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RESEARCH ARTICLE

UK post-Brexit trade agreements and devolution

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Abstract
This paper examines the role to be played by the devolved administrations in the negotiation, conclusion and implementation of trade agreements concluded by the UK post-Brexit. By examining, from a comparative perspective, examples of collaborative frameworks between sub-national entities and central governments established in federal jurisdictions, it proposes a significant reform of existing inter-governmental cooperation mechanisms to ensure that the devolved administrations are given a meaningful voice in the shaping of future trade agreements.

Keywords: Brexit; devolution; trade; WTO; FTAs; EU; comparative federalism; inter-governmental relations

Introduction

For the past 40 years, the UK has been precluded from carrying out its own international trade policy. Under the Common Commercial Policy, the EU has the exclusive competence to conduct trade policy and relations on behalf of its Member States. This includes the right to regulate all aspects of external trade and to conclude trade agreements. Those powers will be repatriated once the UK formally leaves the EU, meaning that the UK will be solely responsible for its external trade relations. This will enable the UK to negotiate and conclude its own trade agreements and to regulate market access issues (eg tariffs, subsidies, trade remedies) in the future, and it will also require the establishment of new legislative and institutional frameworks under which the UK's trade policy will operate.

The ability to negotiate trade agreements has also been identified by the UK government as one of the key 'red lines' in the negotiating objectives for exiting the EU,[1] and the UK has already established a Department of International Trade whose remit includes the negotiation of future UK trade agreements. Much has already been discussed and written about the existing legal parameters (at both EU and international level) within which the UK trade policy will be conducted, as well as the shape that the UK's future trade policy may take.[2] Far less attention, however, has been devoted to the decision-making processes which will underpin the UK's trade policy and law and, in particular, the constituent actors that will be involved in shaping such policy and law. This question is particularly relevant with respect to the UK's the devolved administrations, which will all have a significant stake in the UK's future trade policy. Not only will trade have a considerable impact on the economies of the devolved administrations, but many of the issues that will be addressed in trade agreements will fall under the

[†]I would like to thank Gordon Anthony, John Morison and Ohio Omiunu for comments on previous drafts. Any errors and omissions remain my own.

[1]Theresa May, 'The government's negotiating objectives for exiting the EU' 17 January 2017, available at https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech.

[2]See for example E Lydgate et al 'The UK trade landscape after Brexit' UK Trade Policy Observatory, October 2016; R Holmes et al 'Negotiating the UK's post-Brexit trade arrangements' (2016) 238(1) National Institute Economic Review R22–R3; H Hestermeyer and F Ortino 'Towards a UK trade policy post-Brexit: the beginning of a complex journey', King's College London Law School Research Paper No 2017-04.

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competence of devolved administration. This paper argues that a significant level of involvement of the devolved administrations in the development and implementation of the UK's trade policy is desirable, in order to ensure a coherent and inclusive trade policy which takes into account the interests and needs of all of the UK's constituent parts.

Currently, cooperation between Whitehall and the devolved administrations in the UK is governed by the Devolution Memorandum of Understanding (MoU), a non-binding instrument that spells out the principles and institutions that underpin arrangements for inter-governmental relations.[3] However, the cooperation mechanisms established by the MoU have, in practice, proved largely ineffective and much UK inter-governmental cooperation occurs through bilateral and informal communication channels. Therefore, this paper seeks to explore the possibility of developing a cooperation structure and processes which would enable the devolved administrations to have a tangible impact on shaping the negotiations of trade agreements. It does so by examining, from a comparative perspective, examples of collaborative frameworks between sub-national entities and central governments established in federal jurisdictions, namely Canada, Germany and the USA. Of course, the models of inter-governmental cooperation developed in these jurisdictions may not necessarily be transposable to the UK because of differences between federalism and devolution. In particular, the clear constitutional demarcation of power between different levels of government in federalism offers sub-federal entities a higher degree of autonomy compared to devolution, where the sovereignty of parliament is maintained and powers are merely 'delegated'[4] to territorial units and can, ultimately, be revoked by parliament.[5] Nevertheless, the practical similarities between federalism and devolution mean that a comparative analysis is worthwhile.[6] This can identify best practice developed in federal systems that could be explored in the UK context, and which could enhance the impact of the devolved administrations on the decision-making process.

In particular, with respect to Northern Ireland, the need to avoid a hard border Ireland has led to a proposal for the establishment of a legal regime that could affect the UK's ability to negotiate trade agreements. Under the Protocol on Ireland/Northern Ireland annexed to the EU-UK Withdrawal Agreement of 25 November 2018,[7] unless the parties are able to reach an agreement which would obviate the need for border checks on goods within the island of Ireland, the UK will have to align itself with the EU Common Customs Tariff[8] and Northern Ireland would be subject to additional EU legislation, namely the Union Customs Code[9] and all the ancillary legislation listed in Article 5 (2) of the Union Customs Code, as well as those provisions set out in Annex 5 of the Protocol, mostly in relation to sanitary and phystosanitary, agricultural rules and staid aid.[10] If implemented, this regime would, firstly, mean that the UK would not have the power to set its own tariffs and, secondly, that Northern Ireland would be de facto excluded from trade in goods components of any future UK FTAs. However, since the UK Parliament has so far refused to approve the Withdrawal Agreement,[11] the status of Northern Ireland within the UK's post-Brexit trade policy remains unclear.

[3]Memorandum of Understanding and Supplementary Agreements between the UK Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee (October 2013), available at https://www.gov.uk/government/publications/devolution-memorandum-of-understanding-and-supplementary-agreement.

[4]SD O'Connor 'Altered states: federalism and devolution at the real turn of the millennium' (2011) 60(3) Cambridge Law Journal 503.

[5]V Bogdanor 'Constitutional reform in Britain: the quiet revolution' (2005) 8(73) Annual Review of Political Sciences 84.

[6]P Leyland 'The multifaceted constitutional dynamics of UK devolution' (2011) 9(1) International Journal of Constitutional Law 253.

[7]Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council on 25 November 2018. Text available at https://www.gov.uk/government/publications/withdrawal-agreement-and-political-declaration.

[8]Ibid, Art 3, Annex 2.

[9]Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code OJ L 269, 10.10.2013.

[10]Ibid, Art 6(2) Protocol.

[11]Commons votes to reject Government's EU Withdrawal Agreement, 29 March 2019 https://www.parliament.uk/business/news/2019/march/mps-debate-and-vote-on-the-withdrawal-agreement-with-the-european-union/.

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Section 1 of the paper discusses why the repatriation of trade competences to the UK raises the question of the role to be played by the devolved administrations in the development of the UK's trade policy and, in particular, the negotiation of trade agreements. Section 2 examines examples of inter-governmental cooperation practices in the area of in trade policy adopted in certain in federal jurisdictions with the aim of distilling the strengths and limits of available models, with a particular focus on the USA, Germany and Canada. It aims to assess different systems of inter-governmental cooperation that have enabled sub-national entities to have an impact on the negotiation of trade agreements. Section 3 examines current inter-governmental cooperation frameworks in the UK, arguing that these have proved ineffective in fostering cooperation between Whitehall and the devolved administrations in the field of international relations and therefore do not provide a template for future cooperation in the area of trade. This section also outlines various reform proposals that should be considered in order to establish a system of inter-governmental cooperation that is fit for purpose in the context of post-Brexit trade agreements.

1. The rationale for inter-governmental cooperation in the area of trade policy

(a) The overlap between trade policy and devolved matters – a constitutional perspective

Contemporary trade agreements have become all encompassing. They no longer focus exclusively on classic trade issues such as trade in goods or the removal of 'border measures' such as tariffs.[12] Today, the scope of trade agreements has expanded to cover a wide array of economic issues – from goods and services to procurement, competition policy, environmental and labour standards and human rights – and is increasingly focused on the removal of trade barriers that result from regulatory diversity. The emphasis is thus placed on adoption of common regulatory principles and standards on issues which, historically, have been the exclusive remit of national sovereignty.[13]

The strong regulatory dimension of contemporary trade agreements means that these agreements intrude upon various aspects of regulatory and domestic policy-making. The upshot is that these agreements have become extremely politicised, raising significant questions concerning their democratic legitimacy.[14] This is nothing particularly new. A recent example of this politicisation can be seen in the difficulties faced by the EU in its attempts to negotiate the Transatlantic Trade and Investment Partnership (the TTIP), a trade agreement with the USA.[15] Throughout the negotiations, the EU was faced with strong resistance from politicians and civil society actors alike because of the perception that the agreement would lead to a lowering of EU regulatory standards on issues such as consumer protection and environmental standards.[16] Trade agreements are in this way increasingly characterised by a tension between the use of trade agreements to regulate transnational issues and the resulting loss of regulatory autonomy and democratic accountability.[17] This tension is heightened

[12]R Baldwin '21st century regionalism: filling the gap between 21st century trade and 20th century trade rules', Staff Working Paper ERSD-2011-08, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1869845.

[13]W Dymond and M Hart 'Post-modern trade policy, reflections on the challenges to multilateral trade negotiations after Seattle' (2000) 34(3) Journal of World Trade 21; H Horn et al 'Beyond the WTO? An anatomy of EU and US preferential trade agreements' (2010) 33(1) The World Economy 1565; R Baldwin 'WTO 2.0: governance of 21st century trade' (2014) 9 (2) Review of International Organizations 261.

[14]F Laursen and C Roederer-Rynning 'Introduction: the new EU FTAs as contentious market regulation' (2017) 39(7) Journal of European Integration 763; B Hoekman and C Sabel 'Trade agreements, regulatory sovereignty and democratic legitimacy' EUI Working Papers RSCAS 2017/36, available at http://cadmus.eui.eu/bitstream/handle/1814/47225/RSCAS_2017_36.pdf?sequence=1.

[15]For the EU's textual proposals released during the negotiation of the TTIP see http://ec.europa.eu/trade/policy/in-focus/ttip/index_en.htm.

[16]F De Ville and G Siles-Brugge *The Truth Behind the Transatlantic Trade and Investment Partnership* (Polity, 2016); G Siles-Brugge 'Transatlantic investor protection as a threat to democracy: the potency and limits of an emotive frame' (2017) 30 Cambridge Review of International Affairs 5.

[17]E Bienvenisti 'Democracy captured: the mega-regional agreements and the future of global public law' (2016) Constellations 58.

