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Is there Coherence on the role of sub-national actors in the evolving mechanisms for international trade interactions? A comparative analysis of Belgium and Canada

By

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Subfield of IEL: Trade

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Abstract

In the post-World War II world economic order, international economic relations have conventionally been regarded as an area reserved for state-to-state relations and to some extent global administrative actors (international and regional organisations).

However, with the advent and spread of globalisation, there has been a progressive departure from the traditional paradigms, which dictate the patterns of interaction in the international economic system. Essentially, globalisation has challenged the sovereignty status quo of Westphalian statehood by disaggregating traditional governance structures and encouraging the emergence of new ones (sub-national and non-state actors).

Focusing specifically on the international trade process, there appears to be no uniformity in the theoretical conceptualisation of the role for sub-national actors within the international trade system. At present, sub-national governments enjoy varied degrees of acceptance within the various frameworks for international trade interactions of their home states. Even with more States making adjustments to accommodate sub-national governments in their international trade processes, it is questionable if there is any coherent pattern discernable from these case studies. As such, this paper seeks to ascertain: *whether there is any coherence deducible in the way we conceptualise emerging patterns of engagement by sub-national actors in international trade relations.*

To answer this research question, this paper evaluates the current status of sub-national actors in the international trade interactions of two federal systems - Belgium and Canada. These two countries have been selected for appraisal because they have adopted distinctively dissimilar models for assimilating the participation of sub-national actors into their international trade interactions.

The central argument in this paper is that the emerging discourse on sub-national participation in international trade interactions of federal systems is progressively developing into coherent themes. It will be argued that these themes are emerging irrespective of the differing domestic constitutional settings in which sub-national actors are operating.

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1.1 Introduction

In the 21st century, international economic disciplines have undergone significant changes. A distinct manifestation of these changes is that core aspects of international economic relations (such as trade, investment and finance) which were erstwhile reserved exclusively for state-to-state interactions 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).

In relation to sub-national governments[2] and non-state actors, central governments are finding it increasingly difficult to ignore the input of these stakeholders during negotiation of international economic agreements because of their far reaching effects on all and sundry. Countries such as Canada, Belgium, India, Argentina and the USA, out of necessity and/or pragmatism are adapting their international trade negotiation strategies to accommodate the input of these stakeholders (albeit to varying degrees, using different institutional mechanisms).[3]

Interestingly, in spite of the changing protocols relating to permissible stakeholders in international economic interactions, the participation of sub-national governments in international economic relations is still received with mixed reactions among commentators. This is mainly because sub-national engagement in international trade relations is deeply grounded in a history of scepticism. For a better part of the 20th century, the participation of sub-national actors in international relations was perceived to be unpredictable and in some instances disruptive of the existing status quo.[4] At present, sub-national governments enjoy varied degrees of acceptance within the various frameworks for international trade interactions in their home states and in regional/international economic constructs.

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[2] 'Sub-national actors' is used in the context of sub-national governments/regions/provinces and municipalities.

[3] For example, the Forum of Federations conducted a comprehensive 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. See Hans Michelmann (ed), *A Global Dialogue on Federalism: Foreign Relations in Federal Countries,* Vol 5 (McGill-Queen's University Press 2006).

[4] See KC Wheare, *Federal Government* (4th ed OUP 1963) 183- 186.

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Thus, even with more States making accommodation for sub-national governments in their international trade processes, it is questionable if there is any coherent pattern discernable from these case studies. As such, this paper seeks to ascertain: *whether there is any coherence in the way we conceptualise emerging patterns of engagement by sub-national actors in international trade relations.*

To answer this research question, this paper evaluates the current status of sub-national actors in the international trade interactions of two federal systems - Belgium and Canada. These two 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 help our broader interpretations and understanding of the phenomenon.

The paper will examine and compare the theory and practice of sub-national engagement in international trade interactions in these two case studies with a view to ascertaining:

- The scope of sub-national actors participation in the evolving framework for international economic interactions in these two countries;
- The methods utilised to incorporate sub-national governments into the framework for international trade relations;
- The areas of differences and similarities between the two models; and
- The reasons for the differences between both models and the implications for attaining coherence in the conceptualisation of sub-national participation in international trade relations in the 21st century.

