countries aim to foster stronger intergovernmental linkages between central and sub-national governments in the foreign affairs sphere, they are premised on very different frameworks, which present very interesting results that need to be critically examined in more detail.

It must however be pointed out that the choice of these 2 countries also present a number of methodological challenges which impact on the scope of analysis in this paper. First, Belgian sub-national actors operate within a broader regional framework – the EU, whereas, Canadian provinces do not have a comparable forum for regional accommodation within NAFTA.

Hence, the analysis of Canada vis-à-vis Belgium in this paper will not attempt to tackle the complexities arising from the fact that both countries do not have comparable levels of audience within the international economic fora.

Second, caution is applied in the extrapolations made to other federal systems from the findings of this paper. This paper aims to draw attention to similar patterns in the dissimilar domestic frameworks in both countries, without discounting that there are a multiplicity of other factors and disciplinary perspectives, which can explain away or disprove the existence of any similar patterns identified in this paper. As Hockings, writing in 1996, aptly put it:

> *… The attention paid to the international interests of NCGs [non-central governments] has increased dramatically, resulting in a proliferation of information, which has added immeasurably to our knowledge. Yet, at the same time, it remains shrouded in a degree of ambiguity. To a considerable extent, this reflects the very character of the issue under investigation. The factors underpinning the growing internationalisation of, for example, such diverse entities as Catalonia in Spain, Brandenburg in Germany or Quebec in the case of Canada are the result of a complex web of social, economic and political forces spanning the local, national and international arenas. Consequently, analysis of the internationalisation of NCGs, in offering insights into the nature of both domestic and international politics, has advanced our knowledge whilst still leaving some basic matters undecided.*[42]

[42] B. Hocking, 'Bridging Boundaries: Creating Linkages: Non-Central Governments and Multi-layered Policy Environments' (n 13) 36

This paper does not aim to add to the pile up of knowledge, which already exists on this subject area, without introducing something, which is different and relevant to understanding the basics of the evolving phenomenon Hockings describes above. Essentially, the choice of Canada and Belgium can contribute something different because these 2 case studies can be contextualised within the recent events of the Canada-EU CETA process . The role played by sub-national actors in these 2 countries has no doubt brought to the fore the practical implications of including and/or excluding sub-national actors from the design and implementation of international economic agreements. As such, this paper aims to draw attention to the basic common denominators identifiable in these two case studies, which are shaping the engagement of federal sub-national actors in international economic activities.

3.1 Canada in focus

Generally, the constitutional configuration of the federal system in Canada is premised on a relationship where the provinces have considerable autonomy from the central government in Ottawa.[43] With regard to international economic relations, Canada's involvement in the global economy has not been exclusively controlled by the central government. This is mainly due to the constitutional uncertainty surrounding the allocation of powers on matters

[43] G. Anderson and A. Lecours, 'Foreign Policy and Intergovernmental Relations in Canada' in: H. Michelmann (ed), *A Global Dialogue on Federalism: Foreign Relations in Federal Countries* (n 9) 21; Goff, 'Canadian Trade Negotiations in an era of deep integration' (n 8) 3.

of international trade relations.[44] The constitutional provisions which relate to the allocation of powers between the central government and the provinces for foreign relations include The Treaty-making Power, The Trade and Commerce Power, and The Peace, Order and Good Government (POGG) clauses in the British-North America Act (BNA) of 1867.[45] These constitutional provisions did not give the federal government explicit control over foreign policy at the time of Confederation.[46] The only reference to the central government's role in international relations under the BNA 1867 is found in *s 132*, which grants the Dominion the authority to implement treaties negotiated by Great Britain.[47]

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[44] C. Kukucha, 'Dismembering Canada? Stephen Harper and the Foreign Relations of Canadian Provinces', *Review of Constitutional Studies* 14 (1) (2009) 21.

[45] 30 & 31 Vict c 3. In 1982, the BNA which is Canada's original constitutional document was renamed the 'Constitution Act 1867' in 1982. See E. Stewart, 'Kyoto, the constitution, and carbon trading: waking a sleeping BNA bear', *Review of Constitutional Studies* 13 (1) (2007) 67. The Peace, Order and Good Government (POGG) clause is the introductory phrase of section 91 of the Constitution Act, 1867, which outlines the scope Parliament's legislative jurisdiction in Canada. This clause [the POGG clause] enables the central government to legislate on matters relating to foreign policy in Canada, especially on matters not specifically conferred upon the provinces, i.e., on 'residuary' matters. A. McLellan, and G. Gall, 2006. *Peace, Order and Good Government.* Historica Canada. August 2006 http://www.thecanadianencyclopedia.ca/en/article/peace-order-and-good-government/.

[46] C. Kukucha, *The Provinces and Canadian Foreign Trade Policy* (British Columbia: University of British Columbia Press, 2008) 44.

[47] Kukucha, 'Dismembering Canada? Stephen Harper and the Foreign Relations of Canadian Provinces' (n 44) 27. See also Bernier, *International Legal Aspects of Federalism* (n 23) 51 and A. De Mestral, 'The Relationship of International and Domestic Law as Understood in Canada', in: C. Chios (ed), *Is Our House in Order?* (McGill University Press, 2010) 42 at 51

Over time, the central government's dominance over foreign affairs expanded, however, this occurred alongside a concurrent rise in provincial influence.[48] For example, Kukucha points out that in terms of treaty making, the precedent from the case *Reference re: Weekly Rest in Industrial Undertakings Act* (the 'Labour Conventions' case)[49] was to the effect that the central government had the power to negotiate international treaties; only that it did not have the right to implement agreements in areas of provincial jurisdiction.[50]This supposes a dualised conceptualisation of foreign affairs in Canada.[51] More so, in subsequent cases, the Supreme Court of Canada took a cautious stance and did not rely on the precedence from the *'Labour Convention case'* in favour of either level of government, preferring instead to maintain a balance between federal and provincial authority in this area.[52]This was presumably calculated to encourage co-operation between the central government and the provinces on matters of foreign relations. In relation to the scope of trade and commerce power available to the central government under the Constitution Act, 1867, Kukucha points out that while Parliament was given control over the regulation of trade and commerce by

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[48] Kukucha, 'Dismembering Canada? Stephen Harper and the Foreign Relations of Canadian Provinces' (n 47).