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in the context of countries that have multi-level systems of governance, such as federal systems.[18] In these systems, where power is diffuse, trade agreements can have a direct impact on issues that are regulated at sub-national level.

In the case of the UK, a number of areas that fall under the competence of the devolved administrations could be affected in some shape or form by international trade law. Devolved matters cover areas such as health, education, economic development, transport, environment, agriculture, fisheries and forestry[19] – all topics that are routinely addressed in trade agreements. For example, not only are the agricultural and fisheries sectors subject to WTO rules relating to tariffs, subsidies and quantitative restrictions, they are also increasingly subject to disciplines imposed in bilateral and regional trade agreements.[20] Under the scope of economic development policy, the ability of the devolved administrations to regulate public procurement or to provide state aid would also be constrained by international trade law.[21] Likewise, it has been shown that trade agreements dealing with trade in services can have an impact on the ability of countries to provide public services.[22] Inter-governmental cooperation in this area is crucial both in terms of the development of trade policy, by ensuring that the UK's trade policy reflects the positions of the various regions of the country, and also in terms of the implementation of international trade law obligations which will occur at the devolved level.

There is, it must be noted, some degree of uncertainty surrounding the scope of the devolved powers once the UK leaves the EU. Much of this uncertainty has been caused by the recently adopted EU Withdrawal Bill,[23] whose main purpose is to ensure legislative continuity post-Brexit by converting EU law into UK domestic law (referred to as 'retained EU law'). Clause 12 of the Withdrawal Bill precludes the devolved institutions from amending retained EU law to the extent that such amendments are prohibited under regulations adopted by UK ministers. The rationale behind clause 12 is that in the absence of common frameworks of law provided by EU law to ensure common approaches across the UK, such frameworks must now be provided centrally by the UK.[24] Should the Bill be used to limit regulatory diversity within the UK, it would minimise the need for the involvement of the devolved administrations in the negotiation of trade agreements touching on regulatory issues.[25]

[18]P Goff 'Canadian trade negotiation in an era of deep integration' CIGI papers No 88, February 2016, available at https://www.cigionline.org/sites/default/files/cigi_paper_no.88_web_0.pdf; P Mumford 'Regulatory coherence – blending trade and regulatory policy' (2015) 10(4) Policy Quarterly 11; O Omiunu 'The evolving role of sub-national actors in international economic law: lessons from the Canada-European Union CETA' in F Amtembrink et al (eds) *Netherlands Yearbook of International Economic Law* (Springer, 2017) p 198.

[19]See for example the list of powers devolved to Scotland published by the Scottish Parliament, available at http://www.parliament.scot/images/Parliament%20Publications/ListDevolvedPowers_1999-2016.pdf.

[20]G Arevalo 'Free trade agreements and the Lacey Act: a carrot and stick approach to prevent and deter trade in IUU fisheries' (2015) 10 Florida A&M University Law Review 349; A Rologas Tsangalis 'Fisheries subsidies under the trans-Pacific partnership: towards positive outcomes for global fisheries sustainability and regime interaction under international law' (2017) 16(2) Melbourne Journal of International Law 2.

[21]A Biondi 'The first on the flight home: the sad story of state aid control in the Brexit age' (2016) King's Law Journal 442; P Telles and A Sanchez-Graells 'Examining Brexit through the GPA's lens: what next for UK public procurement reform?' (2017) 47(1) Public Contract Law Journal 1.

[22]M Krajeski *National Regulation and Trade Liberalization in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* (Kluwer Law International, 2013); R Adlung 'Public services and the GATS' (2016) 9(2) Journal of International Economic Law 455.

[23]European Union Withdrawal Bill 2017–19, available at https://services.parliament.uk/bills/2017-19/europeanunionwithdrawal.html.

[24]Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks, 24 April 2018, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/702623/2018-04-24_UKG-DA_IGA_and_Memorandum.pdf.

[25]For an analysis of the EU Withdrawal Bill and its impact on devolved competences see S Tierney 'The European Union (Withdrawal) Bill: legal implications for devolution' UCL The Constitution Unit, 2 September 2017, available at https://constitution-unit.com/2017/09/07/the-european-union-withdrawal-bill-legal-implications-for-devolution; S Douglas-Scott 'Short cuts' (2017) 39(16) London Review of Books 16–17; N McEwen 'Trust in a time of Brexit' The UK in a Changing Europe, 28 November 2017, available at http://ukandeu.ac.uk/trust-in-a-time-of-brexit.

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Another area of certainty concerns the question of Northern Ireland's status within the UK. As the withdrawal negotiations progressed, it became increasingly evident that the UK's future trade policy may be constrained by the need to comply with the 1998 Good Friday Agreement.[26] The Good Friday Agreement provides the constitutional framework for peace and political stability in Northern Ireland and a central element of the peace process has been the removal of a land border within Ireland, which is underpinned by the Common Travel Area and EU law.[27] However, the decision to leave the EU raises the prospect of a hard border within the island of Ireland. Outside the customs union and the internal market, customs checks would be required to, for example, ensure the collection of tariffs, internal taxes and the verification of regulatory compliance.

Both the UK and the EU have stressed the importance of avoiding such an outcome[28] and, in November 2018, the EU and the UK released Withdrawal Agreement[29] which included a Protocol on Ireland/Northern Ireland (Protocol) proposing a 'backstop' solution whereby Northern Ireland would continue to comply with EU customs rules, the free movement of goods and relevant EU internal market legislation relating to goods.[30] The backstop would constitute a measure of last resort, in that it would only apply to the extent that no other solution is found to avoid the application of border checks on trade in goods within the island of Ireland. This regime, however, raises a number of difficult questions with respect to Northern Ireland's status within the UK and the EU. From a trade perspective, the requirement under the backstop that Northern Ireland's customs and regulatory framework be in line with the EU rather than the UK would mean a considerable increase in devolved powers for this region and that, at least in the area of goods, Northern Ireland would be excluded from the UK's post-Brexit trade agreements.

(b) Potential impact of trade agreements on devolved territories

Besides constitutional and political considerations, the broader economic impact of trade agreements on devolved territories must not be ignored. Whilst the empirical evidence suggests that trade liberalisation, on the whole, produces positive economic effects,[31] it is also fairly well established that not everyone wins from trade liberalisation.[32] There is clear evidence that opening domestic markets to foreign competition can adversely affect some domestic industries and, in doing so, harm those workers and regions that rely on these industries.[33] The negotiation of trade agreements thus typically involves a delicate trade-off between two conflicting goals: the desire to open foreign markets in those

[26]The Good Friday Agreement (or Belfast Agreement) signed on 10 April 1998. Text available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf.

[27]A Gordon 'Brexit and the Irish border: legal and political questions' Royal Irish Academy – British Academy Brexit Policy Discussion Paper October 2017, available at https://www.britac.ac.uk/sites/default/files/BrexitandtheIrishBorderLegalandPoliticalQuestions_0.pdf.

[28]HM Government 'Northern Ireland and Ireland' Position Paper 16 August 2017; European Commission 'Guiding principles transmitted to EU27 for the Dialogue on Ireland/Northern Ireland' 6 September 2017; European Commission 'Joint report from the negotiators of the European Union and the UK Government on progress during phase 1 of negotiations under Article 50 TEU on the UK's orderly withdrawal from the European Union' 8 December 2017, text available at https://ec.europa.eu/com mission/sites/beta-political/files/joint_report.pdf; https://ec.europa.eu/commission/sites/beta-political/files/guiding-principles-dia logue-ei-ni_en.pdf.

[29]Above n 27.

[30]Protocol, Art 6(2).

[31]R Baldwin 'Measurable dynamic gains from trade' (1992) 100(1) Journal of Political Economy 162; M Kose and R Riezman 'Understanding the welfare implications of preferential trade agreements' in R Riezman (ed) *International Trade Agreements and Political Economy* (World Scientific, 2012) p 85.

[32]D Rodrik *Straight Talk on Trade: Ideas for A Sane Wold Economy* (Princeton University Press, 2018).

[33]G Harrison et al 'Trade liberalization, poverty and efficient equity' (2003) 71(1) Journal of Development Economics 97; M Kolsky Lewis 'WTO winners and losers: the trade and development disconnect'(2007) 39(1) Georgetown Journal of International Law 165; G Genna 'Economic size and the changing international political economy of trade: the development of western hemispheric FTAs' (2010) 47 International Politics 640; P Dixon 'Australia's recent FTAs: insights from theory and modelling on rationale, welfare gains and political heat' (2015) 34 Econ Pap 208.

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sectors where a country has offensive interests, and the need to protect domestic industries where it holds defensive interests.[34]

This is also relevant in relation to devolution. Inter-governmental cooperation is crucial in so far as the various the devolved administrations of the UK do not necessarily hold the same offensive and defensive economic interests. Northern Ireland offers a striking illustration of the different and sometimes conflicting interests in trade between regions in the UK.[35] Whilst trade in services account for the majority of the UK's trade, services represent only a small proportion of Northern Ireland's exports. Striking disparities also emerge even in trade in goods. For example, whilst Northern Ireland is heavily reliant on exports in the foods, beverages and agricultural sectors, the rest of the UK has a greater reliance on manufacturing goods and the chemical sector.[36] Equally, Northern Ireland is far more reliant on access to the EU internal market than the rest of the UK.[37]

Another example can be found in the case of Scotland, whose most important goods exports are mineral fuels.[38] Conversely, mineral fuels do not fall in the top five commodities for exports for either England or Northern Ireland and only account for a small proportion of Welsh exports.[39] The differing economic profiles of territories within the UK means that it is not beyond the realm of possibility that the negotiation of a trade agreement that creates broad economic benefits for the UK as a whole may lead to losses in certain devolved regions.