The central argument in this paper is that the emerging discourse on sub-national participation in international trade interactions of federal systems is progressively developing into coherent themes. It will be argued that these themes are emerging irrespective of the differing domestic constitutional settings in which sub-national actors are operating. My analysis would show that the experiences in Canada and Belgium are different in terms of the levels of formalism associated with sub-national activity in international trade interactions. However, there are areas of commonality, which should not go unnoticed because they are critical to a holistic conceptualisation of the evolving role of these actors in the 21st century international trade process.

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1.2 The conventional norm on sub-national engagement in international economic relations

Federal systems have always been at the forefront of the controversies when discussing the antipathy towards sub-national participation in international relations.[5] Historically, international law responded to the appearance of federal states by ignoring their constitutional peculiarities and sought to treat them like other sovereign states.[6] 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 State is subject to.[7] This responsibility 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 governments.[8] This obligation applies as the default rule unless a contrary intention is evidenced in the text of an international treaty.[9] In some instances, international treaties have 'opt out' clauses negotiated into them.[10] This can operate by way of federal state clauses,[11] which make it possible for federal systems to expressly escape liability if their sub-national governments do not comply with the requirements of a treaty in areas where they have constitutional competence to act.[12]

Interestingly, although customary international law imposes this default obligation on federal systems, there is no general customary international law rule which stipulates what

[5] See Ivan Bernier, *International Legal Aspects of Federalism* (Longman 1973) 1-6; Wheare, (n 4).

[6] Brenier aptly describes the nature of this relationship as one of 'attraction-repulsion.' Bernier (n 5) 1.

[7] ibid 6; Edward T 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' (2004) 25(1) Nw J Intl L & Bus 1, 20. See also art 27 – 29, Vienna Convention on the Law of Treaties 1969 UN Doc A/CONF 39/27.

[8] Hayes (n 7); art 29 Vienna Convention (n 7).

[9] Hayes (n 8) 20.

[10] Bernier (n 7) 171.

[11] ibid.

[12] 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 for sub-national governments. See Hayes (n 9) 20. See generally Robert B Looper, ''Federal State' Clauses in Multilateral Instruments' (1960) U Ill L F 375; Yuen-Li Liang, 'Colonial Clauses and Federal Clauses in United Nations Multilateral Instruments' (1951) 45 AJIL108.

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measure(s), if any; central governments must take to seek compliance of its sub-national governments at the local level.[13] In the context of international trade, the General Agreement on Tariffs and Trade (GATT) and subsequently the World Trade Organisation (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.

Tracing the GATT/WTO practices to the early years of the post-WW2 era, Brenier points out that at the inception of multilateral cooperation in international relations, the scope of international law was widening and the emerging international instruments during this period started taking into consideration the peculiar problems posed by federal systems.[14] Thus, the potential conflict arising from the possibility that sub-national governments in federal systems could act at cross purposes with the treaty obligations of the federal system was foreseen during the negotiation process for the new multilateral trade order in the aftermath of WW2.[15] 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.[16]

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.*[17]

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 ensure observance by subsidiary governments.'*[18] Furthermore, the 'federal clause' was an

[13] Hayes (n 12).

[14] Bernier (n 11) 1.

[15] Hayes (n 13) 20.

[16] ibid 21.

[17] ibid 22.

[18] ibid.