[49] [1937] AC 326.

[50] ibid. See also F. Morrissette, 'Provincial Involvement in International Treaty Making: The European Union as a Possible Model', *Queen's Law Journal* 37 (2) (2012) 577 at 583.

[51] See L. Delagran, 'Conflict in Trade Policy: The Role of the Congress and the Provinces in negotiating and Implementing the Canada-U.S. Free Trade Agreement', *Publius* 22 (4) 15 at 18 and J. De Beer, 'Implementing International Trade Agreements in Federal Systems: A Look at the Canada-EU CETA's Intellectual Property Issues', *Legal Issues of Economic Integration* 39 (1) (2012) 51 at 54.

[52] Kukucha, 'Dismembering Canada? Stephen Harper and the Foreign Relations of Canadian Provinces' (n 48) 27.

virtue of Section 91(2) of the Constitution Act, 1867,[53] this exclusive control was in reality subject to limitations. The limitations arose from the fact that the provinces were granted jurisdiction over property and civil rights including the regulation of contracts, the effects of which had a significant impact on the conduct of international trade.[54]

The outlook of these provisions and the interpretation given by the Canadian courts indicate that the central government has enjoyed only a slight advantage over the provinces in relation to foreign affairs. The provinces have capitalised on these opportunities to express themselves at the international level, particularly in relation to trade promotion and the opening of trade offices in other countries.[55]

In relation to Canada's obligations under multilateral and regional trade agreements, the general attitude in international law towards ensuring conformity of regions to international obligations has given the central government additional oversight duties over the provinces.[56] However, this responsibility on the central government has proved to be more of a burden than a superior advantage. This is because with the incursion of international economic agreements into areas of constitutional competence of the provinces, it has become

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[53] ibid.

[54] ibid, see generally *Citizens Insurance Company v. Parsons* (1881) 7 App Cas 96. In this case, the Supreme Court of Canada did not use trade and commerce to entrench federal or provincial power. Instead, 'it reaffirmed that there was no federal power to regulate a single trade or business; and, it indicated that issues...must be determined on a careful case by case basis.'

[55] Kukucha, 'Dismembering Canada? Stephen Harper and the Foreign Relations of Canadian Provinces' (n 52) 28-35; Anderson and Lecours 'Foreign Policy and Intergovernmental Relations in Canada' (n 43) 21, 22-23.

[56] Kukucha, *The Provinces and Canadian Foreign Trade Policy* (n 46) 44.

imperative for the central government to improve on consultation mechanisms with the provinces.[57] This is no easy task because it entails balancing competing interests of the various provinces, vis-à-vis the interest of the central government.

3.1.1 Evolution of Provincial involvement in Canada's international trade process

With Canada's involvement in the multilateral negotiations of the GATT from the outset of the multilateral trade system in 1947, elements of sub-national input began to emerge in form of a federal-provincial committee system. This system evolved in response to '(a) constitutional ambiguity regarding the role of the provinces in Canadian foreign policy and (b) the increasing relevance of non-central governments in this policy area.'[58]

During the Kennedy rounds of GATT negotiations in the 1960s, the evidence of consultation between Ottawa and the provinces on issues of international trade negotiation became apparent. For example, during this negotiation round, some provinces submitted formal reports on tariff policy to the federal government and called for greater involvement in the negotiations. Kukucha reports that '*Ottawa's response to the provinces for greater involvement in negotiations was tentative and there was little indication that it would*

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[57] Issues of provincial interest such as services, agriculture, alcohol, government procurement, national health and safety standards, energy, and environment and labour now frequently come up in international trade deals. See Kukucha, 'Dismembering Canada? Stephen Harper and the Foreign Relations of Canadian Provinces' (n 55) 35. More recently during the Canada-EU CETA negotiations, new areas of provincial interest have included previously uncharted subject areas such as: technology-related topics, involving biotechnologies and information communications technologies. See De Beer, 'Implementing International Trade Agreements in Federal Systems: A Look at the Canada-EU CETA's Intellectual Property Issues' (n 51) 52.

[58] Kukucha, *The Provinces and Canadian Foreign Trade Policy* (n 56) 43.

consider an expanded provincial role.'[59] Even though Ottawa was still sceptical about the involvement of the provinces at this point in time, this marked the birth of channels of co-operation between the provinces and Ottawa in relation to international trade negotiations.

During the Tokyo round of GATT negotiations, the provinces became more active in international trade negotiations possibly because international trade norms were becoming increasingly interwoven into the domestic space of the Canadian federalism.[60]Kukucha reports that:

> *By the time the Tokyo Round began in 1973, however, GATT's focus had shifted to the difficult issue of non-tariff barriers (NTBs). Negotiations on visible tariffs were replaced by discussions of subsidies, government procurement, and other technical barriers. Sectoral negotiations on fisheries, resource-based products, and agriculture also involved areas of provincial jurisdiction. This is why the Provinces demanded direct consultation with Ottawa. The federal government understood that, given the scope of the issues involved, it would need the support of the Provinces in order to negotiate a binding international agreement under GATT's federal state clause.*[61]

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[59] ibid 47. See also Ann Weston, 2005. 'The Canadian 'Model' for Public Participation in Trade Policy Formulation.' The North-South Institute, Ottawa, Canada, August. Retrieved 21 September 2016, http://www.nsi-ins.ca/wp-content/uploads/2012/10/2005-The-Canadian-model-for-Public-Participation-in-Trade-and-Policy-Formulation.pdf. 12 – 15.

