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Centre for International  
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# Subnational Participation in International Trade Law Options for the European Union

Markus W. Gehring





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## About the Author

Markus W. Gehring is a senior research fellow in the International Law Research Program at the Centre for International Governance Innovation, as well as the Sir Arthur Watts Fellow at the British Institute of International and Comparative Law. He is also a fellow at the Lauterpacht Centre for International Law at the University of Cambridge, where he teaches international and EU law. He also serves as lead counsel for trade law at the Centre for International Sustainable Development Law.

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## About the ILRP

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions among international and transnational law, Indigenous law and constitutional law.



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## Executive Summary

Subnational actors will increasingly play a role in international treaty making. The “Walloon CETA saga” that occurred during ratification of the Comprehensive Economic and Trade Agreement (CETA) in 2016, in which the Walloon Parliament initially blocked approval for Belgium to sign CETA, indicates that more attention is warranted as to how best to keep subnational interests represented as modern treaties increasingly affect the competences of such actors. If the European Union is to build cohesive economic policy and maintain legitimacy as a unified participant in international economic treaty making, a new, practical constitutional approach to consultation and engagement of subnational counterparts is needed.

Experiences during the recent CETA negotiations offer elements of creative ways forward that are gleaned from a considered comparison of European member-state approaches, taking into account the (admittedly EU-driven) Canadian consultation process as well. Beyond criticism and toward solutions, this paper presents innovative and viable recommendations rooted in principles of federalism, through a comparative analysis of the European Union and Canadian efforts to incorporate the interests of subnational bodies into international economic treaty making during the CETA negotiations.

The recommendations generated by this paper aim to contribute to the success and longevity of such modern, multi-faceted international economic treaty negotiations, moving toward trade agreements that can be ratified and implemented by all implicated authorities across Europe.

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## Introduction

In the often turbulent and dynamic sphere of modern international economic treaty making, few important trade decisions can be made without public scrutiny. While current dialogues that form international trade agreements are typically meant to be dominated by nation-states, as those nation-states bargain uniformly toward an agreement, federated entities, such

as states, cantons, provinces, territories, regions, communities and *laender* are increasingly voicing their concerns and attempting to participate in the international economic policy arena.<sup>1</sup> While the label “sub-federal actor” is sometimes used to describe these bodies, they can be more accurately characterized as federated entities that have their own constitutionally determined competences (jurisdiction) over different subject areas of law and policy. The growing body of academic literature in this field tends to take critical aim at democracy, its processes and its relationship to international law and largely ignores federalist instruments as sources of viable and practical solutions, post-critique.<sup>2</sup> Few examples so sharply define this scenario and draw out what some have characterized as the “structural weaknesses of the European Union as an external treaty-maker” as does the experience of the European Union and Canada in the ratification of CETA, the so-called “Walloon CETA saga” of 2016, in which the Walloon Parliament initially blocked approval for Belgium to sign CETA.<sup>3</sup> As some have noted, the difficulties and frustrations leading up to and including the Walloon and Brussels veto of the proposed CETA between Canada and the European Union simply emphasize the complexity

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1 As used in this paper, “federated” refers to a government structure comprised of polities with varying degrees of autonomy joined in a broader political union federation, whether they are, strictly speaking, federal states or not. In the EU context, the member states would be the European Union’s “federated entities.” At the member-state level, states, cantons, provinces, territories, regions, communities and *laender* would be the respective member state’s federated entities. In the Canadian context, provinces would be Canada’s federated entities. Although each union – the European Union or each member state – and its respective divisions may vary greatly, the paper argues that, in the context of treaty making, it is possible and even useful to analogize all entities at the top tier of a system of multi-level governance, as well as entities within any tiers falling below (within the context of a federation, the federated polities; within a centralized government, the sub-central entities; and within the context of a supranational organization such as the European Union, the national actors, in other words, member states). In most contexts, “national” would refer to the top-most level, and subnational would comprise both the federal and the federated entities (usually at the same level, but with different competences or jurisdiction) and sub-central entities. Thus, typically, federated entities are also subnational entities. Subnational can be used in a further stratified structure where there is a federation (the European Union), its federated members (individual countries) and their respective subnational entities (which may or may not be part of another federation). Subnational in this context thus falls into lower strata.

2 See e.g. Lorenzo Cotula, “Democracy and International Investment Law” (2017) 30:2 *Leiden J Intl L* 351.

3 David Kleimann & Gesa Kübek, “The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU: The Case of CETA and Opinion 2/15” (2016) European University Institute, Robert Schuman Centre for Advanced Studies Working Paper No 2016/58, online: <<http://cadmus.eui.eu/handle/1814/43948>>.

and potential problems that the European Union faces as a modern international trade partner.<sup>4</sup>

The Court of Justice of the European Union (CJEU) has mandated a “principle of unity”<sup>5</sup> in the European Union’s external decision making. Insofar as the European Union seeks to maintain and propagate any aspirations toward this unity as a legitimate international trade-law maker, it will be important to learn from the recent experiences of CETA and the Walloon dissent that so nearly derailed the signature of the approved trade accord. Whether an international actor can address and incorporate the voices and interests of federated entities in a pragmatic way, in the international economic treaty-making process, remains a key question. If the European Union can find new ways to deal with subnational interests within the European Union, it will be better situated, or at least better legitimized, in future negotiations.

In order to develop workable, long-term trade and treaty-making policy and to bolster legitimacy in both the process and product, the European Union can draw upon the instruments and approaches of several countries where federated interests have been or are currently being addressed in international trade treaty making. In the context of CETA, a spectrum of useful examples exists across a continuum from exclusion (and subsequent veto) to consultation to co-decision, with the Canadian approach as one viable source of ideas. Canada is, after all, a highly federal constitutional entity, itself, and is currently negotiating multilateral and bilateral agreements with a very diverse set of countries around the world. As a small and highly liberalized economy, Canada also has a reputation for seeking “twenty-first century” or “second generation” economic agreements.<sup>6</sup> These “new school”<sup>7</sup> international economic agreements necessarily address a multitude of sectors and interests, with nation-states seeking highly integrated economic and global trade

and investment conditions and, by extension, implicating subject matter that is shared with or found squarely within the sole jurisdiction of subnational actors, such as the Canadian provinces (in other words, investment, natural resources, health, education and the environment).<sup>8</sup>

For the European Union, the relevant federated entities are its member states. While the EU member states have transferred to the European Commission competence over many areas concerning trade and investment, the member states continue to have competence over certain subjects that are covered by the European Union’s new economic partnership, association or trade agreements. For instance, the CJEU recently found the investment chapters of the European Union’s trade accords to be still largely within EU member-state competence. The termination of existing member-state investment treaties falls within the member states’ exclusive competence, where the European Union has no competence at all.<sup>9</sup> The new challenge that this paper addresses is what occurs beyond the member state-European Commission relations, namely at the subnational level within the member states: more accurately, these are the federated entities within member states themselves that are dealt with.<sup>10</sup>

The European Union can learn from the CETA negotiation and approval processes, and can adapt and better sustain its legitimacy as a unified actor in future international trade negotiations. In particular, given the European Union’s insistence on full engagement of the Canadian provinces in CETA’s negotiation, it may even be possible to examine the Canadian manner of managing the balance between the federal competence of *entering* into treaties and the federated interest in ensuring that the provinces can actually *implement* such international instruments, in order to find useful lessons for new forms of multi-level governance, such as the European Union.<sup>11</sup>

4 Ian Laird & Flip Petillion, “Comprehensive Economic and Trade Agreement, ISDS and the Belgian Veto: A Warning of Failure for Future Trade Agreements with the EU?” (2017) 12:4 *Global Trade & Customs* J 74.

5 See Anne Thies, “General Principles in EU External Relations Law” in Marise Cremona & Anne Thies, eds, *The European Court of Justice and External Relations Law: Constitutional Challenges* (Oxford, UK: Bloomsbury, 2014) 176.

6 Patrick Fafard & Patrick Leblond, *21st Century Trade Agreements: Challenges for Canadian Federalism* (Montreal, QC: The Federal Idea, 2012) at 3, online: <<https://theyee.ca/News/2014/08/13/CETA-challenges.pdf>>.