The overlap and potential areas of interaction between trade agreements and devolved matters mean that the devolved administrations may be called upon to play an important role in the negotiation, conclusion and implementation of trade agreements. This is desirable for two key reasons. First, the devolved administrations can contribute towards a more efficient trade policy. Their expertise on devolved matters and their greater grasp of the potential impact of international trade commitments on local issues can inform Whitehall's approach and lead to the formulation of more rounded trade negotiating objectives. Secondly, by ensuring that the devolved administrations' interests and concerns are heard and taken into account in trade negotiations, the UK would enhance the legitimacy of the outcome of such negotiations. From a constitutional perspective, a scenario where trade agreements negotiated exclusively by central government could impose regulatory policies in areas that fall within devolved competence would raise questions regarding the democratic legitimacy of those agreements.[40]

This is not an insignificant concern. Trade agreements have been used by governments to circumvent domestic opposition and push through controversial regulatory reforms (so-called 'policy laundering'[41]). In the UK, whilst an Act of Parliament would have the power to indefinitely delay ratification in accordance with the 2010 Constitutional Reform and Governance Act, the ratification process itself is a crude instrument which offers limited leeway for parliamentary scrutiny.[42] Faced with a finalised trade agreement, Parliament will not have the flexibility to approve the agreement whilst rejecting problematic provisions. Rather, ratification comes down to a binary choice: the

[34]E Mansfield *Votes, Vetoes, and the Political Economy of International Trade Agreements* (Princeton University Press, 2012); E Lydgate and R Amos 'Integrating sustainable development objectives into UK trade policy' UKTPO Briefing Paper 19, May 2018, p 4, available at http://sro.sussex.ac.uk/76209/1/Briefing-paper-19-ESD-Web.pdf.

[35]J Tongue 'The impact of withdrawal from the European Union upon Northern Ireland' (2016) 87(3) The Political Quarterly 341.

[36]P Mac Flyn 'The economic implications of BREXIT for Northern Ireland', NERI Working Paper Series, April 2016, NERI WP 2016/No 35, available at http://www.nerinstitute.net/download/pdf/brexit_wp_250416.pdf.

[37]Ibid.

[38]HM Revenue and Customs 'Regional trade in goods statistics', 7 June 2018, p 19, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/686571/RTS_Q4_2017.pdf.

[39]Ibid, pp 10–17.

[40]R Rawlings 'Brexit and the territorial constitution' The Constitution Society, November 2017, p 20, available at https://consoc.org.uk/publications/brexit-territorial-constitution-devolution-reregulation-inter-governmental-relations/.

[41]P Yu 'The political economy of data protection' (2010) 84 Chi Kent L Rev 786–788.

[42]House of Commons Library, 'Parliament's role in ratifying treaties', Briefing Paper No 5855, 17 February 2017, available at https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05855; Lydgate and Amos, above n 34.

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agreement must be approved or rejected in its totality. Parliament may therefore be placed in an uncomfortable position where it has to ratify an agreement despite concerns relating to specific issues in order not to scupper a trade agreement which, in most cases, is the result of a long process of negotiations.[43] It is therefore possible that the UK government would use trade agreements to bypass potentially irksome domestic legislative processes, including on issues that relate to devolved matters.

From a practical perspective, failure to include the devolved administrations in the process of treaty making can create a dynamic of conflict and opposition between layers of government and non-implementation of trade obligations by sub-national governments. On the other hand, a consultative and participatory approach to the process can foster a sense of ownership, increasing the chances that trade obligations will be accepted and implemented at devolved government level. And, more importantly, by understanding devolved interests and the potential impact of trade rules on the devolved economies, the UK will be better placed to further mitigate the negative economic consequences of trade agreements.

(c) Current status of the debate

The above concerns have been echoed by the devolved administrations. The Welsh government specifically called for the establishment of shared governance frameworks in areas where they have 'a direct interest in trade negotiations, particularly given that these would have important inter-dependencies with key aspects of the policy and regulatory context for devolved areas such as steel, agriculture or fisheries'.[44] Scotland's White Paper – Scotland's Place in Europe – goes further, by asserting that the Scottish government must 'take part in trade negotiations that impact on devolved competences'.[45] A recent paper published by the Scottish government has also called for the development of a decision-making process that would enable Scotland to play a role in 'the preparation, negotiation, agreement, ratification and implementation of future trade deals'.[46] Whitehall partially acknowledged some of these concerns in the paper 'Preparing for our future UK trade', published by the UK Department of International Trade:

> The devolved administrations will have a direct interest in our future trade agreements. We will work closely with them to deliver an approach that works for the whole of the UK, reflecting the needs and individual circumstances of England, Scotland, Wales and Northern Ireland, and drawing on their essential knowledge and expertise. We recognise that if we are to represent the UK effectively on the international stage, we must build support for our vision across all four nations and deliver real, tangible benefits. The Department for International Trade has worked successfully alongside the Scottish Government, Welsh Government, and Northern Ireland Executive and their agencies in promoting trade and investment activity and we intend to continue this collaborative approach as we develop the UK's future trade policy.[47]

The UK has thus recognised the need to craft a trade policy that reflects the interests of the devolved administrations and is committed 'to seek the input of the devolved administrations to ensure they influence the UK's future trade policy'. However, no clear indication is given as to whether specific

[43]M Cremona 'International regulatory policy and democratic accountability' in M Cremona et al (eds) *Reflections on the Constitutionalisation of International Economic Law* (Martinus Nijhoff Publishers, 2014) p 166.

[44]'Brexit and devolution – securing Wales' future', January 2017, p 15, available at https://beta.gov.wales/sites/default/files/2017-06/170615-brexit%20and%20devolution%20%28en%29.pdf.

[45]'Scotland's place in Europe' (2016) para 187, available at http://www.gov.scot/Resource/0051/00512073.pdf.

[46]'Scotland's role in the development of future UK trade arrangements – a discussion paper', Scottish Government, August 2018, available at https://www.gov.scot/Resource/0053/00539758.pdf.

[47]Department for International Trade 'Preparing for our future UK trade policy' October 2017, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/654714/Preparing_for_our_future_UK_trade_policy_Report_Web_Accessible.pdf at p 22.

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processes and frameworks will be put in place to enable such cooperation with respect to trade agreements. Events since have also not provided much comfort that there is a great deal of appetite from Whitehall to explore and implement effective cooperative frameworks.

First, the recently established Joint Ministerial Council on European Negotiations[48] – an intergovernmental forum intended to ensure the devolved administrations are engaged in the process of negotiating the UK's departure from the EU – has been severely criticised. The devolved administrations have dismissed it as a box-ticking exercise by Whitehall, used primarily to disseminate minimal information whilst not truly engaging the governments in a consultation or negotiation process.[49] Secondly, there have been reports suggesting that the current government would favour a decision-making process in connection with future trade agreements that would completely exclude the involvement of the devolved administrations.[50] Thirdly, the proposed UK Trade Bill,[51] which sets a framework for the renegotiation of trade agreements that the UK is currently party to as an EU Member State – does not foresee a significant role for the devolved administrations. After the Bill was first published a number of amendments were tabled, proposing a role for the devolved administrations in the decision-making process relating to FTAs. Such amendments ranged from proposals to ensure the consent of devolved ministers for any regulations implementing FTAs within the competence of the devolved administrations,[52] to proposals for frameworks that would enable the consultation of the devolved administrations on FTAs.[53] None of these amendments made their way into the current version of the Trade Bill, which gives the devolved administrations only limited implementation powers. In accordance with the Bill, provisions of these agreements will be carried out by the devolved administrations if a provision is within developed competence.[54] However, there are significant restrictions on the implementation power of the devolved administrations, notably the fact that the devolved administrations are precluded from acting in areas of retained direct EU legislation and that the consent of a Minister of the Crown is required prior to the adoption of regulations making provision about quota arrangements, on account of the need for a coordinated UK-wide position on such arrangements.[55]

All in all, then, while the question of whether the devolved administrations will be involved in shaping future UK FTAs remains an open one, the general direction of travel already strongly suggests that they are likely to be sidelined from the decision-making processes underpinning the negotiation of trade agreements

2. Sub-national entities and trade agreements

(a) Trade policy in federal systems

Conducting an international trade policy in a federal system can present a specific set of challenges. Whilst trade negotiations tend to fall under the exclusive competence of central governments, in many cases, competences of constituent units of a federation will overlap with areas that are regulated in trade agreements. Sub-national entities may, therefore, have a vested interest in ensuring that their interests and regulatory preferences are reflected in trade negotiations. Further, the responsibility for implementing international trade law obligations may fall on the sub-national entities, rather than the central government. The consultation of sub-national entities during the negotiation process increases

[48]HM Government *The UK's Exit from and New Partnership with the European Union* Cm 9417, 2017, p 17.

[49]A Greer 'Brexit and devolution' (2017) The Political Quarterly 2.

[50]S Coates 'Liam Fox tries to bypass Scots and Welsh in bid for Brexit trade deals' *The Times*, 19 April 2017; 'Brexit: trade deals need UK-wide consensus, Carwyn Jones says' *BBC*, 19 August 2017, available at https://www.bbc.co.uk/news/uk-wales-politics-40985845.

[51]Trade Bill 2017–19, 122-EN.

[52]House of Commons, Public Bill Committee: 23 January 2018, 34.

[53]House of Commons, Notice of Amendments given up to and including Tuesday 30 January 2018, NC11.

[54]Trade Bill, Sch 1, para 1(1).

[55]Trade Bill, Sch 1, para 3(2) and (3).

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the likelihood that sub-national measures that are inconsistent with treaty obligations are identified from the outset, thus reducing the likelihood that the implementation of the trade agreement will be opposed. A number of federal systems have, therefore, developed mechanisms that aim to address these challenges and reduce the potential for conflict between various levels of government with respect to international trade policy.[56]

The nature and level of involvement of sub-national entities in trade policy decision-making processes will vary depending on the model of federalism.[57] In some systems, sub-national entities have significant powers in relation to foreign affairs. In Belgium, for example, subnational entities have the power to negotiate, conclude international agreements and implement international trade obligations that fall within the scope of their internal competences.[58] In others, the role of subnational entities is severely limited. In the Commonwealth of Australia, not only does the Commonwealth have treaty-making power, it can also implement treaty obligations that relate to the legislative competence of the states.[59] This section will carry out an analysis of three federal systems (USA, Germany, Canada) where treaty making powers are centralised and where sub-national entities have varying degrees of powers with respect to treaty implementation. The different experiences and varying levels of success encountered by these systems in developing mechanisms that allow for the involvement of sub-national entities in foreign affairs can provide some clarity and inform future attempts to increase the role of the devolved administrations in the negotiation of UK FTAs.