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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.[19]

The current position on federal compliance with the WTO/GATT system is expressed in art 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.'*[20] Jackson and Hayes identify that *'the language of art XXIV: 12 descended directly from language in the draft ITO Charter.'*[21]In addition to art XXIV: 12, there are similar provisions across the GATT/WTO agreements which are modelled after art XXIV: 12.[22]

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 art 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 governments.[23]

For example, during the GATT years of the multilateral trade system there were interpretations, which suggested that the effect and scope of 'reasonable measures' under art XXIV: 12 were not intended to be compelling or mandatory for the contracting parties to the GATT.[24] One interpretation suggested by Jackson was that art XXIV: 12 did not apply to measures of sub-national governments which are constitutionally beyond the powers of the central government. As such, the central government was not in breach of its international

[19] JH Jackson, 'The General Agreement on Tariffs and Trade in United States Domestic Law' (1967) 66 (2) Mich L Rev 249, 304-306.

[20] ibid.

[21] Hayes (n 18) 21; Jackson (1967) (n 19) 304.

[22] For example, art 2.2 Agreement on Subsidies and Countervailing Measures (1994); art XVI (4) Marrakesh Agreement Establishing the WTO; art 13 Agreement on the Application of Sanitary and Phytosanitary Measures (1994); arts 3.1, 3.4 and 3.5 Agreement on Technical Barriers to Trade (1994); art 1.3(a) General Agreement on Trade in Services (1994).

[23] Hayes (n 21) 20-23.

[24] Jackson (1967) (n 21) 302.

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obligations if a sub-national government 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.[25] Another interpretation suggested by Jackson was to the effect that the provision of art 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*.'[26]

During the GATT Uruguay Round which cumulated in the introduction of the WTO, negotiating parties sought to clarify the inherent ambiguities in art XXIV: 12 by adopting an Understanding on the Interpretation of art XXIV of the GATT 1994. The key point in 'The Understanding' concerning the scope of federal compliance under art 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*.'[27] 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*.'[28]

Hayes argues that inasmuch as the '*Understanding on art XXIV: 12 clarifies the responsibility of all GATT/WTO federal nation/states for the non-conforming behavior of their component units under the GATT/WTO, it leaves open the question of what constitutes 'reasonable measures' to seek compliance*.'[29] According to him, '*This is a particularly important question to consider in areas that fall within exclusive regional or local authority*.'[30] Therefore, he is of the view that '*despite the Uruguay Round Understanding on art XXIV: 12, the extent of federal nation/state obligations under art XXIV: 12 remains*

[25] ibid.

[26] ibid.

[27] Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, XXIV: 12 13. See also Hayes (n 23) 24.

[28] Hayes (n 27) 25.

[29] ibid 25.

[30] ibid.

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unclear and what constitutes "reasonable measures" to ensure local observance remains ambiguous.'[31]

From the foregoing, it appears that a lack of consensus on the interpretation of what measures should be taken by federal countries to keep their sub-national divisions in check 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 system of international trade was designed in a manner to give room for wide interpretations to States as to how they should handle what was considered a 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 two federal case studies – Canada and Belgium.

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

1.3.1 Canada in focus

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.[32] With regards to international trade relations, Canada's involvement in global trade has not been exclusively controlled by the central government. This is mainly due to the constitutional uncertainty surrounding the allocation of powers on matters of international trade relations.[33] The constitutional provisions which relate to the allocation of powers between the central government and provinces for foreign relations include The Treaty-

[31] ibid 23-24.

[32] G Anderson and Andre Lecours, 'Foreign Policy and Intergovernmental Relations in Canada' in Hans Michelmann (ed), *A Global Dialogue on Federalism: Foreign Relations in Federal Countries,* Vol 5 (McGill-Queen's University Press 2006) 21.

[33] Christopher J Kukucha, 'Dismembering Canada? Stephen Harper and the Foreign Relations of Canadian Provinces' (2009) 14 (1) Rev Const Stud 21.

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making Power, The Trade and Commerce Power, and The Peace, Order and Good Government (POGG) clauses in the Constitution Act, 1867.[34] These constitutional provisions did not give the federal government explicit control over foreign policy at the time of Confederation.[35] The only reference to the central government's role in international relations under the Constitution Act, 1867 is found in *s 132*, which grants the Dominion the authority to implement treaties negotiated by Great Britain.[36] However over time, the central government's dominance over foreign affairs has expanded.[37] 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)[38] 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.[39]This supposes a dualised conceptualisation of foreign affairs in Canada. However 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.[40]This was presumably calculated to encourage cooperation 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 virtue of section 91(2) of the Constitution Act, 1867,[41] this exclusive control was in reality subject to limitations. The limitations arose from the fact that the provinces were granted

[34] 30 & 31 Vict c 3.