7 This is the author’s term.

8 Fafard & Leblond, *supra* note 6.

9 See the CJEU Opinion 2 of 2015 on the EU-Singapore Free Trade Agreement, which details the competences of the European Union in a modern free trade agreement: *Opinion of the Court (Full Court) of 16 May 2017, C-2/15* [2017] ECLI:EU:C:2017:376 [CJEU C-2/15].

10 See Michèle Finck, *Subnational Authorities in EU Law* (Oxford, UK: Oxford University Press, 2017).

11 J Anthony VanDuzer & Melanie Mallet, “Compliance with Canada’s Trade and Investment Treaty Obligations: Addressing the Gap between Provincial Action and Federal Responsibility” (2016) 54:1 *Alta L Rev* 89.

The first part of this paper outlines how the European Union and Belgium dealt with Wallonia's concerns during the CETA negotiation. In the second section, the paper surveys the experiences and treatment of the subnational actors in other EU nations to better situate the Walloon CETA constitutional situation among a spectrum of continental peers. The paper also considers how the federal government of Canada involved its own provinces in CETA negotiations, partially in response to very firm requests from the European Union as its negotiating partner. In the third part, the paper explores options and consequences of inaction or inadequate action to engage federated entities and the need for innovative policy solutions to better ensure the continued legitimacy of the European Union as a unified actor in international treaty making. Finally, the paper concludes by making practical recommendations as to how the European Union can learn from other federated experiences and build a more inclusive trade policy-making process, which is not so cumbersome as to never result in successful trade negotiations. The Appendix provides further constitutional legal summaries of similar external relations competences.

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## CETA and the Challenge of Federated Engagement

### The European Union's Constitutional Consultation Concerns and CETA

The European Union's drive toward a comprehensive and far-reaching economic and trade arrangement with Canada gave rise to difficult economic policy conversations (and, in some instances, court cases and resistance movements) among jurisdictions within the negotiating parties.<sup>12</sup> The European Union had distinct aspirations for the liberalization of trade, including for intricate areas such as government procurement, regulatory cooperation and

investment. However, CETA met several negotiating roadblocks. For instance, government procurement is very much within the competence of the Canadian provinces, where the federal government, which was leading the negotiations, had little influence. The European Union demanded major liberalization in this area, so that EU companies would be able to bid for government procurement contracts at all levels of government in Canada. This demand was mainly due to the complex interests of federated entities and confusion surrounding the key operative legal principles at play in the European Union (including the principle that the European Union will respect the constitutional requirements of its member states).<sup>13</sup>

CETA took a total of eight years to be negotiated, and its form and substance saw some significant transformations as several EU member states and Canadian provinces, as well as civil society actors, raised concerns over a number of proposed disciplines, including, in particular, the notion to adopt comprehensive investor-state dispute settlement (ISDS) to govern investment disputes.<sup>14</sup> Issues surrounding the legal competence of the European Union to enter into such an agreement, and local concerns about the effects of Canadian competition (specifically, in the agricultural sectors of several member states), were also raised very late in the negotiations.<sup>15</sup>

The commission's legal service on behalf of the Directorate-General for Trade issued a legal opinion which suggested that all of CETA would fall under the exclusive competence of the European Union. Member states that had actively participated in the negotiation were very concerned that they could not engage their parliaments in the ratification process and objected strongly.<sup>16</sup> Commission President Jean-Claude Juncker strongly recommended that CETA should be ratified as a European Union-only agreement.<sup>17</sup> Member-state trade ministers disagreed, and, after a week of uncertainty, the

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13 *Ibid.*

14 *Ibid* at 168.

15 *Ibid* at 171.

16 "Gabriel warnt: Kanada-Abkommen Ceta muss durch Bundestag", *Die Zeit* (13 June 2016), online: <[www.zeit.de/news/2016-06/13/eu-gabriel-warnt-kanada-abkommen-ceta-muss-durch-bundestag-13172207](http://www.zeit.de/news/2016-06/13/eu-gabriel-warnt-kanada-abkommen-ceta-muss-durch-bundestag-13172207)>.

17 "Juncker fordert den EU Alleingang", *Das Handelsblatt* (28 June 2016), online: <[www.handelsblatt.com/politik/international/ceta-handelsabkommen-juncker-fordert-den-eu-alleingang/13802142.html](http://www.handelsblatt.com/politik/international/ceta-handelsabkommen-juncker-fordert-den-eu-alleingang/13802142.html)>.

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12 Laird & Pettillon, *supra* note 4 at 167–68.

Commission proposed that CETA should be ratified as a mixed agreement, which requires the signature and approval of all EU member states.<sup>18</sup>

The situation proved to be more complicated in Belgium than in many other EU member states, simply because the Belgian Constitutional Court had ruled that certain regional parliaments needed to approve an international agreement before the Belgian federal government would be permitted to sign the agreement on behalf of the Kingdom of Belgium.<sup>19</sup> Such constitutional requirements do not exist in other member states, where, generally, the signature of an international treaty is determined at the federal level, although its ratification may involve many actors.<sup>20</sup> In many federally constituted member states, the federated entities' organs or representatives participate in international treaty making at some stage. For example, in Germany, the Bundesrat is a federal organ, similar to the US Senate, which must approve the ratification legislation of most new international treaties. What distinguishes Belgium is the new decision by its constitutional court that requires such organs' intervention before Belgium can consent to the signature of an agreement. This is in contrast to other states where the negotiation, conclusion and signature of international agreements falls within the federal government's external relations prerogative. This potential veto situation arose in the final stages of the negotiation of CETA, and it left the commission wondering how best to proceed in order to avoid a major disappointment for Canada and the failure of its own efforts to successfully conclude a comprehensive trade agreement.

The EU treaty-ratification procedures require approval by the council, the institution in which the member states are represented at the executive level, and by the European Parliament as well. In the council, a qualified majority is required for approval and, in the European Parliament, a

simple majority is sufficient. However, in mixed agreements, all governments will also require their respective legislatures to approve the agreement. The challenge is greater for the EU member states that are federally or quasi-federally constituted because they might require cooperation by the federated entities in the ratification process, as was so visibly demonstrated by the Walloon saga. There is little or nothing the European Union, itself, can do in such a situation.<sup>21</sup> The European Union will not instruct its member states on how to engage with their own constitutional requirements. However, the looming threat of rejection of the trade treaty by the parliaments of several EU member states that are competent to ratify international agreements could (in the long term) hamper the European Union's ability to conclude such agreements.

As commentators argued at the time, Canadians were a trifle surprised to learn that, notwithstanding seven years of negotiations, Prime Minister Justin Trudeau would not be able to sign the EU-Canada CETA on October 27, 2016, in Brussels, as initially planned. Indeed, Canada was informed that as a "mixed" treaty — falling almost entirely under EU jurisdiction and on a few unspecified points under national jurisdiction — CETA could only be signed if all EU member states unanimously agreed. However, the Belgian government would not be able to give its consent to CETA because the francophone Parliament of the Wallonia-Brussels Federation had voted against the agreement. As Markus Gehring and Armand de Mestral noted in a commentary that was published at that time, the opposition to trade deals such as this was not surprising.<sup>22</sup> What was surprising was that the European Union had apparently "moved the goal posts" for an international treaty, in part, by requiring unanimity for CETA's signature (in addition to the necessary post-signature ratification by the European Union and each of its member states).<sup>23</sup> This appeared to be an entirely new practice, unheard of until very recently.<sup>24</sup>

18 Janyce McGregor, "Canada gets clarity on how Europe will ratify trade deal facing dissent, European Commission proposes 'mixed' agreement — meaning individual countries must vote", CBC News (5 July 2016), online: <[www.cbc.ca/news/politics/ceta-european-commission-ratification-mixed-competency-1.3664884](http://www.cbc.ca/news/politics/ceta-european-commission-ratification-mixed-competency-1.3664884)>.

19 *Ibid.*

20 In the European Union, up to 38 parliamentary chambers, including regional ones, have to approve CETA. See UK Parliament Research Service, "CETA: the EU-Canada free trade agreement" (12 September 2017), online: <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7492#fullreport>>.

21 Guillaume Van der Loo & Ramses A Wessel, "The non-ratification of mixed agreements: Legal consequences and solutions" (2017) 3 Common Market L Rev 735.