(b) USA

The USA is a federal system where sovereignty is divided between the federal level and the states – the federal constituent units. Initially, the USA was viewed as an example of dual federalism, where the sphere of competences of federal government and state governments are wholly separate and distinct from each other.[60] American federalism has since evolved into a system of 'concurrent regulatory jurisdiction'[61] thanks to US Supreme Court jurisprudence which has recognised the overlap between federal and state competences and increasingly curbed state competences at the expense of federal competences.[62]

This peripheralisation of states is also reflected in the relatively limited role the US Constitution foresees for states in foreign affairs.[63] In the field foreign affairs, the allocation of powers within the US Constitution points towards federal supremacy at the expense of US states.[64] The US Constitution grants Congress the power to 'regulate commerce with foreign nations'[65] and the

[56]P Fafard and P Leblond 'Twenty-first century trade agreements: challenges for Canadian federalism' The Federal Idea, September 2012, p 13, available at https://ideefederale.ca/documents/challenges.pdf; M Gehring 'Subnational participation in international trade law options for the European Union' CIGI Papers No 167 – April 2018, available at https://www.cigionline.org/sites/default/files/documents/Paper%20no.167_web.pdf.

[57]A Trench 'Intergovernmental relations: in search of a theory' in S Greer (eds) *Territory, Democracy and Justice* (Palgrave Macmillan, 2006) p 224.

[58]Belgian Constitution, Art 167. See S Paquin 'Federalism and compliance with international agreements: Belgium and Canada compared' (2010) 5 The Hague Journal of Diplomacy 185.

[59]*Commonwealth v Tasmania* (1983) 158 CLR 1; see M Chiam 'Tasmanian dams and Australia's relationship with international law' (2015) 24(1) Griffith Law Review 89.

[60]E Cowin 'The passing of dual federalism' (1950) 36(1) VA Law Review 1; J Kincaid 'From cooperative to coercive federalism' (1990) 509(1) The Annals of the American Academy of Political and Social Science 139; JF Zimmerman 'Preemption in the US federal system' (1993) 23 Publius: The Journal of Federalism 1; EA Young 'Dual federalism, concurrent jurisdiction and the foreign affairs exception' (2001) 97 Michigan Law Review 139.

[61]Young, above n 60; N Williams 'The commerce clause and the myth of dual federalism' (2006) 54 UCLA L Rev 1816.

[62]Ibid.

[63]R Baasch and SB Bangalore 'Congress and the reconstruction of foreign affairs federalism' (2016) 115(1) Michigan Law Review 47.

[64]M Schaeffer 'Federal states in the broader world' (2011) 27 Canada-United States Law Journal 2.

[65]US Constitution, Art II, § 3.

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President the power to make treaties.[66] By contrast, the Constitution generally excludes US states from foreign affairs and, in particular, international trade matters. They are precluded from applying 'any imposts or duties on imports or exports'[67] and from entering 'into any agreement or compact with another state, or with a foreign power'.[68]

Whilst the power to negotiate and conclude international treaties rests firmly in the hands of Congress, states can play an role in implementing trade agreements. Under the US constitutional system, treaties can either be self-executing or non-self-executing.[69] Treaties that are self-executing have direct effect, meaning that they do not require implementing legislation and can be invoked by private persons directly before domestic courts.[70] Non-executing treaties, however, do require implementing legislation. This opens up the possibility for states to refuse to implement and comply with internarial treaties that implicate their spheres of competence.[71] It is problematic in the area of international trade law, since the US Congress has an established practice of precluding the self-executing effect of trade agreements.[72] In theory, the federal government could override state law in order to ensure compliance with international law. Under the doctrine of pre-emption, the federal level can pre-empt state law via federal statutes or regulations or, even in the absence of any specific federal intervention, where state action impacts on federal foreign affairs.[73] Applied in the context of international trade policy, this means that state activities relating to international trade can be pre-empted where they affect, directly or indirectly, US trade policy.[74]

However, there is no known case of the federal government stepping in to pre-empt state law that would contravene an international trade agreement.[75] For example, with respect to WTO law, the Uruguay Round Agreements Act[76] (Act of Congress implementing WTO agreements in US law) does not grant the federal government the power to pre-empt state laws that violate WTO law. All the federal government can do is sue states for non-compliance with WTO law,[77] a power which, according to a recent study by Timothy Meyer and Ganesh Sitaraman, has never actually been used.[78] According to Meyer and Sitaraman, this power reflects the US congressional resistance to federal intervention in areas that affect to state competence.[79] But the upshot is that in the US states can, and have, maintained measures that are inconsistent with international trade law obligations[80] and the federal government has been held responsible for the failure of states to comply with such obligations.[81]

[66]Ibid, Art II § 2.

[67]Ibid, Art I §10.

[68]Ibid, Art I §10.

[69]M Matsushita et al *The World Trade Organization – Law, Practice and Policy* (Oxford: Oxford University Press, 2017) p 44.

[70]D Hollins and CM Vasquez 'Treaty self-execution as "foreign" foreign relations law?' in C Bradley (ed) *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford: Oxford University Press, forthcoming), available at https://scholarship.law.georgetown.edu/facpub/2077/.

[71]A Aust *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2017) p 177.

[72]FM Abbott 'Intellectual property provisions of bilateral and regional trade agreements in light of US federal law' UNCTAD ICTSD Project on IPRS and Sustainable Development, 2011, Issue Paper No 2.

[73]JL Friesen 'The distribution of treaty-implementing powers in constitutional federations: thoughts on the American and Canadian models' (1994) 94(4) Columbia Law Review 1429; CA Bradley 'Federalism, treaty implementation, and political process: Bond v United States' (2014) 108(3) American Journal of International Law 408; T Verellen 'Federalism and foreign affairs in Canada and the European Union: the search for equal autonomy' (2016) Cambridge Journal of International and Comparative Law 307.

[74]GW Bowman 'US and Canadian federalism: implications for international trade regulation' (2012) VA l Rev 1029.

[75]T Meyer and G Sitamaran 'Trade and the separation of powers' (2018) Vanderbilt University Law School Legal Studies Research Paper no 18–19, pp 73–74.

[76]Uruguay Round Agreements Act, Pub L 103-465.

[77]19 USC § 3512(b)(2)(A). Also note that a similar limitation is typically included in US FTAs (see S Sheffler 'A balancing ACT: state participation in free trade agreements with sub-central procurement obligations' (2015) 44 Pub. Cont LJ 733.

[78]Meyer and Sitamaran, above n 75, p 74.

[79]Ibid.

[80]Sheffler, above n 77, at 740–743.

[81]See, for example, Appellate Body Report *United States-Measures Affecting the Cross-Border Supply of Gambling and betting Services* WTO Doc WT/DS285/AB/R. For a more detailed analysis of US liability for state-level violations of international trade law see T Meyer 'Local liability in international economic law (2017) 95 NCL Rev 261.

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In an attempt to address these issues, the US has created communication channels through which federal trade officials and state representatives can establish dialogue on trade matters. One such channel is the state single point of contact system, whereby each state establishes a single point of contact (SPC) which is entrusted with the task of consolidating all information received from the United States Trade Representative (USTR) and relaying any feedback from the states back to them.[82] It also established the Intergovernmental Policy Advisory Committee (IGPAC), a body composed of representatives of elected officials of both the federal and state governments, to 'advise, consult with, make policy recommendations and provide information to the [USTR]'.[83]

However, neither mechanism has proved effective in enhancing state influence on US trade policy. The SPC is barely used, because of the sparsity of relevant information provided by the USTR. The IGPAC has also not fostered federal-state cooperation for a variety of reasons. First, the operation of the IGPAC has been hampered by a lack of staffing and support at the federal level, as well as difficulties experienced by state officials in gaining security clearance to access confidential documents.[84] This has meant that few states have participated in the process,[85] which, in turn, has placed a significant burden on existing members to produce reports on a regular basis. Secondly, because there is no requirement to hold meetings on a regular basis (meetings can only be convened at the call of the USTR or at the call of two-thirds of its members), the IGPAC meets only infrequently.[86]

US international trade policy is thus characterised by strong tensions between the federal and state levels.[87] Because of the pre-eminence of the federal government in treaty-making and the ineffectiveness of inter-governmental cooperative systems, states play but a marginal role in defining the country's position in international trade negotiations. But the reluctance of Congress to pre-empt state measures inconsistent with international trade law obligations means that the federal government has often struggled to convince states to implement trade liberalising commitments made in trade agreements. The resulting system is one where the US struggles to negotiate commitments in areas that affect state competences and is increasingly the subject of claims challenging state measures.[88]

(c) Germany

Under the German Constitution (*Grundgesetz*), although foreign relations are a competence of the federation,[89] the sub-national entities (the *Länder*) must be consulted prior to the conclusion of any treaty which affects their special circumstances.[90] The *Länder* also have the power to conclude their own international treaties in areas where they have the power to legislate to the extent that they receive the consent of the federal government.[91] In addition, the *Länder* can also influence foreign affairs through the *Bundesrat* – that is, the upper house of the German Parliament, which is composed of members of the Land governments.[92] In accordance with Article 59 of the German Constitution,

[82]C Freudlsperger 'More voice, less exit: sub-federal resistance to international procurement liberalization in the European Union, the United States and Canada' (2018) 25(11) Journal of European Public Policy 1694.

[83]Office of the United States Trade representative 'Charter of the Intergovernmental Policy Advisory Committee on Trade', available at https://ustr.gov/sites/default/files/040414%20IGPAC%20Charter%20MF%20signed.pdf.

[84]C Kukucha 'Federalism matters: evaluating the impact of sub-federal governments in Canadian and American foreign trade policy' (2015) 21(3) Canadian Foreign Policy Journal 230.

[85]On 17 November 2017, the IGPAC counted only 19 members.

[86]See above n 84.

[87]Meyer and Sitamaran claim that the tensions between the federal and state governments with respect to trade agreements have caused US trade federalism to be 'at best in disarray and at worst at risk of collapsing into trade nationalism': see Meyer and Sitamaran, above n 75, p 65.

[88]Meyer, above n 81, at 270.

[89]German Constitution, Art 32(1).

[90]German Constitution, Art 32(2). See C Panara 'In the name of cooperation: the external relations of the German Länder and their participation in EU decision-making' (2010) 6 European Constitutional Law Review 64.

[91]German Constitution, Art 32(3).

[92]See M Niedobnitek 'The German Bundesrat and executive federalism' (2018) 10(2) Perspectives on Federalism 201.

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international treaties regulating the political relations of the Federation or relating to subjects of federal legislation require the consent of the *Bundesrat*. In short, the *Länder* can act in the field of international relations and the federal state cannot effectively, or constitutionally, conduct foreign affairs without their active involvement.