[35] Christopher J Kukucha, *The Provinces and Canadian Foreign Trade Policy* (UBC Press 2008) 44.

[36] Kukucha (2009) (n 33) 27. See also Bernier (n 11) 51.

[37] Kukucha (2009) (n 37).

[38] [1937] AC 326.

[39] ibid. See also France Morrissette, 'Provincial Involvement in International Treaty Making: The European Union as a Possible Model' (2012) 37 (2) Queen's LJ 577, 583.

[40] Kukucha (2009) (n 37) 27.

[41] ibid.

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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.[42]

The outlook of these provisions and the interpretation given by the courts show 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.[43]

In relation to Canada's obligations under multilateral and regional trade agreements, the general attitude towards ensuring conformity of regions has given the central government additional oversight duties over the provinces.[44] 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 trade into areas of constitutional competence of the provinces, it has become imperative for the central government to constantly consult with the provinces.[45] This is no easy task because it is a game of balancing competing interests.

With Canada's involvement in the multilateral negotiations of the GATT from the onset of the multilateral trade system in 1947, elements of sub-national governments 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.'[46]

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

[42] 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.'

[43] Kukucha (2009) (n 41) 28-35; Anderson and Lecours (n 32) 21, 22-23.

[44] Kukucha (2008) (n 35) 44.

[45] 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 (2009) (n 43) 35.

[46] Kukucha (2008) (n 44) 43.

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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 consider an expanded provincial role*.'[47] Even though Ottawa was still sceptical about the involvement of the provinces at this point in time, this marked the birth of channels of cooperation 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.[48]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.*[49]

This intrusion of international trade disciplines during the 'Tokyo round' of negotiations necessitated the strengthening of linkages between Ottawa and the provinces. 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.[50] In response, the provinces '*especially Québec, Ontario, and Alberta, began to demand a more inclusive role in the formulation of Canadian foreign trade policy*.'[51] Ottawa

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[47] ibid 47. See also Ann Weston, 'The Canadian 'Model' for Public Participation in Trade Policy Formulation' (August 2005) The North-South Institute, Ottawa, Canada. 12 – 15 <http://www.nsi-ins.ca/wp-content/uploads/2012/10/2005-The-Canadian-model-for-Public-Participation-in-Trade-and-Policy-Formulation.pdf> accessed 24 June 2016.

[48] Christopher J Kukucha, 'The Role of the Provinces in Canadian Foreign Trade Policy: Multi-Level Governance and Sub-National Interests in the Twenty-First Century' (2004) 23 (3) Pol & Soc 113, 134.

[49] Kukucha (2008) (n 47) 47.

[50] Kukucha (2009) (n 45) 35.

[51] ibid.

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responded by attempting to institutionalise the interests of the provinces within the Canadian international trade mechanism by including a new **Federal Provincial Coordination Division (FPCD)** under the Ministry of External Affairs. The FPCD became responsible for keeping the provinces informed of all relevant Canadian international initiatives.[52]Other formal mechanisms for the input of the provinces in international trade negotiations included **The Canadian Trade and Tariffs Committee (CTTC)** introduced during the 'Tokyo round.'[53] The CTTC was responsible for gathering briefs from businesses, unions, consumer groups, the provinces and other interested parties during the Tokyo Round of negotiations at the GATT.[54] Subsequently, an '*…ad hoc federal-provincial committee of deputy ministers was established in 1975, which was replaced by a* ***Canadian Coordinator for Trade Negotiations (CCTN)*** *in 1977.*'[55] 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."*'[56] This led to a commitment to continued consultation within the CCTN.[57]

After the CUFTA agreement was implemented in 1987, the CCTN metamorphosed into the **Committee for the Free Trade Agreement (CFTA)** with each province having one official representative.[58] A series of consultative committees were also instituted within various provincial departments to cater for sectorial concerns.[59] The use of such committees became popular in the central government - provincial relationship on international trade negotiations throughout the 1980s.[60] For example during negotiations for the NAFTA, an additional

[52] ibid.