22 Markus Gehring & Armand de Mestral, "EU Should have Told Canada it was Moving the Goal Posts", *The Globe and Mail* (21 October 2016), online <[www.theglobeandmail.com/report-on-business/rob-commentary/eu-should-have-told-canada-years-ago-it-was-moving-the-ceta-goal-posts/article32463376/](http://www.theglobeandmail.com/report-on-business/rob-commentary/eu-should-have-told-canada-years-ago-it-was-moving-the-ceta-goal-posts/article32463376/)>.

23 *Ibid.*

24 *Ibid.*

Article 218.8 of the governing Treaty on the Functioning of the European Union (TFEU) states that “the Council shall act by a qualified majority throughout the procedure.”<sup>25</sup> The qualified majority is met when 55 percent of states representing 65 percent of their population vote in favour of a measure. Qualified majority voting was gradually introduced into EU law to stop one country from blocking decisions, as France’s leader Charles de Gaulle did in the 1960s. Mixed agreements pose special problems in that, at least in the ratification stage, all countries need to agree. But until CETA, unanimity had not been required for signing a trade treaty. In fact, in the case of the 2015 Paris Agreement on climate change, the European Union moved away from even this requirement of all EU member states ratifying a mixed agreement, ratifying the agreement without all EU member states having ratified the international treaty first. As the Gehring and de Mestral commentary argued, it was “disappointing that the European Union did not inform Canada of its intentions to require that mixed treaties be approved unanimously some seven years ago before CETA negotiations began.”<sup>26</sup> The authors considered it likely that such a shift had been influenced by a decision from the German Constitutional Court on October 13, 2016, allowing Germany to consent to CETA despite domestic legal challenges that suggested the trade agreement would undermine democratic rights. The court ruled, however, that Germany’s consent would be on a provisional basis only, subject to a right to rescind and subject to the decision in the Council of the European Union being unanimous. (As the German Constitutional Court is not authorized to rule on the substance of EU law, which is reserved to the CJEU by article 344 of the TFEU,<sup>27</sup> this was a somewhat pyrrhic victory.) As Gehring and de Mestral noted at that time,

The EU prides itself on following the rule of law. While political obstacles are relevant in the political decision-making process, they should not be portrayed as legal obstacles. Making it more difficult than the law permits to see EU consensus is irresponsible and could have far-reaching implications. That the ratification of

CETA would be a long, not to mention circuitous, process on the EU side was always clear. But it is disappointing that the EU did not inform Canada of its intentions to require that mixed treaties be approved unanimously some seven years ago before CETA negotiations began.<sup>28</sup>

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## Conferral and Implications on Federated Engagement

The European Union operates under the basic constitutional principle of conferral, which determines that the Union shall act only within the limits of the competences conferred on it by member states in the EU treaties to attain the objectives set out therein and that powers not given to the Union remain with member states.<sup>29</sup> The European Union has exclusive competences, such as international trade; shared competences, such as the environment; and supporting competences, such as for education.<sup>30</sup> In practice, this presents certain legal issues in terms of what types of international agreements the European Union is able to enter into, and what types — or forms — of conduct require the consent of member states. If an international agreement covers areas over which both the Union and member states exercise their respective competences, the agreement is considered to be “mixed,” meaning that both the Union and member states will need to ratify it.<sup>31</sup> CETA was a mixed agreement because some areas of the treaty (such as portfolio investment and dispute resolution) engaged the member-

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25 *Treaty on the Functioning of the European Union*, 13 December 2007, [2008] OJ, C 115/47 art 218.8 (entered into force 1 December 2009) [TFEU].

26 Gehring & de Mestral, *supra* note 22.

27 TFEU, *supra* note 25, art 344.

28 Gehring & de Mestral, *supra* note 22.

29 Laurens Ankersmit, “The Power to Conclude the New Generation EU FTAs: AG Sharpston in Opinion 2/15” (13 March 2017) *Investment Treaty News* (blog), online: <[www.iisd.org/itm/2017/03/13/the-power-to-conclude-the-new-generation-of-eu-ftas-ag-sharpston-in-opinion-2-15-laurens-ankersmit/#\\_edn2](http://www.iisd.org/itm/2017/03/13/the-power-to-conclude-the-new-generation-of-eu-ftas-ag-sharpston-in-opinion-2-15-laurens-ankersmit/#_edn2)>. Ankersmit cites *Consolidated Version of the Treaty on European Union and the Treaty on the Functioning of the European Union*, [2012] OJ, C 326/01 art 5 at paras 1–2 (entered into force 1 January 1958) [TEU], online: <<http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:12012E/TXT>>.

30 Ankersmit, *supra* note 29.

31 *Ibid.*

state powers.<sup>32</sup> Ratifying CETA would require the approval of all 28 member states. According to the jurisprudence of the CJEU, member states are barred under EU law from negotiating international treaties in areas of EU competence, even if the European Union has not currently exercised its competence. The CJEU draws this principle of “loyal cooperation” from the fact that member states have to give full effectiveness to EU law.<sup>33</sup> The European Union, in areas of its exclusive competence, thus acts resembling a “federation of Sovereign States” in contrast to a simple alliance of like-minded states.

“Mixity” — the negotiation of international agreements in areas of mixed competences — is becoming more of an exception in EU law. Between 1995 and 2009, mixity constituted the standard form of trade treaties by the European Union. However, with the advent of significantly broader competences under the Treaty of Lisbon, more EU-exclusive trade and investment agreements are expected.<sup>34</sup> Nevertheless, mixity critically mobilizes and empowers sub-federal actors such as Wallonia by providing treaty-approving agency — linked directly to the mixed nature of competences addressed in certain international agreements. Sub-federal entities such as Wallonia have been vested with the power to approve certain types of international treaties in order for Belgium to be able to consent or sign. In essence, this means that mixity, as it is implemented in the European Union, provides such entities with the power to veto international agreements, such as CETA. Unlike in Canada where, due to legislative and other factors, the most likely hindrance to the treaty’s legitimacy would primarily stem from disagreements at the implementation stage, the commission’s main vulnerability in passing CETA hinges on the individual approval of every member state of the whole of a mixed agreement.<sup>35</sup> This vulnerability is not new, but it has recently extended to the

signature phase for some states. This creates, in essence, a treaty-making Achilles heel in terms of the European Union’s ability to enter into certain international treaties. As such, Wallonia, taking a stance against the ISDS and other clauses dealing with competition in the agriculture sector, decelerated what was hoped to be a speedy jaunt through the provisional approval process by holding up CETA’s signature for a week until certain, relatively minor, alterations to the treaty text were made.<sup>36</sup> Such a system of approval called into question the unity of international representation. Canadian politicians even felt compelled to talk to the Walloons directly in order to avoid a standoff.

In the CETA negotiations, it would have been preferable if each member state had secured prior internal approval of the negotiation mandate, including by their respective federated entities, where needed. Under EU law, it is the primary responsibility of the constituent member states, including Belgium, to ensure active consultation and participation of the subnational level. The regions are mentioned in the EU treaties, and they have their own EU organ, the Committee of the Regions.<sup>37</sup> The Belgian constitutional position now requires the signature of any international agreement to be met with the agreement of all of Belgium’s sub-federal actors. This situation posed the question whether there is something else that the European Union could have done to engage or consult all subnational actors, who have to ratify the treaty eventually, at an earlier stage. While such engagement and consultation might pose complicated questions of EU competence, such a proposal could rely on the existing institutions tasked with regional representation.

Canada’s approach during the CETA negotiations was to consult its provinces during each round of negotiations in order to engage their subject-matter expertise, respond to their concerns and accommodate their respective interests. However, there was no similar engagement by the European Union of European subnational entities, at least, not until the Walloon voiced their opposition and put signing the agreement at risk. The specific constitutional situation in Belgium enables its

32 See the helpful clarification that the sustainable development chapter falls under the exclusive EU competence in CJEU C-2/15, *supra* note 9.

33 See most recently *Germany v Council*, C-399/12, [2014] ECLI:EU:C:2014:2258, online: <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=158373&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1345079>>.

34 See Joris Larik, “No mixed feelings: The post-Lisbon Common Commercial Policy in Daiichi Sankyo and *Commission v. Council (Conditional Access Convention)*” (2015) 52:3 *Common Market L Rev* 779, online: <<https://openaccess.leidenuniv.nl/handle/1887/50798>>.

35 In a Canadian context, this would be similar to each province having a veto on the entirety of any international agreement into which the federal government attempted to enter.