Finally, with respect to the implementation of treaties, there is the question of whether international commitments negotiated by the federal state in areas of exclusive *Länder* competence can only be implemented by the latter. Although there is an argument that this should be the case, as laws relating to exclusive *Länder* competence cannot be enacted at the federal level,[93] this is a question that has never been conclusively answered by German jurisprudence and also one where disagreement pervades in German constitutional scholarship.[94] However, in practice, potential for conflicts between the federation and *Länder* in areas where international treaties overlap with *Länder* competences have been sidestepped by the development of formal system of cooperative federalism through which the *Länder* play an important role in the treaty-making process.

This need for cooperation between the two levels of government has led to the development by the Federal Constitutional Court (*Bundesverfassungsgericht*) of the principle of loyalty/fidelity – that is, the reciprocal obligation between the federation and the *Länder* to pursue 'affirmative cooperation and restraint whenever common interest so demands'.[95] It also led to the conclusion of the 1957 Lindau Accord between the federation and the *Länder*, which details the mechanics of the cooperative relationship.[96] First, Article 3 of the Accord provides that the consent of the *Länder* is required where the federal state intends to conclude an agreement that falls exclusively within the competence of the *Länder*, and the former must be given an opportunity to participate in the negotiation of such agreements. Secondly, the Lindau Accord also provides that where it intends to negotiate an agreement that affects the interest of the *Länder*, the federal state must give the *Länder* the opportunity to express their views and concerns at the earliest possible opportunity.[97]

To put in practice such cooperation, the Lindau Accord also established a permanent body of high-ranking Land representatives in charge of coordinating all interaction with the Federal Foreign Office.[98] Through the work of this body, the *Länder* have been able to secure information concerning international treaty negotiations and participate in the 'preparatory phase of treaty making'.[99] These bodies are then complemented by multiple federal-*Länder* committees that focus on specific issues that affect foreign policy.[100] Finally, although as an EU Member State Germany does not have the power to conduct its own trade policy, under the German constitution, the *Länder* have been given specific rights with respect to decision making at EU level. Where the EU intends to act on an area that falls under supposedly 'sensitive areas' of exclusive competence (education, culture or broadcasting), Germany will be represented within the Council of Ministers by a representative of the *Länder* appointed by the *Bundesrat*.[101] This representative takes a lead role on negotiations in the Council of Ministers and acts 'with the participation and in coordination with' the federal government.[102] For all

[93]BR Opeskin 'Constitutional modelling: the domestic effect of international law in commonwealth countries' (2001) 27(2) Commonwealth Law Bulletin 1252.

[94]J Brohmer 'The external affairs power in Australia and in Germany: different solutions, similar outcome' (2012) 24 Giornale di Storia Costituzionale 49 at 58; R Schutze *Foreign Affairs and the EU Constitution* (Cambridge University Press, 2014) p 187 at p 189.

[95]D Halberstam 'The foreign affairs of federal systems: a national perspective on the benefits of state participation' (2001) 46(5) Villanova Law Review 36.

[96]For an overview of the Lindau Accord see Schutze, above n 94.

[97]R Hrbek 'The Federal Republic of Germany' in H Michelmann (ed) *Foreign Relations and Federalism* (McGill-Queen's University Press, 2009) p 151.

[98]Ibid.

[99]Ibid.

[100]R Lhotta and J von Blummenthal 'Intergovernmental relations in the Federal Republic of Germany' in J Poirier et al (eds) *Intergovernmental Relations in Federal Systems* (Oxford: Oxford University Press, 2015) pp 220–223.

[101]Panara, above n 90, at 80–81.

[102]Hrbek, above n 97.

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other matters falling within the *Länder's* exclusive competences, the federal government has an obligation to involve and work in coordination with a *Länder* representative appointed by the *Bundesrat* in all negotiations and discussions held at EU level.[103]

Germany's approach of inter-governmental cooperation presents at least two features that render it more effective than the systems adopted in the US. Whereas the consultation of US sub-national units is informal and depends on the goodwill of the federal government, in Germany the rights of the sub-national entities are guaranteed by constitutional law. The *Länder* have a right to be consulted in advance of treaty negotiations and to be involved in negotiations at EU level that pertain to exclusive areas of competence. And whereas the US has created weak and under-funded institutional frameworks for inter-government cooperation, Germany has established a strong complex network of institutions that foster regular and constructive interaction between federal and sub-federal levels

(d) Canada

At the outset, Canadian federalism presented characteristics that were not too dissimilar to those of the US system of dual federalism.[104] Canada's Constitution Act operates a clear distinction between the spheres of competence of the federal and sub-national (provincial) governments by identifying the competences assigned to federal and provincial levels as 'exclusive'.[105] However, whilst the US federal system has evolved into a constitutional order where power is increasingly centralised, Canadian constitutional practice has safeguarded the autonomy of provinces by developing the principle of exclusivity of division of powers.[106] While there are limits to this principle,[107] Canadian federalism remains very much a system where each level of government remains 'sovereign in its areas of jurisdiction, each adopting and implementing its own laws, programs and tax regimes'.[108]

One of the consequences of the exclusive character of the distribution of powers in Canada's constitutional system is that provinces have a significant role to play in shaping foreign affairs. Although the federal government has the exclusive competence to negotiate and commit Canada to international law obligations, Canada has a dualist system where the duty to implement international obligations falls on the entity with constitutional jurisdiction over the matter.[109] As a result, any obligation negotiated by the federal government which falls under the competence of a province may only be implemented under domestic law by the latter. Furthermore, only the federal government can be held legally responsible for non-compliance with international obligations.[110] This means that in case of non-compliance by a province with international law, it is the federal government that will be held responsible and liable for the costs and damage incurred by Canada's international interlocutors.[111]

The absence of a direct legal obligation on provinces to comply with international law, combined with the absence of a dispute settlement mechanism to compel provinces to comply, means that there is little incentive for provinces to comply with international rules negotiated by the federal government

[103]Ibid.

[104]See section 2(b).

[105]Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 92. See MA Field 'The differing federalisms of Canada and the United States' (1992) 55(1) Law and Contemporary Problems 108; K Rosenn 'Federalism in the Americas in comparative perspective' (1994) 26 Inter-American Law Review 11.

[106]K Lenaerts 'Constitutionalism and the many faces of federalism' (1990) 28(2) The American Journal of Comparative Law 206.

[107]See E Brouillet 'The federal principle and the 2005 balance of powers in Canada' (2006) 34 Supreme Court Law Review 330.

[108]M-A Adam et al 'Inter-governmental relations in Canada: competing visions and diverse dynamics' in Poirier et al, above n 100, p 138.

[109]*AG Canada v AG Ontario* (Labour Conventions case) [1937] App Cas 326 (CAN PC).

[110]See A Van Duzer and M Mallett 'Compliance with Canada's trade and investment obligations: addressing the gap between provincial action and federal responsibility' (2017) 54(1) Alberta Law Review 84.

[111]A Van Duzer 'Could an intergovernmental agreement increase the credibility of Canadian Treaty commitments in areas with provincial jurisdiction' (2013) 68(4) International Journal 538.

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which are considered to go against their own interests.[112] Indeed, the inability of the federal government in Canada to guarantee provincial compliance with international obligations has, in the past, led to the collapse of bilateral trade negotiations.[113]

Consequently, in the context of the negotiation of international trade agreements, which touch on so many areas that fall within the competence of provinces, the particular constitutional make up of Canada raises concerns regarding its reliability as an international partner.[114] To address the unique role played by provinces in the implementation of international trade law obligations and to ensure that international commitments signed on to by the federal government are implemented, Canada has, over time, institutionalised cooperative mechanisms that allow for the consultation and sometimes even the involvement of provinces in trade negotiations.

Consultations occur within the framework of the Federal-Provincial Territorial Committee on Trade (C-Trade),[115] a body composed of trade representatives from both the federal government and provincial executives. It meets on a quarterly basis to discuss a wide variety of trade policy issues, from broad discussions on the general orientation of the Canadian international trade policy framework and Canada's position in relation to the negotiation of bilateral or multilateral trade agreements,[116] to discussions on specific trade topics of relevance to the provinces.[117] In these meetings, the federal government representatives will outline the areas where trade agreements may harm defensive interests of provinces and balance them against those areas where provinces may have offensive interests to promote.[118] Beyond these meetings, the federal government also makes draft negotiating documents available to province representatives, who are invited to submit their observations and put forward their agendas. The C-Trade meetings therefore provide a platform for ongoing information exchange on the development of trade negotiations, and a venue through which provinces can influence the negotiating positions of the federal government. In doing so, the discussions enhance the legitimacy of the negotiated agreements in the eyes of the provincial executives.[119]

The C-Trade cooperation framework is also complemented by a number of consultative committees that focus on sector-specific issues. For example, agriculture is not an issue that is typically addressed in the context of C-Trade but rather in a specifically designated federal-provincial committee.[120] Similarly, there are several ad hoc sectoral committees dealing with mutual recognition arrangements.[121] In addition to these consultative mechanisms, the provinces maintain regular dialogue with the federal government on trade policy matters. Cooperation occurs through informal channels of communication between trade officials on both sides. However, informal cooperation remains limited to minor administrative and technical issues, rather than the more important policy issues.[122] This leads us to another key reason behind the success of Canadian provinces in influencing trade policy: the provinces have invested significant resources in building capacity and expertise across the board on

[112]Van Duzer and Mallett, above n 110, at 102–104.

[113]Ibid.

[114]A Tejpar 'The challenges of federalism to Canada's international trade relations: the Canada-European Union comprehensive economic trade agreement' (2017) 72(1) International Journal 115–117.

[115]A Weston 'The Canadian "model" for public participation in trade policy formulation' The North-South Institute, August 2005, p 4; F Morissette 'Provincial involvement in international treaty making: the European Union as a possible model' (2012) 37(2) Queen's LJ 587.

[116]S Paquin 'Federalism and the governance of international trade negotiations in Canada: comparing CUSFTA with CETA' (2013) 68(4) International Journal 545 at 547, 550.

[117]C Kukucha *The Provinces and Canadian Foreign Trade Policy* (UBC Press, 2008) p 54.

[118]Van Duzer and Mallett, above n 110, at 92.

[119]O Ominuno 'The evolving role of sub-national actors in the mechanisms for international trade interactions: A comparative analysis of Belgium and Canada' (2017) 6(2) Global Journal of Comparative Law 136.

[120]Kukucha, above n 17, p 54.