[53] David R Protheroe, *Imports and Politics: Trade Decision-Making in Canada, 1968-1979* (Institute for Research on Public Policy 1980)156.

[54] Kukucha (2009) (n 50) 36.

[55] ibid.

[56] ibid.

[57] ibid; Patrick Fafard and Patrick Leblond, 'Twenty-First Century Trade Agreements: Challenges for Canadian Federalism' (2012) The Federal Idea <http://ideefederale.ca/documents/challenges.pdf> accessed 24 June 2016.

[58] Fafard and Leblond (n 57) 5-6. See also Axel Hulsemeyer, *Globalisation and Institutional Adjustment: Federalism as an Obstacle?* (Ashgate 2004).

[59] Kukucha (2009) (n 56) 35.

[60] ibid.

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committee - **the Committee for North American Free Trade Negotiations (CNAFTN)** was introduced along with the CFTA.[61]

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 cooperation forum in Canada. It involves a series of meetings between Ottawa and the provinces which are held four times annually.[62] Both levels of government engage in consultations and information sharing, which includes Ottawa making draft documents available to the provinces when Canada enters negotiations in areas of provincial jurisdiction.[63] 'The provinces are encouraged to provide feedback and guidance on these proposals and federal negotiators are sensitive to the economic interests of the provinces.'[64]In addition to the CTRADE forum, Kukucha identifies three 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 one department at the provincial level in contact with Ottawa on international trade matters. Many of the larger Provinces have specific departments to coordinate CTrade and other foreign trade policy considerations. And even where these coordinating 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.*[65]

In summary, cooperation 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 sub-national governments as stakeholders in the changing landscape of international economic interactions in Canada. There have been calls for this model to be transplanted to other policy areas such as labour and the environment.[66]

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[61] ibid.

[62] Kukucha (2008) (n 49) 52.

[63] ibid 54. See also Fafard and Leblond (n 58) 22.

[64] Kukucha (2008) (n 62).

[65] ibid.

[66] ibid 58.

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In addition, constitutional formalisation of the existing channels of cooperation has been demanded by some provinces but rejected by Ottawa.[67]Although the system is without any formal constitutional entrenchment, its development over the years has been instrumental to maintaining the 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 and cautious. This model will subsequently be compared with the next case study – Belgium.

1.3.2 Belgium in focus

Belgium is a complex federal country made up of three Communities (the Flemish Community, the French Community and the German-speaking Community); three Regions (the Flemish Region, the Walloon Region and the Brussels Region); and four linguistic regions (the Dutch-speaking region, the French speaking region, the bilingual region of Brussels-Capital and the German-speaking region).[68] 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.[69]

With regard to the conduct of foreign policy in general, there is a formal constitutional structure for shared competence and cooperation among the component units of the Belgian federation.[70] This formalized process of cooperation is encapsulated in Art 167 (1) of the 2007 Belgium Constitution which stipulates inter alia for shared competence between the King, Communities and Regions *'To regulate international cooperation, including the concluding of treaties, for those matters that fall within their competences in pursuance of or by virtue of the Constitution.'*[71]

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[67] ibid 56.

[68] See art 1-4 of The Belgian Constitution.

[69] Francoise Massart-Pierad and Peter Bursens, 'Belgian Federalism and Foreign Relations: Between Cooperation and Pragmatisim' in Michelmann (ed) (n 32) 18ff, 19-20.

[70] Michael Keating, 'Regions and International Affairs: Motives, Opportunities and Strategies' (1999) 9(1) Reg & Fed Stud 1, 11.