36 Christian Oliver, Hans von der Burchard & Simon Marks, “How the EU threw away its trade powers” (21 October 2016) *Politico* (blog), online: <[www.politico.eu/article/walloon-rebellion-threatens-commissions-trade-powers/](http://www.politico.eu/article/walloon-rebellion-threatens-commissions-trade-powers/)>.

37 European Committee of the Regions, online: <<http://cor.europa.eu/en/Pages/home.aspx>>.

regional parliaments<sup>38</sup> to prevent the federal government from signing agreements such as CETA.<sup>39</sup> In a decentralized governance model, the considerable regional and federated authority led to the dramatic, but eventual, approval of CETA. This approval was subject to Walloon conditions that *had* to be met — lest the entire international instrument fail, unless it were to be repacked into an EU-exclusive agreement.

The rift between federal law-making powers and provincial implementation creates a critical limiting factor in Canada's ability to carry out international treaty obligations within a federated jurisdiction, similar to the way the governance model employed in the European Union (based on the principle of conferral) places limits on the ability of the European Union to enter into such international agreements.

In the multi-level governance system of the European Union, which does recognize each member state's regions to a certain extent,<sup>40</sup> the federated entities are usually kept informed of, and indeed consulted in, trade and other economic treaty negotiations. In turn, these federated entities should engage their own subnational bodies. The European Union should also ensure that a European-level dialogue is initiated and kept in place with interested entities, engaging the subnational bodies directly through the Committee of the Regions. This could be done, for instance, by changing the role of the Committee of the Regions in trade negotiations and, also, for example, by requiring a mandate from the regions and their home institutions on issues that invoke their competences. These practical arrangements hold the potential to strengthen the European demos (as a sense of legitimate democratic engagement) and also to decrease the likelihood of future last-minute regional vetoes.

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38 Belgium has three linguistic communities, each with its own Parliament: the Parliament of the Flemish Community, known as the Flemish Parliament; the Parliament of the French Community; and the Parliament of the German-speaking Community. Belgium also has a Parliament for each region: the Flemish Parliament (which acts both as a regional and linguistic Parliament), the Walloon Parliament and the Brussels Parliament (article 115 of the Belgian Constitution). This results in at least five Parliaments, besides the federal Parliament in Belgium.

39 Eric Maurice, "Local Opposition to EU Trade Deal Multiplies", *EU Observer* (3 June 2016), online: <<https://euobserver.com/economic/133696>>.

40 See Finck, *supra* note 10.

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## Consultation and Managing Federated Interests

Canada incorporated and adapted innovative negotiation techniques as a result of federated consultation with the provinces and territories. Early and fulsome consultation shaped the negotiations and was a critical factor in the eventually successful completion of CETA because the treaty embodied cooperation between a federal actor that relied on federated entities — the provinces — which have no authority to negotiate internationally, for implementation of parts of the international agreement. The European Union has a dual challenge in this regard — under EU law, not even the member states have the right to negotiate trade agreements, as this falls under the exclusive competence of the Union (except in very few areas),<sup>41</sup> and the European Union cannot legally require that its member states consult with their respective subnational entities before casting their votes in the Council. Thus, based on the Canadian experience in CETA, this paper focuses on proposing a more appropriate approach to international negotiations for the European Union in the future.

First, in the CETA negotiations, Canada consulted earlier and more earnestly than in the prior Canada-EU trade negotiations that failed in 2006.<sup>42</sup> The very laudable CETA experiment of provincial participation happened gradually, over several negotiation rounds. Unfortunately, such arrangements are not currently being replicated in the North American Free Trade Agreement context, and this may lead to concerns in later stages. Notwithstanding, the European Union very much welcomed the participation by the Canadian provinces. EU analysis had shown that the Canadian provinces' support and engagement would be essential for the implementation of

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41 See CJEU C-2/15, *supra* note 9.

42 Christopher Kukucha, "Provincial/Territorial Governments and the Negotiation of International Trade Agreements" (October 2016) Montreal Institute for Research on Public Policy Insight No 10 at 6, online: <<http://irpp.org/wp-content/uploads/2016/10/insight-no10.pdf>>, noting the failure of the 2006 Canada-EU Trade and Investment Enhancement Agreement, where the provinces were not involved in the negotiations until, subsequently, in objection, much later in the process.

CETA, if it were to offer more to Europe than had already been secured through existing relationships with the federal government.

The provinces were not initially in the room in terms of first-hand participation in the negotiations, themselves, until the European Union conceded that reaching an agreement with provincial commitments took precedence over typical negotiation formalities.<sup>43</sup> While a conclusive analysis of the CETA experiment would be beyond the scope of this paper, it should also be highlighted that such a negotiations dynamic has not yet been repeated by the federal Canadian government in subsequent negotiations. This said, Canada's other trade negotiations do not propose to create such close economic relationships as CETA does. The incorporation of the provinces enabled the federated actors whose implementation capacity would be committed to have the opportunity to observe the complexities of negotiating a binding and multi-faceted international trade agreement that touched and relied on all levels of government. In principle, every state decides who comprises its delegation in international negotiations, although there are legal, political and practical limits as to how many actors could be accommodated in the negotiation room, and contracting partners would not want trade negotiations to be conducted in public.

Second, addressing specific issues of concern for the provinces added a degree of legitimacy to their role in the talks because the provinces primarily weighed in only where their interests were directly the focus of the negotiation.<sup>44</sup> It also added, in the end, to the internal (in other words, domestic) legitimacy of CETA and made ratification in Canada less problematic for the federal government, as areas falling under the provinces' jurisdiction, for instance, sectors such as services, procurement, monopolies, technical barriers to trade, investment, labour and environmental issues, and state-owned enterprises, were thus easier to discuss.<sup>45</sup> While, at times, the provincial participation created complexity in the negotiations (Team Canada sometimes doubly or triply outnumbered its EU counterparts), it also made the task of negotiation simpler for the federal negotiators on whose

shoulders the negotiations would ultimately rest because they could immediately consult with their provincial counterparts to get a more legitimate guarantee that obligations would be fulfilled post-agreement.<sup>46</sup> In this way, provincial participation in the CETA negotiations bore something of a dual role as well — one in the consultative manner, safeguarding provincial concerns and having the provinces experience the process of international treaty making first-hand as observers, and the other as a capacity or internal trust-building exercise between the federated and federal actors.

Further, the Canadian approach of bringing the provinces to the negotiating table, while cumbersome because it engaged more actors than a typical negotiation between federal officials of the parties involved and was ultimately unsuccessful,<sup>47</sup> nevertheless had the significant indirect benefit of sidestepping potential internal objections between provincial actors: as a result, there existed no single unified objection to the whole of CETA across various federated entities.<sup>48</sup> As Christopher Kukucha identifies, "The lack of convergence among the provinces on all aspects of CETA meant that Ottawa never faced internal pressure from a pan-Canadian provincial/territorial negotiating front. There were horizontal attempts to facilitate dialogue between provincial and territorial negotiators in some areas, such as labour mobility, but these tended to be general discussions that did not focus on technical language. Ultimately, where provincial/ territorial cooperation did occur was on specific sectoral negotiations, where commonalities were easier to identify."<sup>49</sup>

Essentially, the adjustment toward incorporation of provincial views and the preferences of the EU trade partners led to a situation where it seems that *commonalities*, rather than differences, generated a better dynamic, and it appears that Canada was able to avoid such pan-provincial objections that may have undermined the CETA negotiations and the agreement, itself.<sup>50</sup> Indeed,

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43 *Ibid.*

44 *Ibid* at 7.

45 *Ibid* at 3.

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46 *Ibid* at 7.

47 Having the provinces in the room proved unworkable and, toward the end of the negotiations, they were "phased out." Canada reverted to its traditional consultation method of briefing the provinces on a daily basis, after the bilateral talks had concluded for the day and without the EU negotiators present. See Kukucha, *supra* note 42 at 8.

48 *Ibid* at 10.

49 *Ibid.*

50 This is the author's inference.

provincial objections delayed Canada's joining the International Centre for Settlement of Investment Disputes (ICSID) convention for many years.

Prior consultation works quite differently from dealing with *ex post facto* objection. The federal government had to resolve provincial concerns regarding the ICSID convention one by one over the course of many years. In contrast, the early involvement of federated entities would assist ratification or the implementation process because objections would likely have been resolved during the negotiation process.