[60] C. Kukucha, 'The Role of the Provinces in Canadian Foreign Trade Policy: Multi-Level Governance and Sub-National Interests in the 21st century', *Politics and Society* 23 (3) (2004) 113 at 134.

[61] Kukucha, *The Provinces and Canadian Foreign Trade Policy* (n 58) 47.

This intrusion of international trade disciplines into provincial policy space at the time of the 'Tokyo round' of negotiations necessitated the strengthening of linkages between Ottawa and the provinces.[62] Canada's commitments under the multilateral trade negotiations of the GATT led to growing concerns for the provincial governments over federal policy initiatives that challenged sub-national interests.[63] In response, the provinces '*especially Québec, Ontario, and Alberta, began to demand a more inclusive role in the formulation of Canadian foreign trade policy*.'[64] Ottawa responded by attempting to institutionalise the interests of the provinces within the Canadian international trade mechanism by including a new **Federal Provincial Co-ordination Division (FPCD)** under the Ministry of External Affairs.[65] The FPCD became responsible for keeping the provinces informed of all relevant Canadian international initiatives.[66]Other formal mechanisms for the input of the provinces in international trade negotiations included **The Canadian Trade and Tariffs Committee**

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[62] Delagran, 'Conflict in Trade Policy: The Role of the Congress and the Provinces in negotiating and Implementing the Canada-U.S. Free Trade Agreement' (n 51) 15.

[63] Kukucha, 'Dismembering Canada? Stephen Harper and the Foreign Relations of Canadian Provinces' (n 57) 35.

[64] ibid.

[65] For details of the role of the FPCD in central-provincial co-ordination in Canada, see generally B. Hocking, *Localizing Foreign Policy: Non-Central Governments and Multi-layered Diplomacy* (UK: Palgrave Macmillan, 1993) 193-195.

[66] ibid.

(CTTC) introduced during the 'Tokyo round.'[67] The CTTC was responsible for gathering briefs from businesses, unions, consumer groups, the provinces and other interested parties during the Tokyo Round of trade negotiations.[68] Subsequently, an '*…ad hoc federal-provincial committee of deputy ministers was established in 1975, which was replaced by a* ***Canadian Co-ordinator for Trade Negotiations (CCTN)*** *in 1977.*'[69] In 1985, during the build-up to the negotiations of the Canada-US Free Trade Agreement (CUFTA) Agreement, '*The Premiers of British Columbia, Alberta, Saskatchewan and Manitoba all announced their support for "full provincial participation."*'[70] This led to a commitment to continued consultation within the CCTN.[71]

After the CUFTA agreement was implemented in 1987, the CCTN metamorphosed into the **Committee for the Free Trade Agreement (CFTA)** with each province having 1 official

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[67] D. Protheroe, *Imports and Politics: Trade Decision-Making in Canada, 1968-1979* (Montreal: Institute for Research on Public Policy, 1980)156. See also G. Winham, *International Trade and the Tokyo Round Negotiation* (Princeton: Princeton University Press, 1986) 334-337.

[68] Kukucha, 'Dismembering Canada? Stephen Harper and the Foreign Relations of Canadian Provinces' (n 64) 36.

[69] See Winham, *International Trade and the Tokyo Round Negotiation* (n 67) 332.

[70] Kukucha, 'Dismembering Canada? Stephen Harper and the Foreign Relations of Canadian Provinces' (n 68) 36.

[71] ibid; P. Fafard and P. Leblond, '21st century Trade Agreements: Challenges for Canadian Federalism', *The Federal Idea* (2012). Retrieved 21 September 2016, http://ideefederale.ca/documents/challenges.pdf.

representative.[72] A series of consultative committees were also instituted within various provincial departments to cater for sectorial concerns.[73] The use of such committees became popular in the central government - provincial relationship on international trade negotiations throughout the 1980s.[74] For example during negotiations for NAFTA, an additional committee - **the Committee for North American Free Trade Negotiations (CNAFTN)** was introduced along with the CFTA.[75]

Although the CNAFTN was tailored specifically for the NAFTA negotiations, it subsequently metamorphosed into the **Federal-Provincial Territorial Trade Committee (CTRADE) system**. CTRADE is the current federal – provincial co-operation forum in Canada. It involves a series of meetings between Ottawa and the provinces, which are held 4 times annually.[76] Both levels of government engage in consultations and information sharing, which includes Ottawa making draft documents available to the provinces when Canada

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[72] Fafard and Leblond, '21st century Trade Agreements: Challenges for Canadian Federalism' (n 71) 5-6. See also A. Hulsemeyer, *Globalisation and Institutional Adjustment: Federalism as an Obstacle?* (Aldershot: Ashgate, 2004).

[73] Kukucha, 'Dismembering Canada? Stephen Harper and the Foreign Relations of Canadian Provinces' (n 71) 35.

[74] Delagran, 'Conflict in Trade Policy: The Role of the Congress and the Provinces in negotiating and Implementing the Canada-U.S. Free Trade Agreement' (n 62) 15, 20; Paquin, 'Federalism and the governance of trade negotiations in Canada: Comparing CUSFTA with CETA' (n 5) 548.

[75] ibid.

[76] Kukucha, *The Provinces and Canadian Foreign Trade Policy* (n 61) 52.

enters negotiations in areas of provincial jurisdiction.[77] 'The provinces are encouraged to provide feedback and guidance on these proposals and federal negotiators are sensitive to the economic interests of the provinces.'[78]In addition to the CTRADE forum, Kukucha identifies 3 other forms of consultation, which take place between federal and provincial governments on matters relating to international trade:

> *First, there is almost always more than 1 department at the provincial level in contact with Ottawa on international trade matters. Many of the larger Provinces have specific departments to co-ordinate CTrade and other foreign trade policy considerations. And even where these co-ordinating mechanisms exist, most Provinces have other officials responsible for trade policy in a wide range of departments. Ministries of environment, agriculture, finance, and forestry all have interests related to international economic policy that need to be protected.*[79]

In summary, co-operation between Ottawa and the provinces on matters relating to international trade negotiations has been the most distinct expression of how Canada is making adjustments to accommodate the provinces as stakeholders in the changing landscape of international trade interactions in Canada. There have been calls for this model to be transplanted to other policy areas such as labour and the environment.[80] In addition, constitutional formalisation of the existing channels of co-operation has been demanded by

[77] ibid 54. See also Fafard and Leblond, '21st century Trade Agreements: Challenges for Canadian Federalism' (n 72) 22.