[121]Ibid.

[122]G Inwood et al *Intergovernmental Policy Capacity in Canada: Inside the Worlds of Finance, Environment, Trade, and Health* (McGill-Queen's University Press, 2011) p 250.

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trade policy matters, to the extent that in some areas their expertise is considered to be superior to, and their input is actively sought out by, the federal government.[123]

Finally, it should be noted that there are recent examples of occasions where the role of provinces in trade negotiations was elevated to that of an active participant in trade negotiations. During the negotiations of the EU-Canada Comprehensive Economic Trade Agreement, the EU, which was hoping to gain access to the provincial procurement markets in Canada, requested that provinces be involved in the negotiation process. Throughout the negotiations, the provinces' role included the 'co-determination of negotiating positions, as well as the direct participation as members of the Canadian delegation'[124] in the areas of services, technical barriers to trade, labour, sustainable development investment, procurement and competition. Provincial representatives were also able to engage directly with EU trade officials on a bilateral basis to discuss particularly sensitive issues. Another recent example can be found in the context of the negotiation on the Comprehensive and Progressive TransPacific Partnership (CPTPP)[125] where, at the request of the US, provinces were not allowed to sit at the negotiating table but were briefed after all negotiating meetings and given the opportunity to voice their concerns and advise on matters that fell within their competence.[126]

The Canadian model of inter-governmental cooperation presents a number of features that explain its success relative to other federal systems that have experimented with executive federalism in the area of trade policy. The first distinctive feature relates to the constitutional limitations imposed on the central government regarding the implementation of treaties, which have meant that Canada was strongly incentivised to develop mechanisms that have integrated provinces and amplified their voice in trade policy making. Secondly, although C-Trade effectively remains a political body that is not protected by statute, it operates under a formal structure and under strict rules. Unlike committees such as the IGPAC, that can only meet at the request of governments, the C-Trade meets on a quarterly basis. Further, as C-Trade is composed of high-level trade representatives from provincial and federal level, it combines both political heft and expertise. The committee has, as a result, been used as a forum where important trade issues can be discussed constructively, rather than simply being viewed as a forum where provinces can be merely be debriefed on the latest developments. The fact that the work of C-Trade is complemented by various working committees that focus on more specific technical issues also has two important consequences. It means that central government and the provinces are better prepared to articulate positions in advance of meetings and that minor issues can be addressed an appropriate level, which then allows C-Trade meetings to address more important and sensitive policy issues. Thirdly, the role of provinces in Canada's trade agreements has not been limited exclusively to consultations. Where needed and possible, provinces have also been involved in the negotiation process and have played a key role in in advancing trade negotiations. The close involvement of provinces in the CETA negotiations is said to have 'improved communication, transparency and cooperation which have reduced the incentive for provincial and territorial governments to push for a greater role'.[127] Together these features of the Canadian inter-governmental cooperation have led to the increased impact of provinces in the outcome of trade negotiations, which in turn has led to a decrease in provincial resistance to trade agreements and a reduction in the use of threats of non-implementation of trade obligations by the provinces.[128]

[123]Kukucha, above n 117, p 54.

[124]Paquin, above n 116.

[125]The CPTPP is currently in the process of being ratified in Canada. The text of the agreement is available at http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/toc-tdm.aspx?lang=eng.

[126]Freudlsperger, above n 82, at 1697.

[127]C Kukucha, 'Provincial/territorial governments and the negotiation of international trade agreements' (2016) 10 IRPP Insight 12, available at http://irpp.org/research-studies/insight-no10/.

[128]Freudlsperger, above n 82, at 1697.

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(e) Accounting for differing of approaches to trade federalism

The preceding discussion has shown how the nature and level of interaction between federal levels and subnational levels of government can vary significantly from one federal system to another.

Both the German and the Canadian brands of federalism have led to the development of effective intergovernmental cooperation in the field of international relations between federal and sub-national governments. In both cases, such cooperation is underpinned by the existence of strong constitutional powers that have, either directly or indirectly, allowed sub-national entities to wield influence in foreign/trade policy.

In Germany, the power of the *Länder* to affect international relations is directly recognised and protected under the German Constitution, which enshrines the right of the *Länder* to be consulted in the event that the federal government intends to conclude a treaty that affects *Länder* competences. The right to be consulted is then complemented by the constitutional principle federal comity or loyalty and reinforced by the Lindau Agreement, which requires the prior consent of the *Länder* when the federal government concludes a treaty that falls under the exclusive jurisdiction of the former.

Besides, even in the absence of such guarantees, it would have been very difficult for the German federal government to ignore the *Länder* in the conduct of foreign affairs, as the *Länder* have the power to implement international obligations in their fields of competence. Indeed, in the case of Canada, provinces do not have *de jure* treaty-making powers. There is no constitutionally protected right to consult provinces or to seek their consent on matters that would affect provincial competences. But the mere fact that provinces have the exclusive competence to implement international obligations in their fields of competence gives them considerable leverage in international trade negotiations.

In both the German and Canadian cases then, there were good reasons to develop formal institutional structures through which both levels of governments can cooperate on foreign affairs matters that overlap with sub-national competence. In the specific case of Canada, it has led to the development of dedicated formal structures of cooperation in the area of international trade, which allow provinces to not only be consulted on the progress of trade negotiations but also, in some cases, to actively participate in these trade negotiations

At first sight, US federalism should have led to the development of a similar system to that of Canada. The US federal government has the sole competence to conduct negotiations and conclude trade agreements but only has limited powers to compel states to comply with international trade obligations. However, whilst these circumstances led to the development of a strong system of intergovernmental cooperation in Canada, in the US, states have largely been left out of the loop when it comes to trade negotiations. One explanation for this, provided by Christopher Kukucha, relates to the distinction between the concepts of intra-federalism and inter-state federalism. In intra-state federal systems, sub-national interests are represented at the federal level through state parliamentary representatives.[129] The US provides a classic example of such intra-state federalism. It has a bicameral system where legislators are subdivided into two powerful parliamentary assemblies, one of which – the US Senate – is composed of members who are entrusted with the task of representing sub-federal entities. In such systems, the federal executive places far more emphasis on addressing state interests voiced within the national parliamentary systems than on managing relationships with the executives of sub-federal entities.[130] By contrast, in federal interstate systems such as Canada, sub-federal executives tend to be far more powerful. Whilst Canada also has a bicameral system of representation, its second chamber is comparatively weak compared to that of the US because it is composed of senators who are only loosely connected with the provinces and who are appointed by political parties rather than being directly elected.[131] The upshot is that the federal executive has, historically, been far more engaged with the provincial executives when dealing with matters that affect the latter.[132]

[129]Kukucha, above n 84, at 225–226.
[130]Kukucha, above n 84, at 225.
[131]C Kukucha 'International relations theory and Canadian foreign trade policy' (2014) 69(20) International Journal 223.
[132]Ibid.

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3. UK devolution and foreign affairs

(a) Pre-eminence of national executive in UK foreign affairs

The UK is not a federal system but rather a territorially devolved constitutional system.[133] By comparison with federal systems, the UK remains a highly centralised state, where devolved territories enjoy far less autonomy and fewer constitutional guarantees than sub-national federal entities.[134] This can be seen in the very limited role played by the devolved administrations in foreign policy. Foreign affairs are a reserved[135] (or 'excepted'[136]) matter, meaning that the negotiation and conclusion of international treaties fall under the exclusive competence of the Crown. Indeed, the broad powers of the executive in the field of foreign affairs was recently confirmed in *Miller*,[137] where the UK Supreme Court confirmed that the power to make treaties fell under the scope of the Royal prerogative.[138]

Furthermore, the UK adopts a strong dualist approach, whereby international treaties must be incorporated into domestic law in order to be given effect.[139] This is achieved through an Act of Parliament – whether an Act specifically implementing the treaty or one delegating or providing a framework for future implementation.[140] In accordance with the Sewel Convention,[141] whilst the UK Parliament retains the authority to legislate on any issue, the government must proceed with the understanding that, barring the consent of devolved legislature, the UK Parliament must not legislate on devolved matters.[142] In theory, the Sewel Convention could be triggered where an Act of Parliament is required to domesticate an international treaty which touches on devolved matters. However, in *Miller*,[143] the UK Supreme Court dismissed the idea of the Sewel Convention as a 'legal rule justiciable by the courts',[144] viewing it instead as a political convention aimed merely at 'facilitating the harmonious relationships between the UK Parliament and the devolved legislatures'.[145] In doing so, *Miller* confirmed the notion that compared to federal systems, in the UK's system of devolution, sovereignty remains very much centralised.

The devolved administrations are not completely excluded from UK foreign affairs. They do have a responsibility to enact implementing legislation, where an international obligation falls wholly within a

[133]A McHarg 'The future of the UK's territorial constitution: can the union survive?' (31 March 2016), available at https://ssrn.com/abstract=2771614; M Keating 'Brexit and the territorial constitution of the UK' (2018) 98 Droit et société 54–56.

[134]N McEwen et al 'Intergovernmental relations in the UK: continuity in a time of change?' (2012) 14 The British Journal of Politics and International Relations 332–333.

[135]Scotland Act 1998, Sch 5; Government of Wales Act 1998, Sch 2.

[136]Northern Ireland Act 1998, Sch 2.

[137]*R (on the application of Miller) v Secretary of State for Exiting the European Union (Birnie and Others intervening)* [2017] UKSC 5, [2017] 2 WLR 583, para 54.

[138]See A Young 'Brexit, Miller and the regulation of treaty withdrawal: one step forward, two steps back?' (2017) 111 AJIL 434.

[139]There are exceptions where unincorporated international treaties can have an impact on UK domestic law, notably interpretative obligations to interpret domestic laws in a manner that ensures consistency with international law. See M Hunt *Using Human Rights Law in English Courts* (Oxford: Hart Publishing, 1997) pp 297–324.

[140]Aust, above n 71, p 170.

[141]P Bowers and C Sear 'The Sewel convention', House of Commons Briefing paper SN02084, 25 November 2005, available at https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN02084.

[142]A McHarg 'Reforming the United Kingdom constitution: law, convention, soft law' (2008) 71 Modern Law Review 853; D Feldman 'Case note and comment: pulling a trigger or starting a journey? Brexit in the Supreme Court' (2017) 76(2) Cambridge Law Journal 22.

[143]*R (on the application of Miller)*, above n 137.

[144]Ibid, para 148.