It is important to note that the legal and constitutional constraints that trigger provincial consultation throughout negotiations such as the CETA negotiations, due to the provinces' role in the implementation phase, also prevent Canada from experiencing a Walloon-like scenario similar to the one that could have hampered signature of CETA. This is because the signatory power lies with the federal government alone. Unlike in the EU structure, no single province, or even a group of provinces, can hold an international agreement hostage at the eleventh hour, prior to its signature, as occurred in the CETA negotiations, to preclude Canada from signing an international agreement. In an early consultation-type system, such as that advanced by Canada in CETA, any such show-stopping concerns would most likely be addressed well in advance of the negotiation and well before signatories' pens were drawn.

However, as evidenced by Canada's experience with the ratification of the ICSID convention, the impact of constitutional limits such as those placed on the Canadian federal government by the authority vested in the provinces at the implementation stage can have practically the same effect as the European Union's inability to sign such agreements without full federated support, especially given the modern economic treaty-making context, with an increasing variety of interlocking subject matters. And while it would not be unusual if other countries were to face similar constitutional limits on their treaty-making powers, many modern economic agreements reach deeply into the national constitutional order and, thus, are likely to engage all levels of government more directly.

While some have noted that the Canadian constitutional system, in which the federal government has exclusive competence to negotiate and enter into international agreements,

is preferable<sup>51</sup> to the Belgian system, in which federated entities may preclude the federal government from signing such agreements, the practical effect is similar, although it manifests itself at a later stage. This is because a lack of legal authority at the federal level in Canada to *implement or carry out obligations* contained in such agreements is, in practice, akin to not having the authority to consent to enter into the agreement in the first place.<sup>52</sup> In essence, the threat of default on a federal actor's international obligations and the threat of being unable to enter into such obligations similarly undergird the practical reality of both Canada and the European Union needing to consult with their respective federated actors in order to be able to enter into international treaties with a maximum degree of legitimacy.

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## The Walloon CETA Saga in Its Constitutional and Continental Context

A common understanding of the role of a federal entity in international treaty making is that the federal entity possesses the sole agency to negotiate, conclude and enter into international treaties. However, in certain EU countries, distinct constitutional heritages underpin a diverse continuum of a sub-federal actor's ability to engage in and influence international treaty making.<sup>53</sup> For example, nations such as Germany and Austria display a strong federalism, where sub-federal actors are well represented in

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51 Stéphane Paquin, "Federalism and Compliance with International Agreements: Belgium and Canada Compared" (2010) 5 Hague J Diplomacy 173, online: <[www.stephanepaquin.com/wp-content/uploads/2017/06/HJD-PDF-final.pdf](http://www.stephanepaquin.com/wp-content/uploads/2017/06/HJD-PDF-final.pdf)>.

52 *Ibid* at 180, citing A Patry, *Le Québec dans le monde* (Montreal, QC: Leméac, 1980) at 155: "the case of the Labour Conventions, that challenged the ability of the Canadian government to legislate in provincial fields of jurisdiction in order to implement international engagements"; and also citing, "For example, the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards was concluded by Canada's federal government (step 1), but was implemented (step 2) by the two levels of government: federal and provincial. The Hague Convention on Civil Aspects of the Abduction of Children was concluded by the federal government (step 1), but implemented exclusively by the provinces (step 2)."

53 See the Appendix for a survey of the treatment of sub-federal actors in the referenced EU member states.

organs of the federal government. As such, the external representation of sub-federal concerns — including in the development and undertaking of international obligations — is less problematic because sub-federal rights and competences are protected at the constitutional level.

In a second category are countries such as Spain, where the wide autonomy for provinces is constitutionally protected, but where strong centralizing tendencies also exist. For this group, external representation is a growing concern, especially given desires for independence that are very much alive in certain sub-federal factions in both countries. As well, with Spain and the European Union, sub-federal actors (Catalan and Basque *comunidades*) are not limited from self-representation in Brussels, despite certain other constitutional ceilings in place that restrict all international negotiations to the federal government.<sup>54</sup> In such a system, while significant grey areas arise with overlapping competences and constitutionally protected authorities as split between sub-federal and federal entities, so arises a type of consultative process by which sub-federal actors gain a voice in otherwise off-limits international discussions.

Belgium finds its place among federal constitutional structures, where sub-federal entities are constitutionally empowered to impact international negotiations. The Walloon saga stands as an important canary in the mine shaft as to the potential consequences of such mixed, decentralized constitutional structures if sub-federal interests are left unaddressed.

Last, in a final category, are countries such as Italy and the United Kingdom, which — while not strictly federal states — nevertheless grant subnational actors many rights. For this group, external representation was never a question, but is now becoming one, as subnational actors acquire more competences and would prefer to self-represent their interests internationally.

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<sup>54</sup> Spanish Constitution, BOE No 311, 29 December 1978, art 149(1)(3), noting “foreign affairs” captures all EU affairs.

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## Toward Engagement and Effectiveness in Trade Negotiations among Federated Entities: Identifying Options for Engagement in Trade Treaty Negotiations

International treaty implementation is less problematic in EU law, theoretically. Once a treaty has been ratified, it becomes part of EU law. As such, the European Union can compel member states to comply with international treaties via the violation complaint procedure. It is ultimately for the constitutional order of the member state in question to decide how it ensures compliance, as only the member state, not its subnational actors, is held directly responsible for any breach.<sup>55</sup> However, international treaty negotiation, signature and ratification in the European Union may benefit from more innovative thinking. As the Walloon CETA saga demonstrated, the European Union is still developing its treaty-making procedures and arrangements on several levels. The European Union could do nothing, but to strengthen this capacity and ensure that the European Union is best enabled to enter into international economic treaties with the full knowledge and consent of the member states, avoiding later signature or ratification obstacles, there are other alternatives available.

### Option 1: Do Nothing

A failure to consider the interests of member states and their subnational entities holds the potential to undermine the European Union’s effectiveness as a treaty maker. If the scale and ambition of international economic treaties such as CETA continue to grow, touching on the subject matter and jurisdictional purview of the myriad federated entities that comprise multi-level governments,

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<sup>55</sup> This question was raised in the *Köbler* case (Case C-224/01 [2003] ECR I-10239) before the CJEU, in which Austria argued that it had no constitutional mechanism to ensure compliance of the Land Tirol with EU law. The court decided that state responsibility still lay with the Austrian federal government.

doing nothing will become more difficult. If clumsy, heavy-handed decision making is perceived to persist, the European Union risks being plagued by difficult debates and challenges in its internal relations and by concerns over its ability to sign and ratify accords in its external relations. Where the content or administration of modern economic agreements touches on the competences of member states and their subnational levels, if nothing is done, the European Union will be constrained to conclude treaties only in the areas of its own exclusive competences, or else to painstakingly seek consent from all these actors, one by one. International economic law in the European Union can and does affect many other subjects, including investment, health and the environment.

If nothing is done, the European Union faces what Tanja Borzel terms a “double legitimacy trap”: a declining (perceived or actual) problem-solving capacity in the context of external treaty relations (output legitimacy) can no longer compensate for the lack of democratic participation and accountability (input legitimacy).<sup>56</sup> In the new economic treaty making, mixity seems a more likely scenario than sole EU competency. Modern trade agreements, which recognize and seek to reflect the effects of economic changes on the broader social and environmental fabric of the jurisdictions involved, will almost certainly affect subject matter under subnational jurisdiction, thus requiring a new approach to international treaty making. If the European Union remains inactive in terms of identifying contentious sticking points and consulting those affected, EU decision makers may expect federated actors to continue to block even the preliminary approval of new economic agreements at their points of pressure, much as Wallonia did with respect to CETA.