[78] Kukucha, *The Provinces and Canadian Foreign Trade Policy* (n 77).

[79] ibid.

[80] ibid 58.

some provinces but rejected by Ottawa.[81]Although the system is without any formal constitutional entrenchment, its development over the years has been instrumental to maintaining a delicate balance between the provinces and the central government at Ottawa. More importantly, this model portrays a perspective about sub-national involvement in international interactions, which is moderate, cautious and flexible. This model will subsequently be compared with the next case study – Belgium.

3.2 Belgium in focus

Belgium is a complex federal country made up of 3 Communities (the Flemish Community, the French Community and the German-speaking Community); 3 Regions (the Flemish Region, the Walloon Region and the Brussels Region); and 4 linguistic regions (the Dutch-speaking region, the French speaking region, the bilingual region of Brussels-Capital and the German-speaking region).[82] In view of the multifarious composition of the Belgian state, the federal system in operation in Belgium has evolved in tandem with these peculiar diversities.[83]

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[81] ibid 56. See also Paquin, 'Federalism and Compliance with International Agreements: Belgium and Canada Compared' (n 11) 184.

[82] See Arts. 1-4 G.G.W.

[83] Francoise Massart-Pierad and Peter Bursens, 'Belgian Federalism and Foreign Relations: Between Co-operation and Pragmatism' in Michelmann (ed), *A Global Dialogue on Federalism: Foreign Relations in Federal Countries* (n 43) 18ff, 19-20.

With regard to the conduct of foreign policy in general, there is a formal constitutional structure for shared competence and co-operation among the component units of the Belgian federation.[84] This formalised process of co-operation is encapsulated in Article 167 (1) of the 2007 Belgium Constitution which stipulates inter alia for shared competence between the King, Communities and Regions *'To regulate international co-operation, including the concluding of treaties, for those matters that fall within their competences in pursuance of or by virtue of the Constitution.'*[85]

This constitutional arrangement between the components of the Belgian federation has been progressively negotiated over time through a series of Special Acts on the Belgian Federal State Reform. One notable constitutional milestone in the development of the Belgian foreign policy system includes The Institutional Reform Act of 8 August 1988. This Act introduced the constitutional principle of *in foro interno in foro externo* and the *absence of hierarchy*

[84] M. Keating, 'Regions and International Affairs: Motives, Opportunities and Strategies', *Regional and Federal Studies* 9(1) (1999) 1 at 11.

[85] ibid. See Title IV Belgian Constitution. See also Paquin, 'Federalism and Compliance with International Agreements: Belgium and Canada Compared' (n 81) 184-185. Other federal systems, which have constitutional provisions formalising co-operation on foreign policy, are, Argentina and Austria. For Argentina: see Sects. 124 and 125 National Constitution of the Argentine Republic 1994. Retrieved 21 September 2016 http://pdba.georgetown.edu/Constitutions/Argentina/argen94_e.html. See also E. Iglesias, 'Argentina: The Growing Role in Foreign Affairs' in: Michelmann (ed), *A Global Dialogue on Federalism: Foreign Relations in Federal Countries* (n 83) 9. For Austria: see Art. 23e of the Austrian Federal Constitutional Law (as amended in 1989). See also S. Hammer, 'Austrian Federal Relations: Federal Precedence and Informal Regional Linkages' in: Michelmann (ed), *A Global Dialogue on Federalism: Foreign Relations in Federal Countries* (n 83) 15.

between different levels of administration.[86] The terms *in foro interno in foro externo* are Latin phrases, which literally mean: in foro interno ('in the inner court') and in foro externo ('in the outer court').[87] In the context of foreign policy *in foro interno in foro externo* are used in the context of how the external competences of the regions in Belgium are directly correlated with their internal competence under the Belgium constitution.[88] According to Paquin, the implication of this is that '*Belgian sub-national governments possess a true international legal personality and, in practice, this means that foreign countries and international organizations can, if they want, negotiate and conclude real treaties with Belgium's Sub-national governments*.'[89]

The revision of the Constitution in 1993 built on the 1988 reform by further adapting the organization of Belgium's co-operation mechanism for international relations along the

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[86] Paquin, 'Federalism and Compliance with International Agreements: Belgium and Canada Compared' (n 85) 185; Massart-Pierad and Bursens, 'Belgian Federalism and Foreign Relations: Between Co-operation and Pragmatism' (n 83) 96 (extended version), 19 (Booklet Series).

[87] These terms were popularly used by Thomas Hobbes to explain the difference between how man processes the external and internal aspects of the law of nature. See generally, K. Hoekstra, 'Hobbes on Law, Nature, and Reason', *Journal of History and Philosophy* 41(1) (2003) 111; J. Bennett, 'Selections from Thomas Hobbes – Leviathan'. Retrieved 21 September 2016 http://www.woldww.net/classes/General_Philosophy/Hobbes_on_the_state_of_nature.htm.

[88] Massart-Pierad and Bursens, 'Belgian Federalism and Foreign Relations: Between Co-operation and Pragmatism' (n 86) 96.