[145]Ibid, para 151. For a critical appraisal of the *Miller* judgment and its approach to the Sewel Convention see M Elliott 'The Supreme Court's judgment in Miller: in search of constitutional principle' (2017) 76(2) Cambridge Law Journal 275; K Wing 'Brexit and parliamentary sovereignty' (2017) 80(4) The Modern Law Review 721; C McCrudden and D Halberstam 'Miller and Northern Ireland: a critical constitutional response' (2017) University of Michigan Public Law Research Paper No 575, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3062964; P Eeckhout 'The emperor has no clothes: Brexit and the UK constitution' in B Martill and U Steiger (eds) *Rethinking the Futures of Europe* (UCL Press, 2018) p 169.

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devolved matter.[146] However, even here, central government has the power to order the devolved administrations not to adopt a measure or to revoke a measure which it considers to be incompatible with international obligations.[147] There is, therefore, only a very limited role for the devolved administrations in the shaping and implementation of UK foreign policy.

(b) Inter-governmental relations in foreign affairs

Despite this reduced role for the devolved administrations, to the extent that the foreign policy conducted by the UK government can impact on devolved matters, the UK has developed a series of agreements which provide guidelines and mechanisms to ensure cooperation in policy making in matters that fall within the sphere of competence of the devolved administrations.[148] The main agreement is embodied in the Memorandum of Understanding on Devolution which provides the various principles underpinning inter-governmental relations, such as the principles of communication and consultation, the duty to cooperate and the principle of confidentiality. This memorandum is then complemented by five supplementary agreements (concordats) which address specific aspects of the relationship between the various administrations.[149]

The first concordat establishes a Joint Ministerial Committee (JMC), the main institutional body through which cooperation occurs, as well as concordats dealing with matters such as EU affairs, international relations, statistics and financial assistance to industry.[150] The JMC meetings can take two forms: (i) a plenary JMC meeting, which is held on an annual basis and comprises the Prime Minister, the Deputy Prime Minister, and the First Ministers and Deputies and the Secretary of State of each devolved administration; and (ii) functional JMC meetings, comprising departmental ministries of the UK and the devolved administrations, which are held upon request of the relevant administrations.[151]

The concordat on international relations sets out a number of guidelines for cooperation between the UK government and the devolved administrations in international relations. First, there are requirements relating to information exchanges.[152] The UK government is required to make the devolved administrations aware of international developments that touch on devolved matters, and the devolved administrations must inform the government of developments in the devolved administrations that may affect international relations. Secondly, with respect to the shaping and development of foreign policy, the UK government must consult the devolved administrations on matters of foreign policy that will affect devolved matters. The devolved administrations may also 'hold working level discussions'[153] with countries or within international organisations on matters that pertain to devolved matters, and may form part of UK negotiating teams on negotiations that 'bear directly on devolved matters'.[154] Thirdly, with respect to implementation, the concordat recalls that the devolved administrations are legally bound to implement all international obligations undertaken by the UK, even in areas that pertain to devolved matters.[155] The UK government must notify any new international obligations to the devolved administrations whose implementation falls within their remit.[156] Although

[146]S Douglas-Scott 'Treaties, devolution and Brexit: Briefing Paper' Scottish Parliament – EU and External Relations Committee http://www.parliament.scot/S5_European/General%20Documents/Treaties_Devolution_Brexit_briefing.pdf; Aust, above n 71, pp 171–72.

[147]Northern Ireland Act 1998, ss 21 and 26; Scotland Act 1998, s 58; Government of Wales Act 2006, s 82.

[148]A Scott 'The role of concordats in the new governance of Britain: taking subsidiarity seriously?' (2010) 5(1) Edinburgh Law Review 21.

[149]MoU, above n 3.

[150]Ibid, pp 12–21.

[151]Ibid, pp 12–16.

[152]Ibid, p 52.

[153]Ibid, p 53.

[154]Ibid, p 54.

[155]Ibid, p 55.

[156]Ibid, p 56.

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the devolved administrations are free to decide how to implement these obligations, they must consult with relevant UK departments to ensure the consistent and compatible implementation of these obligations throughout the territory of the UK.[157] In the event of legal proceedings being brought against the UK before international courts or arbitration panels, the UK will act as the sole representative.[158] The devolved administrations can, if the cases relate to the implementation of devolved matters, contribute to such proceedings by issuing instructions to counsel and participating in hearings.[159] In relation to the issue of liability, the devolved administrations are responsible for the payment of any compensation and costs awarded against the UK for their failure to implement or enforce an international obligation.[160]

(c) The limited effectiveness of the UK system of inter-governmental relations

In theory, the concordats should provide a framework for inter-governmental cooperation in areas of foreign policy that overlap with devolved matters. In practice, however, the concordats have not worked particularly well. In 2015, the House of Lords Select Committee on the Constitution issued a report on inter-governmental relations which found that, with the exception of the European Affairs sub-committee, the JMC had proved highly ineffective in fostering cooperation between the UK government and the devolved administrations. Representatives of the devolved administrations viewed the JMC as a forum that is used to air broad political grievances rather than discuss practical issues in a constructive manner.[161] The approach of the UK government to JMC was also criticised as a box-ticking exercise, and because the meetings were rarely used to discuss any issues of substance.[162] The modest success of the EU Affairs sub-committee was attributed to the fact that the meetings were organised by the Foreign and Commonwealth Office, a body used to negotiating with people holding different positions, and the fact that the need to settle a common position in advance of meetings at EU level meant that the work of this sub-committee was more focused compared to the others.[163] Even here, however, it was noted that the views of ministers of the devolved administrations were heard but routinely ignored.[164]

Clearly then, the UK's system of inter-governmental cooperation, as it currently stands, would not provide the devolved administrations with the type of influence on trade policy that is bestowed on Canadian provinces. This should come as no surprise as, first, the UK the devolved administrations do not have a right to be consulted and lack the leverage available to Canadian provinces and German *Länder* which results from their competence to implement international obligations that fall within their competences. Because the concordats are not legally binding, and therefore create no obligation to cooperate, the UK the devolved administrations are left mostly reliant on the goodwill of the central government to adopt an inclusive and cooperative approach to engage with the devolved administrations and reflect their viewpoints in national policy. This is aptly illustrated by the fact that no JMCs were held from 2002 to 2008.[165] There are also numerous of examples where the UK has simply decided against involving the devolved administrations in any type of consultative process, even in devolved matters, in order to avoid having to accommodate their views.[166]

Secondly, the concordats only establish very loose forms of cooperation. The plenary JMC meeting is held on an annual basis and is consequently viewed mostly as a formality and, at best, an

[157]Ibid.
[158]Ibid.
[159]Ibid, p 57.
[160]Ibid.
[161]House of Lords Select Committee on the Constitution 'Inter-governmental relations in the UK' 11th Report of Session 2014–15, p 18, available at https://publications.parliament.uk/pa/ld201415/ldselect/ldconst/146/146.pdf.
[162]Ibid, p 18.
[163]Ibid.
[164]Ibid, p 19.
[165]Ibid, p 14.
[166]D Kenealy 'Concordats and international relations: binding in honour only' (2012) 221(1) Regional and Federal Studies 69.

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opportunity to present and discuss broad policy agendas. And whilst the functional JMC and working level groups should in principle allow for more detailed technical discussion, these are only held on ad hoc basis, meaning that they do not provide the sort of continuity that is required in order to foster mutual trust. In practice, most cooperation between the UK national and the devolved administrations has occurred through informal channels and the development of personal relationships between administrations.[167] This creates the possibility that the level of cooperation will vary from one devolved administration to another or even within one administration, depending on the ability of individuals to engage with each other.[168] There are also problems associated with the lack of accountability in informal cooperation, as it is more difficult to assess the nature and impact of discussions that are based on bilateral relationships.[169]

4. Devolution and post-Brexit trade agreements

(a) A new framework for inter-governmental cooperation in trade?

The deficiencies associated with the UK's system of inter-governmental relations may prove problematic in the context of the UK's post-Brexit trade policy, as EU trade powers are repatriated and subject to increased domestic public scrutiny. A good example can already be seen with respect to the growing debate surrounding the possibility of a future UK-US FTA and, in particular, the potential impact on areas of sensitivity for the devolved administrations, such as food standards (a devolved matter) and geographical indications such as Scotch Whisky.[170] Under the current system, it would be perfectly possible for the UK government to negotiate a trade agreement that would affect these matters without consulting or involving the devolved administrations in any meaningful way.

To address these deficiencies, the UK should consider the establishment of a formal and institutionalised system of cooperation based on regular consultations. The formal cooperation mechanism can adapt the template set by Canadian inter-governmentalism and create a Joint Committee on Trade (JCT) focused exclusively on trade. The JCT would be composed of relevant ministerial representatives of the central government and the devolved administrations and meet four times per year to discuss major issues relating to trade agreements, such as the setting of negotiation objectives and common positions, the identification of areas where trade agreements should reflect the specific circumstances of the devolved territories and even the potential disputes that may arise in connection with this agreements.

However, simply transposing the Canadian system of inter-governmentalism into the UK would not be a magic bullet given the sui generis characteristics of UK devolution. The constitutional restrictions on the powers of the devolved administrations mean that the leverage available to the devolved administrations to force the central government to take their interests and views into account when negotiating trade agreements will be limited. Without a constitutional right to be consulted and the threat of non-implementation, the power relations between central government and the devolved administrations are strongly skewed in favour of the former. And as the experience of inter-governmental relations in the UK show, there will be an incentive for central government to simply ignore the devolved administrations where it considers that they will create obstacles to the achievement of their foreign policy goals.[171]

For this reason, it is argued that that the UK should go further than the Canadian model, and enshrine in statute the right of the devolved administrations to be consulted in connection with future UK trade agreements as well as the institutional and procedural frameworks through which such

[167]McEwen et al, above n 134.

[168]House of Lords Select Committee, above n 161; Scottish Parliament 'Changing Relationships: Parliamentary Scrutiny of Intergovernmental Relations', 8th Report, 2015, 6 October 2015.

[169]Ibid.

[170]O Ilott 'Four uncomfortable truths about a quick deal on UK-US trade', Institute for Government, 16 January 2017; M Busch et al 'The future of US-UK trade – what case for a bilateral agreement? UKTPO Briefing Paper July 2018, p 6.

[171]Kenealy, above n 166.