## Option 2: Innovate Enhanced Consultation Mechanisms

The European Union may decide to innovate, seeking to secure the eventual signature and ratification of the new treaties into which it aspires to enter by identifying and engaging earlier and more strategically with key member states and their subnational entities on their interests and

issues. In many cases, the balancing of subnational interests falls squarely within the competence of the EU member states themselves. Theoretically, it is the responsibility of these member states to ensure that adequate consultations and engagement take place. The German Constitutional Court has ruled that both the Senate-like Bundesrat (as the representation of the *laender*) and the parliamentary Bundestag must be consulted at the earliest stages and give consent prior to Germany’s consenting to new economic commitments at the EU level, such as loans or expenditures.<sup>57</sup>

Complex consultation arrangements for international trade policy are not completely foreign to the European Union. Indeed, it could be argued that, in some ways, the European Union has actually made the World Trade Organization (WTO) more workable, as only the commission represents the European Union and its member states. The European Union uses methods developed through its Committee of the Regions of EU member-state trade ministers, where the European Union has adopted a system of consulting member states before negotiation guidelines are drawn up and informing them periodically as negotiations progress. Only the commission represents the body as a whole, and the committee is equipped to agree on changes in trade negotiation strategy on short notice. A similar mechanism that widens the circle among interested subnational entities, as these same subnational authorities become ever more sophisticated in identifying their economic, environmental and social interests, may be worth considering.

While such efforts may be viewed as half-hearted by some, the adoption of a system of negotiation that provides for federated engagement, while avoiding the creation of a process that is far too cumbersome to be practical (in particular, if only one side opts for a collaborative model), may hold the potential to yield benefits for those consulted and for the eventual treaty, itself.<sup>58</sup> If steps are taken toward proactively engaging with the subnational authorities, as Canada tried to do during the CETA negotiations

<sup>56</sup> Tanja Borzel, *What Can Federalism Tell Us About the European Union? The German Experience* (London, UK: Royal Institute of International Affairs, 2003), online: <[www.chathamhouse.org/sites/files/chathamhouse/public/Research/Europe/borzel.pdf](http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Europe/borzel.pdf)>.

<sup>57</sup> BVerfG, *Judgment of the Second Senate of 21 June 2016*, 2 BvR 2728/13, ECLI:DE:BVerfG:2016:rs20160621\_2bvr272813 [OMT Decision], online: <[www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/06/rs20160621\\_2bvr272813en.html](http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/06/rs20160621_2bvr272813en.html)>.

<sup>58</sup> See previous comments on the 20- to 30-person delegations and discussions between Canada and the European Union during the CETA negotiations.

(although bringing the subnational authorities to the negotiations was ultimately not successful), by using innovative consultation mechanisms in real time, the overall legitimacy and effectiveness of the European Union to continue to forge international trade relationships may be better served. In essence, as in a firm in which the workforce is directly engaged and able to assist in the preparation of a highly competitive international bid, the European Union — it is hoped — will sow the seeds of understanding for the overall trade negotiations strategy and its expected returns earlier, and this will lead to higher support for the eventual accord and greater success in signature, ratification and implementation.

### Option 3: Attempt Multi-level Co-negotiation of International Accords

Certain experts, especially those with less enthusiasm for new trade liberalization commitments, have argued that nothing short of the elevation of federated actors to nation-state status will ensure that subnational bodies can be engaged in an economic treaty-making process and, therefore, motivated to respect the international commitments contained therein.<sup>59</sup> Indeed, some have suggested that in the CETA context, at a certain point, Canada was too ambitious, giving its provinces what was essentially a seat at the table, rather than simply maintaining the consultative and collaborative arrangements that had been established, although it should be acknowledged that in the final stages of the negotiations, Canada reverted to its traditional consultation method.<sup>60</sup> Such an option risks the scenario where every country or federal entity appears at the trade negotiations table alongside a full array of provinces, states, regions, departments, communities or municipalities, attempting to reach agreement among themselves on every minor point. Such a scenario would be completely unworkable and would lead to chaos in external representation. However, international relations are not possible without a level of cohesion and representation for domestic interests. For instance, it is hard to imagine any gains that would outweigh the complexities of attempting to engage, alongside the 162 WTO members themselves,

direct representation of the 10 provinces and three territories from Canada; this was also the conclusion by the Canadian federal government for the later phases of the CETA negotiation.

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## Practical Recommendations for European Trade Policy Making

As the European Union has no competence to encourage its member states to consult their subnational actors, it follows that the European Union should be more proactive in informing and consulting them. The EU Committee of the Regions is one of the organs that could serve such a consultation and information purpose. Currently, the Committee of the Regions is only involved at the very end of a trade negotiation. However, this mechanism could be consulted much earlier, or even used to identify important issues up front and to develop strategies and scenarios for decision making. For certain discussions, such as trade negotiations that affect education and training, which is a devolved competence held by regional or local authorities in many member states, early discussion rounds between the commission and affected local authorities, facilitated by the Committee of the Regions, could ensure more informed trade policy making and fewer obstacles for signature and ratification of the eventual accord. Generally, the Canadian model, which did not grant formal authority to the provinces, but involved them early on, suggests that such arrangements might lead to better decisions. While Canada changed the approach in the late phases of the CETA negotiation (as such, the experiment might be called a failure), the Canadian model also shows that for many of the high level — rather than the more detailed technical — discussions, more levels of government can be engaged.

As a global adjustment to the EU approach to treaty making, complete consultation — communicated both internally to subnational authorities with whom the European Union seeks to engage, as well as externally to potential trading partners — can offer the European treaty-making process greater verisimilitude. The perception and reality

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<sup>59</sup> Paquin, *supra* note 51 at 177.

<sup>60</sup> Kukucha, *supra* note 42.

of effectiveness, it can be argued, is something that the European Union seeks, and perhaps even requires, to engage in international treaty making. Trade agreements, today, do affect many areas of policy, beyond straight economic exchanges. The modern treaty-making contexts compel innovation that is pragmatic and workable in real time. By consulting early, substantively and comprehensively with affected subnational actors to identify interests and to posit likely scenarios with options, the European Union has the potential to engage all relevant parties critical in the approval process. Such an approach can also prepare potential partners for a more boldly collaborative trade strategy and secure more informed, knowledgeable mobilization of the benefits of a new treaty by the same subnational authorities. By encouraging the EU Committee of the Regions to take up the enhanced consultation role, the commission can also spread the load and responsibility of such complex and nuanced negotiations within and between its member states and federated constituencies, bolstering both the internal and external credibility — as well as the longevity and benefits — of new economic agreements.

While the conundrum of the Walloon CETA saga in a trade agreement signature process may occur again in the future, it is time to review how the European Union can, while being respectful to the EU member states' constitutional orders, ensure greater participation of subnational actors. The EU constitutional order is a living one, which should be able to adapt to new constitutional realities, such as the Belgian requirement of consent by its federated parliaments. Consultation of civil society at large is now enshrined in the sustainability impact assessment process, but more needs to be done to include all constitutional actors. It will not be surprising if future EU trading partners will insist on either EU-competence-only trade agreements or a guarantee of consultation and agreement on scenarios with both federated entities and subnational authorities, just as the European Union requested from Canada during the CETA negotiations. Such requests are not impositions, but rather opportunities. They offer the potential for better informed and engaged participation of subnational actors in EU external decision making and, in the end, more sustainable trade treaties.

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## Appendix: Treatment of Sub-federal and Federal Actors in Certain EU Member States with Regard to International Relations

### Belgium's Trade Conversations with Its Communities

Situated at the decentralized end of the European continuum, the Kingdom of Belgium is a relatively young federal state compared to others on the Continent.<sup>61</sup> As such, up until 1993, foreign policy was almost entirely the responsibility of the federal-level government.<sup>62</sup> The organization of foreign relations is what makes Belgian federalism most remarkable, as regions and communities now enjoy full foreign relations for the sectors they govern domestically.<sup>63</sup> In Belgium, both the territorial entities and linguistic groups enjoy participation in foreign relations, largely strengthened to the point where even the signature of a new international treaty requires their consent.

### The United Kingdom's Engagement of the Home Nations on Trade Policy

At the other end of the federalism spectrum is the United Kingdom, which operates on a model of consolidated foreign affairs management in which the different home nations or devolution entities only enjoy devolved powers that do not bar the central level from exercising any foreign relations powers, including the national authority to enter into international treaties. This was recently tested in the seminal *Miller* case in the UK Supreme Court in which the developed administrations of Wales, Scotland and Northern Ireland argued that they must give consent before the United Kingdom could trigger article 50 of

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<sup>61</sup> *Ibid* at 105.