[71] ibid. see Title IV Belgian Constitution. See also Stéphane Paquin, 'Federalism and Compliance with International Agreements: Belgium and Canada Compared' (2010) 5 Hague J Dip 173, 184-185. Other federal systems which have constitutional provisions formalising cooperation on foreign policy are, Argentina and Austria. For Argentina: see s 124 and 125 National Constitution of the Argentine Republic 1994 <http://pdba.georgetown.edu/Constitutions/Argentina/argen94_e.html> accessed 12 May 2014**.** See also Eduardo Iglesias, 'Argentina: The Growing Role in Foreign Affairs' in Michelmann (ed) (n 69) 9. For Austria: see art 23e of the Austrian Federal Constitutional Law (as amended in 1989). See also Stefan Hammer,

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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* between different levels of administration.[72] 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').[73] 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.[74] 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*.'[75]

The revision of the Constitution in 1993 built on the 1988 reform by further adapting the organization of Belgium's cooperation mechanism for international relations along the unique configuration of the Belgian federal system.[76] This led to the introduction of three 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.[77] Paquin explains how each category of treaties works thus:

'Austrian Federal Relations: Federal Precedence and Informal Regional Linkages' in Michelmann (ed) (n 69) 15.

[72] Paquin (n 71) 185; Massart-Pierad and Bursens, (n 69) 96 (extended version), 19 (Booklet Series).

[73] 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' (2003) 41(1) J His Phil 111; Jonathan Bennett, 'Selections from Thomas Hobbes – Leviathan' <http://www.woldww.net/classes/General_Philosophy/Hobbes_on_the_state_of_nature.htm> accessed 24 June 2016.

[74] Massart-Pierad and Bursens (n 72) 96.

[75] Paquin (n 72) 185.

[76] ibid.

[77] ibid.

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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 twenty different steps to complete the whole procedure.[78]

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 trade in areas such as foreign markets and exports (without prejudice to any national policy to coordinate and promote foreign trade and to generally cooperate in that area).[79]

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 three 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 art 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.[80] 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 coordination problems.[81] 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

[78] ibid.

[79] 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 Cooperation <http://diplomatie.belgium.be/en/policy/economic_diplomacy/division_of_powers/> accessed 03 June 2014; Paquin (n 78) 186ff, 190.

[80] Bursens and Massart-Pierad (n 74) 97-98.

[81] ibid.

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democracy, national security etc.).[82] Third, the regions and communities are obliged to inform the federal government of any foreign activities they are involved in.[83]

Another constitutional method adopted to ensure coordination in foreign policy is the use of Cooperation Agreements.[84] According to Bursens and Massart-Pierad, Cooperation Agreements '*broadly frame the application of Belgium's external relations by involving the various bodies involved*.'[85] 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 Cooperation 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.[86]

The institutional checks available to ensure coordination on foreign policy are mainly in the form of committees which are designed to maximise effective coordination by minimising potential friction among stakeholders. For example, there is the Inter-ministerial Committee on Foreign Policy (ICFP).[87] The ICFP Secretariat is maintained by the Foreign Service in charge of relations with Communities and Regions.[88] It does not meet on a regular basis with an average of two meetings happening per year.[89] Therefore, the system also relies on informal meetings between cabinet-level personnel and civil servants from both levels of government.[90] The primary objective of this committee is to minimise friction in the coordination mechanism on foreign policy by dealing with political conflicts.[91] It achieves

[82] ibid 98.

[83] ibid.

[84] ibid 101.

[85] ibid.

[86] Paquin (n 78) 189.

[87] ibid 187.

[88] ibid.

[89] ibid 188.

[90] ibid.

[91] ibid 101.

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this through a mechanism of dialogue and information exchange between the centre and the regions.[92]

From the foregoing, 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. In comparison with previous Canadian example, the intergovernmental mechanisms in Belgium are highly institutionalised.[93] As such, Belgium's compliance with international trade agreements is negotiated by all stakeholders and any decision reached is deemed to be the common position of the Belgian state.[94]

1.4 Distinct themes deducible from the two case studies

The details of the existing relationships between the provinces/regions and the central governments in the two countries discussed above allow some distinct themes to be deduced.