[89] Paquin, 'Federalism and Compliance with International Agreements: Belgium and Canada Compared' (n 86) 185.

unique configuration of the Belgian federal system.[90] This led to the introduction of 3 distinct categories of agreements in Belgium: 1) treaties that exclusively involve the powers of the federal government and that are concluded and ratified by this same federal government; 2) treaties related exclusively to community or regional powers and that are concluded and ratified by communities and regions; and 3) mixed treaties.[91] Paquin explains how each category of treaties works thus:

> *When a treaty project is brought to the attention of the federal government, it must inform the other levels of government. The regions and communities can then ask to be a party to the treaty if it affects their fields of jurisdiction. It is only after negotiation between the various parties that there is a decision about the category of the proposed treaty.*
>
> *When an agreement involves federal powers and either community or a regional power at the same time, the treaty is concluded according to a special procedure convened among the different orders of government. It must also be approved by all of the parliaments involved. Mixed treaties require 20 different steps to complete the whole procedure.*[92]

In the context of international trade relations, these special reforms have empowered the regions in Belgium with competences for determining policy with regard to international

[90] ibid.

[91] ibid.

[92] ibid.

trade in areas such as foreign markets and exports (without prejudice to any national policy to co-ordinate and promote foreign trade and to generally co-operate in that area).[93]

This unique approach adopted by Belgium is not without its challenges. Essentially, the model of shared competence adopted creates a complex labyrinth of actors and multifaceted issues. To cater for these complexities, the constitutional reforms have introduced institutional and constitutional checks. For example, the 1993 reform introduced 3 notable constitutional restrictions on the powers of the regions in relation to their activities in the international arena. First, there is the substitution mechanism under *Article 169* of the 1993 and 2007 Constitutions. This states that if a region does not adhere to an international or EU commitment and it is convicted by an international court, then the central government can substitute for the region (but not the other way round) to ensure compliance.[94] According to Bursens and Massart-Pierad, this restriction was introduced in anticipation that shared competence between the regions and the federal government on foreign policy could lead to co-ordination problems.[95] Second, it was stipulated in the reform of 1993 that the foreign policy activity of the regions must not contradict the broad orientations of the commonly agreed foreign policy of the Belgian state (this refers to areas of shared ideology such as

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[93] See generally, the *Lambermont Accords* of 29 June 2001, which had the effect of regionalizing international trade in Belgium. See also Kingdom of Belgium Foreign Affairs, Foreign Trade and Development Co-operation. Retrieved 21 September 2016 http://diplomatie.belgium.be/en/policy/economic_diplomacy/division_of_powers/. Paquin, 'Federalism and Compliance with International Agreements: Belgium and Canada Compared' (n 92) 186ff, 190.

[94] Bursens and Massart-Pierad, 'Belgian Federalism and Foreign Relations: Between Co-operation and Pragmatism' (n 77) 97-98.

[95] ibid.

democracy, national security etc.).[96] Third, the regions and communities are obliged to inform the federal government of any foreign activities they are involved in.[97]

Another constitutional method adopted to ensure co-ordination in foreign policy is the use of Co-operation Agreements.[98] According to Bursens and Massart-Pierad, Co-operation Agreements '*broadly frame the application of Belgium's external relations by involving the various bodies involved*.'[99] In essence, these agreements are intended to ensure that all the relevant stakeholders to foreign relations in Belgium are carried along regarding the decisions made by any particular actor. An example of such a Co-operation Agreement is the one between the regions and the federal government, catering for Belgium's participation in the EU Council of Ministers. Under this agreement, ministers of the federative states can represent Belgium and conclude agreements in its name.[100]

The institutional checks available to ensure co-ordination on foreign policy are mainly in the form of committees, which are designed to maximise effective co-ordination by minimising potential friction among stakeholders. For example, there is the **Inter-ministerial Committee on Foreign Policy (ICFP)**.[101] The Foreign Service in charge of relations

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[96] ibid 98. See Art. 128 G.G.W.

[97] ibid.

[98] ibid 101.

[99] ibid.

[100] Paquin, 'Federalism and Compliance with International Agreements: Belgium and Canada Compared' (n 93) 189.

[101] ibid 187.

maintains the ICFP Secretariat with Communities and Regions.[102] It does not meet on a regular basis with an average of 2 meetings happening per year.[103] Therefore, the system also relies on informal meetings between cabinet-level personnel and civil servants from both levels of government.[104] The primary objective of this committee is to minimise friction in the co-ordination mechanism on foreign policy by dealing with political conflicts.[105] It achieves this through a mechanism of dialogue and information exchange between the centre and the regions.[106]

From the above discussions and analyses, it is clear that compliance with international trade norms in Belgium is designed to be a product of joint participation by the central government and regional governments under a formalised and constitutionally recognised framework.[107] As such, all stakeholders negotiate Belgium's compliance with international trade agreements and any decision reached is deemed to be the common position of the Belgian state.[108]

However, as it was pointed out in the introduction, the spectacular stand-off created by Wallonia is evidence of the growing impact of the complex Belgian system on the international economic process in Belgium and more broadly within the EU. Although the

[102] ibid.

[103] ibid 188.

[104] ibid.

[105] ibid 101.

[106] ibid 187.

[107] ibid 173, 177.

[108] ibid 184-187.

incident with Wallonia was eventually resolved, there are suggestions that similar situations may arise in the future in relation to trade deals such as the TTIP.[109]

4. Common themes: Co-operation and mutual interests

From the details of the existing relationships between the provinces/regions and the central governments in the 2 countries discussed above, the differences in their constitutional setups are obvious. As such, this paper will not dwell on these differences. The main focus of this section is to identify common themes that unify both case studies. This is especially vital, in view of the recent developments with the Canada-EU CETA negotiations, where we saw sub-national actors from these 2 countries taking centre stage for different reasons.