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

<sup>63</sup> *Ibid* at 106.

the Treaty on European Union to withdraw from the European Union. The UK Supreme Court ruled unanimously that the authority of Wales, Scotland and Northern Ireland was devolved and, while certain constitutional conventions protect their legislative authority, no such conventions existed in international relations.<sup>64</sup>

In this way, the United Kingdom falls into the centralizing school, which asserts that foreign affairs are the sole domain of federal-level actors.<sup>65</sup> In the United Kingdom, CETA could only be accepted, rejected or indefinitely delayed (essentially blocked) by the Westminster Parliament.<sup>66</sup> It should be noted that the United Kingdom is not explicitly federal, but rather just devolved powers, which, theoretically, the Parliament in Westminster could always exercise.<sup>67</sup>

## Italy's Regional Debates on Trade

Despite the fact that Italy is not a federal state, treaty making in Italy resembles the German model, with sole jurisdiction over international relations residing in the central government, but with a significant concurrence of state and regional power to Italy's 20 regions.<sup>68</sup> Notably, the Italian constitution protects the realm of international relations as solely a federal-level power vested in the office of the president, but foreign trade, most of which is now attributed to the European Union, is legally considered one of many concurrent powers held between both

regional and state governments.<sup>69</sup> Louis F. Del Duca and Patrick Del Duca note that Italy seems to be in the midst of an experiment, evolving from a unitary to a decentralized, federal-type constitutional democracy.<sup>70</sup> This decentralization stems from a long history in Italy of conferring constitutional powers and protections to regions whose political voices present a more (e.g., historically, geographically or politically) unified and independent voice or, more plainly, to those subnational actors that pose a threat to national cohesion.<sup>71</sup> Similarly, subnational actors in Italy could play a larger role in the treaty-making process because the regions often, as in Germany, implement and administer a lion's share of the treaty conditions, especially in trade arrangements.<sup>72</sup>

## Spain's *Comunidades* and Trade Policy

Spain operates a type of dual or cooperative regionalism.<sup>73</sup> The Spanish model of regionalism, often described in Spanish literature as that of the "state of the autonomies" (*estado de las autonomías*), precludes the direct participation of federated interests in foreign affairs, but nevertheless reserves a healthy amount of autonomy for nationalities and regional concerns.<sup>74</sup> As Thomas Alexander Vandamme notes, "Probably [the] most striking feature [of Spanish Federalism] is its 'variable speed federalism' whereby the different regions are allowed to develop their

64 *R (on the application of Miller and another) v Secretary of State for Exiting the European Union*, [2017] UKSC 5, aff'g [2016] EWHC 2768 (Admin) & [2016] NIQB 85 [Miller].

65 Paquin, *supra* note 51, citing KC Wheare, *Federal Government* (Oxford, UK: Oxford University Press, 1967) & Rufus Davis, "The Federal Principle Reconsidered" in Aaron B Wildavsky, ed, *American Federalism in Perspective* (Boston, MA: Little Brown, 1967).

66 Dominic Webb, "CETA: The EU-Canada Free Trade Agreement" [2017] House of Commons Library Briefing Paper No 7492 at 17, online: <[www.parliament.uk/wp-content/uploads/2015/09/CBP-7492.compressed.pdf](https://www.parliament.uk/wp-content/uploads/2015/09/CBP-7492.compressed.pdf)>.

67 See the extensive discussion by the UK Supreme Court in *Miller*, *supra* note 64, rejecting approval by Scotland or Wales of the article 50 trigger, but see submissions by both nations.

68 Committee of Legal Advisors on Public International Law, *Expression of Consent by States to be Bound by a Treaty: Analytical Report and Country Reports* (Strasbourg, France: Council of Europe, 2001) at 25. Louis F Del Duca & Patrick Del Duca, "An Italian Federalism? The State, Its Institutions and National Culture as Rule of Law Guarantor" (2007) 54:4 Am J Comp L 799 at 10, online: <<https://ssrn.com/abstract=942868>>.

69 Del Duca & Del Duca, *supra* note 68 at 15, nn 75, 76.

70 *Ibid* at 10.

71 *Ibid*: "The Constitution [in 1948] accorded Five Outlying Regions (Friuli-Venezia Giulia, Sardinia, Sicily, Trentino-Alto Adige and Val d'Aosta), so-called Special Statutes, which afforded them some immediate autonomy reflective of comparative geographic isolation, prior legislative and administrative self-sufficiency, and linguistic minorities."

72 See among others Giulio Vesperini, "Regional and Local government in Italy: an overview" at 2-4, online: <[www.irpa.eu/wp-content/uploads/2011/06/vesperinig.pdf](http://www.irpa.eu/wp-content/uploads/2011/06/vesperinig.pdf)> or possibly Stelio Mangiameli, ed, *Italian Regionalism: Between Unitary Traditions and Federal Processes* (Switzerland: Springer International, 2014) at 291, nn 33, 34, online: <<https://books.google.ca/books?id=McolBAAQBAJ&pg=PA295&ots=RYZxpereG1&dq=Italy%20treaty%20implementation%20regions&pg=PA291#v=onepage&q=Italy%20treaty%20implementation%20regions&f=false>>.

73 Thomas Alexander Vandamme, "From Federated Federalism to Harmonized Federalism? The Case of EU Subsidiarity Scrutiny in Spain and Belgium" (2011) Amsterdam Law School Research Paper No 2011-15 at 14, 17, online: <<https://ssrn.com/abstract=1890496>>, <<http://dx.doi.org/10.2139/ssrn.1890496>>.

74 *Ibid* at 14, 17.

level of autonomy at their own pace until all have reached the ceiling as set by the Constitution. Thus, by gradual devolution, a federal system is established with the ambition to accommodate the wishes of the ‘nationalities’ (a term not defined by the Spanish Constitution, but usually understood as referring to the Basque, Catalan and Galician Regions) but that aims to firmly encapsulate them in a balanced federal system.”<sup>75</sup>

However, while the leading legal principle in Spanish federal relations is that of divided competence, rather than that of hierarchy,<sup>76</sup> much overlap and many grey areas exist in terms of the delineating competences. Importantly, the Spanish model (unlike the Belgian model) clearly limits external or foreign relations to the sole jurisdiction of the federal government.<sup>77</sup> However, due to structural impediments,<sup>78</sup> a progression from competitive to collaborative engagement between the federated and central governments<sup>79</sup> and the relative inequality of “stronger” regions exerting more political influence than “less strong” regions,<sup>80</sup> many federated entities (*comunidades*) started to “face outwards” and develop direct contacts with the European Union and other foreign institutions.<sup>81</sup>

As such, in terms of treaty making, the influence and role of federated entities in Spain appears to be necessarily evolving toward more consultative,

cooperative engagement, despite the federal government’s exclusive foreign affairs jurisdiction.<sup>82</sup>

## Austria’s *Laender*-level Discussions of Trade Policy

As a federal state comprised of highly autonomous yet integrated regions (*laender*), Austria is a European example of how integration between federated actors and external, or foreign, actors can evolve. *Laender* participate in the regional bodies of the European Union and the Council of Europe, and both federal and external relations occur in a highly developed structure. As Hans Michelmann summarizes, “Article 10 of [the federal Constitution Act] assigns the external political and economic representation of Austria to the federation. The federal order also holds the treaty-making power, although it must consult with the *Länder* before concluding international treaties that the *Länder* would be required to implement. The views of the *Länder*, however, are not binding. Only if the federation concludes treaties on matters within the jurisdiction of the *Länder* is the approval of the Federal Council, the second chamber of federal Parliament, required.”<sup>83</sup>

However, in 1988, an amendment to the Constitution Act conferred competence upon the *laender* to enter into treaties, following notice to and final approval of the federal government.<sup>84</sup> The *laender* have taken a more active interest in international negotiations recently. For example, this has led Austria to adopt several resolutions seeking to have the General Agreement on Trade in Services exempt areas of traditional federated authority, such as water, health, education, audio-visual services, urban transport and social services.<sup>85</sup>

75 *Ibid* at 14–15, citing Spanish Constitution, *supra* note 54, art 2.

76 *Ibid*.

77 *Ibid* at 22, citing Spanish Constitution, *supra* note 54, art 149(1)(3), noting “foreign affairs” captures all EU affairs.