First, increased sub-national participation in international trade relations in both countries is occurring within the ambit of stronger intergovernmental cooperation, rather than direct engagement by sub-national governments with foreign entities.[95] Even though Belgium has more express constitutional provisions to support sub-national engagement in foreign affairs than Canada does, both countries appear to still be cautious about direct engagement of sub-national actors in trade negotiations with foreign states. More so, although the scope of cooperation is not restricted only to dialogue in Belgium but also extends to 'permitted policy action' taken by sub-national governments, these permitted policy actions are usually coordinated and supervised by the central government. In essence, the process is still controlled by the central government through checks and balances, such as the use of cooperation agreements and the constitutional restrictions under art 169 of the Belgian Constitution.

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[92] ibid 187.

[93] ibid 173, 177.

[94] ibid 184-187.

[95] The system is not closed to non – governmental actors in the process of cooperation. But the primary focus of the discussions in this paper is on sub-national actors in federal systems as stakeholders in international economic relations.

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Second, there are clear differences in the experiences of Canada and Belgium, which demonstrate that there is no uniform approach to conceptualising the accommodation of sub-national engagement on the international scene. However, in spite of the differing domestic approaches seen in both countries, there are areas of commonality. Notably, the level of engagement between sub-national governments and central governments on international trade negotiation (in both countries) is clearly being driven by growing mutual interests (between sub-national governments and central governments) on specific cross-cutting issues which new breed international economic agreements now cover. Also, the level of engagement (between sub-national governments and central governments) in both countries is being shaped by the differing priorities attached to specific trade topics.

Criekeman[96] distinguishes between 'conflictual' and 'cooperational' issues, arguing that areas, which are 'conflictual', are usually less amenable to strong cooperation between levels of government.[97] In this instance, the argument in this paper is that both 'conflictual' and 'cooperational' issues are spurring more sub-national engagement in international trade interactions in Canada and Belgium. The issues that are conflictual represent the areas in which the sub-national governments disagree with the central government and as such are therein agitating for different negotiating positions. Cooperational 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 governments are working more closely (in both countries) to achieve common purposes.

The Canadian experience shows that Ottawa has had to demonstrate a sense of commitment to implementing the mechanisms for cooperation between them and the provincial governments even in areas that are 'conflictual' or risk having the provinces exploit the loopholes in the constitutional provisions to take counterproductive action.[98] This could occur if the provinces dissent 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 the sub-national governments (this encompasses a broader scope of minority state and non-state

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

[97] ibid.

[98] Kukucha (2008) (n 64) 53.

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actors in a federal system) can contribute to the policy process in federal systems.[99] The effectiveness of dissent as a tool for facilitating cooperation 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 negotiation position adopted by Canada.[100] Specifically, Kukucha identifies that the original US proposal for art 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.[101]

Irrespective of the differences in approach of 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. Both systems place emphasis on the need for state participation in the policy formulation process instead of pursuing state regulatory autonomy.[102] *'This way, states thereby gain ex ante and ex post opportunities to influence federal law…'*[103] 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,[104] this also portrays how premature it is to imagine that any State will totally open up the policy space for their sub-national governments to have full and unrestricted access to the international economy.

[99] See generally, Heather K Gerken, 'Second-Order Diversity' (2005) 118 Harv L Rev 1099.

[100] Kukucha (2009) (n 61) 37.

[101] ibid.

[102] ibid 26.

[103] ibid.

[104] ibid 14ff, 23.

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1.5 Conclusion: 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 governments and foreign economic interactions are perceived as 'strange bedfellows'. As such, it is possible to down play the significance of sub-national activism 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 that are associated with this emerging phenomenon. In most of my conversations with people about my area of research, it seems amusing to some to even suggest that sub-national governments have a role to play in international trade (either as actors or regulators). The reality is that sub-national governments 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 governments were unwelcome 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. The experiences in Canada and Belgium demonstrate how two very dissimilar models can have distinguishable strands that unify them.

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