First, increased sub-national participation in international trade relations in both countries is occurring within the ambit of stronger inter-governmental co-operation, rather than direct unregulated engagement by sub-national actors with foreign governments.[110] Even though

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[109] See Par Roosevelt Namur, 2016. 'Good news! The war on TTIP and CETA can be won.' (n 6). There are also suggestions that Wallonia could pose a stumbling block to any potential trade deal between the EU and the UK, which is currently in the process of leaving the EU. This suggestion arose after the EU Trade Commissioner Cecilia Malmstrom said: 'If we can't make it with Canada, I don't think we can make it with the UK.' BBC. 2016. 'Reality Check: Could Walloons sink a Brexit trade deal?'. BBC. 24 October. Retrieved 10 March 2017 http://www.bbc.co.uk/news/world-europe-37755668.

[110] The system is not closed to non – governmental actors in the process of co-operation. See Trew, 'Correcting the democratic deficit in the CETA negotiations: Civil society engagement in the provinces, municipalities, and

Belgium has entrenched constitutional provisions to support sub-national engagement in foreign affairs while Canada does not, both countries appear to still be cautious about direct unregulated engagement of sub-national actors in trade negotiations with foreign states. More so, although the scope of co-operation is not restricted only to dialogue in Belgium but also extends to 'permitted policy action' taken by sub-national actors, these permitted policy actions are usually co-ordinated and supervised by the central government using the constitutional mechanisms discussed in the previous section. In essence, the process is still controlled by the central government through checks and balances, such as the use of co-operation agreements and the constitutional restrictions under Article 169 of the Belgian Constitution.

This is an important point because it is a reflection of the difficulty all sub-national actors experience when attempting to attain legitimacy in the international scene. Essentially, the limitations and restrictions of sub-national actors come to the fore. In this regard, sub-national actors in Belgium are not faring better than their counterparts in Canada, even though they have a more constitutionally guaranteed mandate to engage in international economic processes. This is also not perceived as a triumph of the existing international regime which still frowns on sub-national engagement in foreign activities. Rather, it is a reflection of the reality that the legitimacy of sub-national actors on the international scene is at its infancy. However, with recent developments with the Canada-EU CETA, it would be interesting to see if perceptions and attitudes among stakeholders will shift favourably or otherwise for sub-national actors. Already, within the EU and across the world, opinions are divided over the action of Wallonia during the Canada-EU CETA. Those who are opposed to

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Europe' (n 6), but the primary focus of the discussions in this paper is on sub-national governments in federal systems as stakeholders in international economic relations.

the capitalism, globalisation and free trade tenets obviously welcome these developments.[111] However, those in favour of these principles have questioned the motives behind Wallonia's action and have raised concerns about the future of international trade liberalisation.[112] This

[111] Verlaine points out that: 'The revolt by the Socialist-led regional parliament [of Wallonia] representing just 0.7% of the EU's population is a microcosm of a broader backlash against globalization, under which the region hasn't flourished.' See Julia-ambra Verlaine. 2016. 'World News: A Belgian Region's Anti-Globalization Stand Once an Industrial Powerhouse, Wallonia has Hit Hard Times in the Post-War Era of Expanding Free Trade.' *The Wall Street Journal Asia*, 28 October 28. Also, the action by Wallonia has been welcomed by some activists who see it as a new constitutional weapon to scupper future mega-regional trade deals. For instance in a publication by Namur, it is stated that: '…Because many of the provisions in CETA and TTIP fall within the ambit of regional government, the Walloon resolution is of huge importance. To acquire legal force, CETA must be approved and ratified by all EU member-states and the resolution is therefore a decisive first step towards ensuring the non-adoption of the treaty.' See Par Roosevelt Namur, 2016. 'Good news! The war on TTIP and CETA can be won.' (n 109).

[112] A columnist writing in the Economist argued that: 'CETA would make Europe EUR 5.8 billion a year richer, by one estimate. But the real danger of letting Wallonia derail it is the precedent it would set. With so many potential vetoes, ... it is hard to imagine the Transatlantic Trade and Investment Partnership (a much bigger deal between America and the EU) being passed.' See The Economist. '2016. 'Hot-air Walloons; The Canada-EU trade deal.' The Economist. 22 October. Retrieved 10 March 2017, http://search.proquest.com.proxy.library.dmu.ac.uk/saveasdownloadprogress.getfilefor. See also, a publication in Newstex, where it is argued that there is a 'globalisation trilema'(i.e., a scenario where stakeholders the world over are attempting to have the most two of: economic integration, national sovereignty and democracy), which creates a hard choice for all stakeholders involved in the economic liberalisation process. It is further argued that this is however impossible because 'Liberalisation, like many economic shifts, creates winners and losers. Many existing political structures advantage the votes of the losers, giving them, in many cases, the ability to block changes that generate net, though unevenly distributed, benefits. In order to move toward greater liberalisation, then, one either has to ignore popular opinion in these places (abandoning the democracy leg of the trilemma), or change the locus of political decision-taking (abandoning national sovereignty).' See Newstex. 'The

paper does not take a position on the merits or otherwise of free trade. However, this paper takes a position that it is time to face up squarely to the realities that international economic regulation without the input of sub-national governments is no longer possible. As such, there is a pressing need to move away from the blame culture to focus on how these actors can be effectively brought on board, even it means compromising the existing status quo in international economic law. A key to this may lie in understanding 'how' and 'why' these actors are more pronounced on the world stage than ever before.

Second, in line with the last point made in the previous paragraph, it is argued that the level of engagement between sub-national actors and central governments on international trade negotiation (in both countries) is clearly being driven by growing mutual interests (between sub-national actors and central governments) on specific cross-cutting issues which new breed international economic agreements now cover. Also, the level of engagement (between sub-national actors and central governments) in both countries is being shaped by the differing priorities attached to specific trade topics.