78 *Ibid* at 17: “the lack of territorial representation of the *Comunidades* in the Senate is, according to some, a flaw in the system that hampers regional legitimacy of the federal institutions and a major challenge as to their representation in EU affairs.” Vandamme (*supra* note 73) cites Daniel J Elazar, *Exploring Federalism* (Tuscaloosa, AL: University of Alabama Press, 1987). See A Martin, “El control del principio de subsidiariedad” in *La constitucionalización del proceso de integración europea* (Madrid, Spain: AEPDIRI, Colección Escuela Diplomática, 2005) at 53; Javier Laso-Pérez, “Parliamentary Control of European Union Affairs: From a Slow Adapter to a National Player? The Role of National Parliaments in the European Union” in *Proceedings of the FIDE XXIV Congress* (Madrid, Spain: Servicio de Publicaciones de la Facultad de Derecho Universidad Complutense de Madrid, 2010) at 460.

79 Vandamme, *supra* note 73.

80 *Ibid* at 22: “Catalan and Basque nationalist parties are represented in the Cortes which provides further opportunities for these *Comunidades* (and their parliaments) not in the least as they are constantly essential key players in the formation of the federal government.”

81 *Ibid* at 18.

82 This is the author’s inference.

83 Hans Michelmann, *Foreign Relations in Federal Countries* (Montreal, QC: McGill-Queen’s University Press, 2009) at 66.

84 *Ibid* at 71.

85 *Ibid*.

## Germany's *Laender*-level Consultations on Economic Negotiations

Germany engages in cooperative federalism — where powers are jointly shared among federated governments rather than being located at one level exclusively.<sup>86</sup> As such, it resembles a similarly decentralized model of governance, as does Belgium, and shares the risks associated with the type and amount of localized input and agreement required for Germany to enter into certain types of international or EU-bound agreements.<sup>87</sup> Regional units of governance in Germany enjoy a wide swath of sovereignty and articulate their interests through voluntary coordination and cooperation with the central (federal) government, typically in the form of intergovernmental conferences.<sup>88</sup> The functional division of powers creates a domestic system where the central (federal) government makes certain laws that the federated governments are tasked to implement.<sup>89</sup> As well, major policy initiatives usually require the consent of both the federation and a majority of the federal units.<sup>90</sup> The federal level enjoys exclusive external representation in theory only, where it enjoys competence, but this was seen as weakening the external relations of the early Federal Republic of Western Germany. As such, the federal level and the *laender* agreed on the Agreement of Landau, which requires early consultation by the federal level in areas where *laender* competences are involved, but bars *laender* from engaging in their own international relations. The agreement thus guarantees unity in external representation in exchange for early consultation.<sup>91</sup> It also guarantees that a rejection by the Bundesrat, the second chamber representing all *laender*, cannot be overturned by the Bundestag, the directly elected first chamber.<sup>92</sup>

Such institutional autonomy is further complemented by economic and fiscal autonomy, whereby local-level fiscal decisions are not hindered

by the interventions of central government.<sup>93</sup> With CETA, significant federated opposition arose throughout the discussions in the form of regional protests in numerous cities, mainly related to ISDS, yet approval by the relevant federated actors was achieved, evinced by the national-level signature of Germany to the mixed agreement.<sup>94</sup>

## Canada's Practice of Provincial Engagement in Trade Negotiations

As Canada negotiated CETA, it faced a dual challenge of managing expectations and relationships with treaty partners, while also respecting provincial jurisdiction and the constitutional division of powers.<sup>95</sup> With its ambitious aspirations to secure access to a vast market of 500 million people in 27 countries, with the potential to create up to 80,000 new jobs and inject up to \$12 billion a year into the Canadian economy, including a 20 percent boost in two-way trade, Canada was motivated by the economic and political capital offered by CETA. At the federal level, negotiations thus moved toward finding workable solutions to the legitimacy and implementation concerns and constitutional grey zones such an agreement would raise with a variety of its federated actors.<sup>96</sup> As J. Anthony VanDuzer and Melanie Mallet note, the hurdles toward striking a deal were not insignificant:

Canada's federal system makes negotiating treaty obligations in areas of provincial jurisdiction particularly difficult. Canada's ability to implement its trade and investment treaty commitments collides with its division of law-making powers. The federal government has exclusive authority to commit Canada to international obligations in any area, but compliance with international obligations in areas of provincial competence, like local procurement, is within provincial

<sup>86</sup> Borzel, *supra* note 56 at 2.

<sup>87</sup> See OMT Decision, *supra* note 57.

<sup>88</sup> Borzel, *supra* note 56 at 3.

<sup>89</sup> *Ibid* at 4.

<sup>90</sup> *Ibid*.

<sup>91</sup> Lindauer Abkommen 1957.

<sup>92</sup> See also Bund-Länder-Vereinbarung in Angelegenheiten der Europäischen Union.

<sup>93</sup> Borzel, *supra* note 56.

<sup>94</sup> *Ibid*. See also Alicja Siekierska, "What You Need To Know About CETA", *The Globe And Mail* (6 July 2016), online: <[www.theglobeandmail.com/report-on-business/what-you-need-to-know-about-ceta/article30764897/](http://www.theglobeandmail.com/report-on-business/what-you-need-to-know-about-ceta/article30764897/)>.

<sup>95</sup> VanDuzer & Mallet, *supra* note 11.

<sup>96</sup> Barrie McKenna, "Canada-EU Talks Push Cities, Provinces into Constitutional Grey Areas", *The Globe and Mail* (4 November 2012), online: <[www.theglobeandmail.com/report-on-business/canada-eu-trade-talks-push-cities-provinces-into-constitutional-grey-areas/article4911048/](http://www.theglobeandmail.com/report-on-business/canada-eu-trade-talks-push-cities-provinces-into-constitutional-grey-areas/article4911048/)>.

jurisdiction. The federal government has no constitutional power to compel provincial compliance. Canada is internationally responsible to its partners if provinces act contrary to treaty obligations, but the provinces have no legal responsibility under domestic or international law to comply with Canadian treaties.<sup>97</sup>

Essentially, CETA pitted the federal treaty-making competence against the provincial treaty-implementing power, with the potential consequence of provincial non-compliance threatening to undermine Canada's ability to carry out its CETA obligations.<sup>98</sup> As well, the negotiation drew the interests of federated entities to the forefront of the treaty conversation because the *content* of the federal obligations set out in the treaty often fell squarely within the responsibility and jurisdiction of the provinces.<sup>99</sup>

Since no constitutional or other legal mechanism could compel the compliance of the provinces (or other sub-federal actors, such as cities and so on) and the federal government could not rely on federated non-adherence for default (as per the Vienna Convention), the CETA negotiation at the federal level for Canada essentially occurred on two fronts: one at home with its domestic federated counterparts and the other with its primary trans-Atlantic treaty partner, the European Union.

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97 VanDuzer & Mallet, *supra* note 11 at 2, citing Peter Hogg, *Constitutional Law of Canada* (Toronto, ON: Carswell, 2012) (loose-leaf 2011 supplement) 11-2, 11-19; Allan E Gotlieb, *Canadian Treaty-Making* (Toronto, ON: Butterworths, 1968); Robert Howse, "NAFTA and the Constitution: Does Labour Conventions Really Matter any More?" (1994) 5:3-4 *Const Forum* 54 at 54; Joanna Harrington, "Scrutiny and Approval: The Role for Westminster-Style Parliaments in Treaty-Making" (2006) 55:1 *ICLQ* 121 at 122, 136ff; *Canada (AG) v Ontario (AG)*, [1937] AC 326, [1937] 1 DLR 673. VanDuzer & Mallet note at n 9 that "the situation in Quebec is modified by *An Act Respecting the Ministère des Relations Internationales*, SQ M-251.1, under which the Minister of Economy, Science and Innovation may agree to the signing of a trade treaty that affects any matter within the province's jurisdiction (s. 22.1). The Act contemplates that Québec is only bound to the treaty if it consents to it, which requires the approval of the National Assembly (ss 22.3, 22.4). Following such consent, Quebec appears to be obliged to implement the treaty."

98 VanDuzer & Mallet, *supra* note 11 at n 11, note that "a state is internationally responsible for actions that are not in compliance with the state's international obligations. A state cannot invoke any internal constitutional rules that allocate jurisdiction to subordinate levels of government as an excuse for non-compliance." See *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, 8 ILM 679, art 27 (entered into force 27 January 1980).

99 McKenna, *supra* note 96, citing Fafard & Leblond, *supra* note 6.



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