To illustrate the significance of this point, this paper draws on Criekeman's[113] arguments about the factors that motivate or repel co-operation among levels of government. He distinguishes between 'conflictual' and 'co-operational' issues, arguing that areas, which are 'conflictual', are usually less amenable to strong co-operation between levels of government.[114] In this instance, the argument in this paper is that both 'conflictual' and 'co-

Economist: Free exchange: Making sense of the Wallonian veto.' Newstex. 24 October. Retrieved 10 March 2017, http://search.proquest.com.proxy.library.dmu.ac.uk/saveasdownloadprogress.getfileform.

[113] See D. Criekemans, 'Are the Boundaries between Paradiplomacy and Diplomacy Watering Down?' (World International Studies Committee (WISC) 2nd Global International Studies Conference, Slovenia, July 24 2008).

[114] ibid.

operational' issues are spurring more sub-national engagement in international trade interactions in Canada and Belgium. The issues, which are 'conflictual', represent the areas in which the sub-national actors disagree with the central government and as such are therein agitating for different negotiating positions. 'Co-operational' issues on the other hand, are those areas where both parties are in agreement or at least amenable to agreement. In such areas, sub-national actors are working more closely (in both countries) to achieve common negotiating positions.

The Canadian experience shows that Ottawa (irrespective of the less formal system) has had to demonstrate a sense of commitment to implementing the mechanisms for co-operation between them and the provincial governments even in areas, which are 'conflictual' or risk with the provinces exploiting the loopholes and ambivalence in the constitutional provisions in order to take counterproductive action.[115] This could occur if the provinces differ with respect to the adoption of a negotiating position adopted by the central government. As Gerken points out, the power of dissent is another way in which sub-national actors (this encompasses a broader scope of minority state and non-state actors in a federal system) are contributing to the policy process in federal systems.[116] The effectiveness of dissent as a tool for facilitating co-operation in the area of international trade relations is identifiable in the Canadian experience. For example, during the Doha multilateral negotiation and the NAFTA negotiation processes, the provinces' objection to certain issues was reflected in the final

[115] Kukucha, *The Provinces and Canadian Foreign Trade Policy* (n 81) 53.

[116] See generally, H. Gerken, 'Second-Order Diversity', *Harvard Law Review* 118 (2005) 1099.

negotiation position adopted by Canada.[117] Specifically, Kukucha identifies that the original US proposal for Article 2.2 of the WTO Agreement on Subsidies and Countervailing Measures (SCM), which Washington intended to use as a limitation on the competitive state subsidies in Canada, was opposed by Canada because the provinces- specifically Ontario and Quebec- opposed it during the negotiation process.[118] It has also been evident during the Canada-EU CETA negotiations, although the context was different due to the more direct role given to the provinces during negotiation.

Irrespective of the differences in approach adopted by Canada and Belgium, another area of commonality is that both systems are designed to explore practical methods for balancing national and state power in relation to specific subject areas, which are of mutual interest to both levels of government. This shifts the focus from regulatory autonomy and potentially reduces the possibility of clamours for secession within these States. Both systems place emphasis on the need for sub-national participation in the policy formulation process, instead of pursuing state regulatory autonomy.[119] *'This way, states thereby gain ex ante and ex post opportunities to influence federal law…'*[120] without necessarily undermining the delicate fabric of the federal relationship. Although this makes the process flexible and open to both formal and informal methods for achieving mutual agreement on policy issues,[121] this also

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[117] Kukucha, 'Dismembering Canada? Stephen Harper and the Foreign Relations of Canadian Provinces' (n 73) 37.

[118] ibid.

[119] ibid 26.

[120] ibid.

[121] ibid 14ff, 23.

portrays how premature it is to imagine that any State will totally open up the policy space for their sub-national actors to have a full and unrestricted mandate in international trade relations. However, with the recent developments during the Canada-EU CETA, sub-national actors are clearly adapting in response to exogenous forces and changes occurring within transnational settings. For instance, it is interesting to point out that it took the influence of a negotiating party – the EU, to force the Canadian central government to finally shift in its method of co-operation with the provinces during the CETA negotiations. On the other side of the divide, it is also interesting to see that Wallonia has made the EU and indeed the rest of the world take notice of growing sub-national influence on international trade outcomes, irrespective of whether or not they were involved in the process.

5. Implications for the future

As was pointed out in the analysis on how federal systems have impacted the design and evolution of international trade rules, sub-national actors and foreign economic interactions are ordinarily perceived as 'strange bedfellows'. As such, it is easy to down play the significance of sub-national engagement in the international scene because they are still largely nuanced expressions occurring mainly within the domestic settings of their home states. The danger with such assumptions is that we could miss the distinct patterns, which should draw our attention to the opportunities and challenges, which are associated with this emerging phenomenon.

For instance, identifying and mapping common patterns in the 2 case studies discussed in this paper is important for re-evaluating the effectiveness of international norms on the subject matter. In view of the common patterns of co-operation identified in the 2 case studies, it is

argued that the federal compliance clauses in international trade agreements such as GATT Article XXIV: 12 discussed in section 2.3 can be given an interpretation which is compatible with a co-operative federalism model. A co-operative federalism perspective is applicable to the interpretation of federal compliance clauses in international trade agreements if we proceed on a premise that the requirement for compliance with international trade norms in federal systems is not exhaustive on 'how' compliance should be achieved. For example, it was pointed out in section 2.3, during the GATT years of the multilateral trade system, there were interpretations which suggested that the effect and scope of 'reasonable measures' under Article XXIV: 12 was not intended to be compelling or mandatory for the contracting parties to the GATT.[122] Jackson argued that Article XXIV: 12 did not apply to measures of sub-national actors, which are constitutionally beyond the powers of the central government. As such, the central government was not in breach of its international obligations if a sub-national actor in the exercise of such powers contravened an international obligation, as long as the central government did everything within its power to ensure local observance of GATT.[123] Another interpretation suggested by Jackson was to the effect that the provision of Article XXIV: 12:

> *[W]as not intended to apply as a matter of law against local subdivisions at all, and even when the central government has legal power to require local observance of GATT it is not obligated under GATT to do so, but merely to take reasonable measures.*[124]

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[122] See Jackson, 'The General Agreement on Tariffs and Trade in United States Domestic Law' (n 33) 249, 302.

[123] ibid.

[124] ibid.

The panel decisions during the GATT years, which centred on the interpretation of Article XXIV: 12 did not fare better in clarifying the meaning of 'reasonable measures'. The decisions reached focused on a logical evaluation of the steps taken by the central government to secure compliance of its sub-national units in each of the cases.[125] Hayes is of the view that there is no clear indication from this approach adopted by the GATT panels on the exact scope of reasonable measures. According to him, 'Other than the reference in *Canada-Import* to 'serious, persistent, and convincing effort' no GATT Panel has discussed what constitutes a 'reasonable measures' under Article XXIV: 12.'[126] This paper aligns with the view above because it demonstrates that 'reasonable measures' is open to any interpretation which promotes compliance, but the manner in which this compliance is achieved is debatable. For example, in the *Canada-Import case*, the Panel specified:

> *[T]hat in determining whether the actions of a country constituted reasonable measures, one should look to whether that country had made "serious, persistent,*

[125] The some key cases which have been decided by the GATT/WTO Panels on the effect of Art. XXIV: 12 on federal systems include: *Canada-Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies DS17/R-39S/27 (October 16, 1991); Canada-Measures Affecting the Sale of Gold Coins L/5863 (Sept. 17, 1985) and US: Measures Affecting Alcoholic and Malt Beverages DS23/R-39S/206 (March 16, 1992*.

[126] Hayes, 'Changing Notions of Sovereignty and Federalism in the International Economic System: A Reassessment of WTO Regulation of Federal States and the Regional and Local Governments within their Territories' (n 40) 30.

and convincing efforts" to ensure observance of the provisions of the General Agreement.[127]

It is argued that co-operation as a means of ensuring compliance with international trade norms fulfills these requirements stipulated in the decision above. As we have learned from the Canada-EU CETA if robust co-operation mechanisms are maintained between different levels of government in federal systems, sub-national units are better positioned to contribute to the formulation and negotiation of trade policy at the outset, rather than a reactive system which responds only when sub-national units have acted contrary to policies negotiated without their input.

Although the introduction of the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade (GATT) 1994 brought more clarity to the scope of the section, however, Hayes is of the view that the Uruguay Understanding still leaves open the question of what constitutes 'reasonable measures' to seek compliance.[128] Furthermore, Hayes points out that 'There is no customary international law rule regarding what measure(s), if any, central governments must take to seek compliance at the local level.'[129] As such, the requirement of *'taking necessary measures'* which from the GATT/WTO jurisprudence considered in section is not definitive can be interpreted as a requirement that contracting parties should strengthen the participation and linkage between all the relevant stakeholders, including their sub-national units, so as to ensure compliance with international

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[127] *Canada-Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies DS17/R-39S/27 (October 16, 1991)*.

[128] ibid.

[129]ibid 20.

trade obligations. This is occurring in both case studies treated in this paper, irrespective of the different constitutional/institutional methods underlying their respective regimes.

6. Conclusion

When engaged in conversations with people about my area of research, it seems amusing to some people to even suggest that sub-national actors have a role to play in international trade (either as involved actors or regulators). However, the recent stand-off created by Wallonia in relation to the Canada-EU CETA is an interesting example of how the dynamics in international economic relations are changing. In light of the new wave of nationalism sweeping across the world after the elections in the USA and 'Brexit' etc., there is a growing sense that the opposition to the Canada-EU CETA is just the tip of the iceberg. Schill argues that post-CETA:

> *International economic law's constitutional frontiers will be further exposed in a host of upcoming decisions that all involve the relationship between constitutional law and international economic law. For one, the German Constitutional Court will have to decide on the merits of the constitutional challenge to CETA, and proceedings before other constitutional courts may follow. But also at the EU level, various proceedings before the Court of Justice of the European Union (CJEU) involve questions of EU constitutional law. Thus, the question of whether intra-EU investment treaties can be squared with principles of EU constitutional law is before the CJEU in a variety of different proceedings. But also the pending question before the CJEU of where the power*

> *to conclude EU trade and investment agreements resides, whether it is EU only or shared with Member States, involves a constitutional question on the distribution of competences in a quasi-federal system.*[130]

This is apt because for all the complexities of mega regional economic agreements springing up around the world, who could have predicted that Wallonia, a small region in Belgium, with just over 3.5 million people could potentially derail the whole deal which had been 7 years in the pipeline? This raises further challenging questions about the institutional design of world economic governance, which has continued to receive scant attention over the years. More so, for all the arguments that power has in the era of globalisation been rescaled away from States towards regional, multilateral and non-state actors, what happened with the Canada-EU CETA deal is a wakeup call for all stakeholders to seat up and take the evolving role of sub-national governments in international economic governance more seriously. Having said this, the reality is that sub-national actors will always struggle to project themselves as distinct international trade stakeholders because their engagement in this sphere is undoubtedly fraught with challenges. However, the case studies in this paper should remind us that the world where sub-national actors were not recognised in international affairs is firmly in the past. There is enough evidence to suggest that sub-national activism is going to increase in correlation to the expanding scope of international economic agreements. Hence, it is imperative to develop a fresh perspective towards conceptualising their role in the evolving international trade process. More importantly, the experiences in Canada and Belgium demonstrate how 2 very dissimilar domestic models of

[130] S. Schill 'Editorial: The Constitutional Frontiers of International Economic Law', *Journal of World Investment & Trade* 18 (2017) 1 at 3.

assimilation can have distinguishable strands, which unify them. It is important for scholars to continue profiling sub-national foreign economic activities in federal systems with a view to mapping areas of mutuality and coherence between different case studies. This will aid policy makers to develop a holistic view of how sub-national actors positively and negatively impact on the evolving international economic landscape.

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