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consultation can occur. Inter-governmental cooperation in this area would be made legally binding to ensure that cooperation occurs on a quarterly basis rather than on an ad hoc basis. It is further proposed that the right of the devolved authorities to be consulted would cover all aspects of trade agreements – that is, the right of the devolved authorities would not be limited to the components of trade agreements that touch on devolved matters. This is because, as discussed,[172] irrespective of the scope of devolved matters, trade agreements stand to have significant economic impact on the devolved regions.

The additional security resulting from the requirement to hold regular meetings would encourage the devolved administrations to assume responsibility in trade matters, and to make the necessary investment to develop capacity and expertise in trade matters.[173] As the Canadian model shows, regular dialogue would also build trust between the parties, which is more likely to lead to constructive cooperation.[174]

The formal institutionalised mechanisms of cooperation should also reflect the complex nature of contemporary trade agreements. As discussed,[175] the complexity relates to the variety of subject matters regulated in trade agreements as well as the processes involved in negotiating, concluding and implementing them. First, the UK's new institutional framework for inter-governmental relation in trade should reflect the fact that there a number of areas covered in trade negotiations that overlap with devolved matters. Here again, the UK could take inspiration from the Canadian model and grant the JCT the power to establish working committees focused on key areas of strategic interests for the devolved administrations. These sub-committees would be composed of civil service staff with expertise on specific trade issues from both central government and the devolved administrations, and would be used to carry out more technical discussions. Secondly, the UK should consider going beyond the Canadian model by ensuring that cooperation takes into account the dynamic nature of trade agreements. Cooperation should not be limited to initial consultations, but encompass the entire lifespan of trade agreements from the decision to launch negotiations to the conclusion of the agreement and even beyond. Indeed, in the Canadian model, consultations have so far been limited to the negotiation phase of trade agreements.[176] Once concluded, the role of the provinces is typically limited to that of implementing the trade agreement. Yet, there has been a recent trend in trade agreements between large developed economies to incorporate regulatory cooperation mechanisms that are intended to provide a forum where regulatory divergences can be identified and ironed out progressively.[177] This is the case in the EU-Canada CETA, which establishes a Regulatory Cooperation Forum to explore and discuss policy issues and initiatives that may affect trade.[178] A similar mechanism was also considered in the context of the negotiations for the EU-US TTIP,[179] leading some to refer to the agreement as a 'living agreement' where regulatory approximation can be discussed and new norms developed.[180] Finally, the CPTPP[181] – an agreement the UK has recently signalled its intent to accede

[172]See section 2(b).

[173]Kukucha, above n 117.

[174]Omiunu, above n 18.

[175]See section 1(a).

[176]Paquin, above n 116, at 548.

[177]T Epps 'Regulatory cooperation in trade agreements' in S Frankel and M Kolsky Lewis (eds) *Trade Agreements at the Crossroads* (Routledge, 2014) p 141.

[178]Canada-EU CETA, Arts 21.1–21.9, [2016] OJ L 11, 23.

[179]EU 'TTIP-EU proposal for Chapter: Regulatory Cooperation', 21 March 2016, available at http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154377.pdf. For an analysis of the proposals see A Alemanno and J Wiener 'The future of international regulatory cooperation: TTIP as a learning process toward a global policy laboratory' (2015) 78 Law and Contemporary Problems 103; R Parker 'Four challenges for TTIP regulatory cooperation' (2015) 22 Columbia Journal of European Law 1.

[180]K De Gucht 'Transatlantic Trade and Investment Partnership (TTIP) – solving the regulatory puzzle' The Aspen Institute Prague Annual Conference, Prague, Czech Republic, 10 October 2013, available at http://europa.eu/rapid/press-release_SPEECH-13-801_en.htm; M Cremona 'Negotiating the Transatlantic Trade and Investment Partnership (TTIP) – context and scope of TTIP' (2015) 52 Common Market Law Review 352; D Jancic 'TTIP and legislative-executive relations in EU trade policy' (2017) 40(1) West European Politics 208.

[181]Above n 125.

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to post Brexit – also contains a 'Regulatory Coherence' chapter which creates an institutional framework with the aim of, inter alia, assessing the possibility of eliminating regulatory barriers on an ongoing basis.[182] In other words, contemporary trade agreements are increasingly looking to create institutional frameworks that allow the parties to negotiate regulatory issues post-ratification. And if the devolved authorities are to be granted the right to be consulted in the context of trade negotiations, there is no reason why this right should not also be extended to negotiations that are being held post-ratification, especially if such negotiations pertain to regulatory areas that overlap with devolved matters

Finally, consideration must also be given to the right of the devolved administrations to participate in trade negotiations. Again, the UK model could go further than Canada by providing a legally binding obligation to include representatives from the devolved regions in negotiations where such negotiations relate specifically to devolved matters. Both the Canadian and German experiences show that the inclusion of sub-national representations in international negotiations need not undermine the cohesion of a country's negotiating position. On the contrary, in both cases, the evidence suggests that the involvement of representatives of the devolved administrations would add a layer of legitimacy to the negotiation process and improve the chances of a successful outcome. In other words, allowing for such representation would not only reflect the fact that the devolved territories are also responsible for matters addressed in trade agreements, but also further reinforce buy-in for such agreements at devolved levels. Further, the participation of the devolved administrations could also facilitate trade negotiations. Since they are more experienced and attuned to the complexities of matters that fall wholly within devolved competence, they may also be better placed to put forward solutions and break deadlocks that may arise in relation to such matters.

(b) Potential limitations of the proposal

A system along such lines would not be a panacea. First, there is a lot more that the devolved administrations can do to enhance their influence. A significant investment will have to be made by the devolved administrations to improve their capacity in dealing with trade policy issues. There is very little point in giving the devolved administrations a platform to influence decision-making at Whitehall if they are not able to formulate coherent positions on the wide array of complex issues that are covered in trade agreements. This will require, for example, the allocation of resources to recruit and build expertise in the field, the implementation of mechanisms that allow for coordination of expertise of policies across internal departments and the further development of para-diplomatic activities.[183]

Secondly, there are limits to what can be achieved through cooperative frameworks. There is no guarantee, nor should there be one, that the devolved territories will secure all of their respective objectives in future trade agreements. As it negotiates trade agreements, the UK will inevitably face difficult choices and be forced to make trade-offs between its sometimes conflicting economic interests. The price for opening up a lucrative foreign market in a sector where the UK has a clear offensive interest may be to open its own market to foreign competition in sectors where it is at a comparative disadvantage. In such cases, however, the value of a formalised system of inter-governmental cooperation is that these difficult choices can be openly debated prior to and during the negotiation processes, whilst also giving governments time to explore domestic adjustment measures that can be put in place to compensate workers and sectors that will lose out from trade liberalisation.

[182]CPTPP, Art 25.6. See also T Bollyky 'Regulatory coherence in TPP talks' in C Lim et al (eds) *The Trans-Pacific Partnership* (Cambridge University Press, 2012) p 171; D Gantz 'The TPP and RCEP: mega-trade agreements for the Pacific rim' (2016) 22 Arizona Journal of International and Comparative Law 57.

[183]See for example E Royles 'Small, smart, successful: a nation influencing the twenty-first-century world? The emerging Welsh paradiplomacy' (2010) 23(1) Contemporary Wales 142; H Rioux Ouimet 'From sub-state nationalism to subnational competition states: the development and institutionalization of commercial paradiplomacy in Scotland and Quebec' (2015) 25 (2) Regional and Federal Studies 109; E Royles 'Substate diplomacy, culture, and Wales: investigating a historical institutionalist approach' (2016) 46(2) Publius 224.

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Finally, it must be noted that formal cooperation also presents certain drawbacks. One obvious counter-argument to the above proposals is that it creates overly burdensome barriers to the negotiation of trade agreements. This concern is further enhanced by the fact that the UK currently finds itself in a race against time to sign as many trade agreements as possible to compensate for the inevitable loss of market access that will result from leaving the EU – both in terms of access to the EU internal market and third countries with whom the EU has preferential trade arrangements in place. But this argument is not particularly persuasive. The experience of trade federalism suggests there, even in countries where subnational entities have a significant influence on international trade policy matters, federal governments tend to retain the final say in the determination of trade policy with the role of sub-national entities being limited to that of consultation. As Farfard and Leblond point out, 'in the final analysis, the role of subnational government remains advisory and the federal government can, and routinely does, ignore the concerns of one or more subnational governments'.[184] One might add to this that any attempt to exclude the devolved administrations from the realm of international trade politics, whilst perhaps tempting in the short term, will prove ineffective and even counter-productive in the long-term. It is a far better approach to develop mechanisms that empower the devolved administrations and acknowledge their interests in trade policy, whilst at the same time carefully delineating the limits of their involvement in the process of the negotiation and conclusion of trade agreements. Such an inclusive approach, where trade policy is shaped by a broad-based debate, would also send a far more positive signal in terms of the type of country that the UK wishes to be in a post-Brexit world.

Conclusion

There is a strong argument that, post-Brexit, the UK should be able to speak with one voice in most matters that pertain to external trade policy. To do otherwise would diminish the country's leverage in trade negotiations and, ultimately, undermine the integrity of its single market. But trade policy must also be constructed in a manner that reflects the political and constitutional specificities of devolution. The devolved administrations have an ever-expanding list of competences which overlap with many issues regulated under contemporary trade agreements. The economic profiles, the defensive and offensive economic interests and the political agendas of the devolved territories vary significantly from one region to the next. Indeed, one of the many lessons to be drawn from the results of the British referendum on the UK's membership of the EU is that it is a heterogeneous country composed of nations with sometimes starkly different interests, politics and values.[185] In light of the increasingly politicised and controversial nature of international trade politics, to carry out a trade policy that would ride roughshod over the desires of the devolved administrations would be a recipe for further division and fragmentation.

The question thus raised is how to develop internal mechanisms that give the devolved administrations a real voice and influence in shaping the UK's future trade agreements without inhibiting the UK's ability to pursue a coherent trade policy. Various models of inter-governmental cooperation have been developed in federal systems, with variable degrees of success. There is, however, no ready-made model that could be transposed seamlessly into the UK. Each cooperative framework is the result of the particular specificities of the constitutional and political system of the country. As discussed, the Canadian model would not necessarily yield the same results if emulated in the UK, for the simple reason that the power and leverage of the devolved administrations is considerably smaller than that of subnational entities in decentralised federations such as Canada.

This paper argues that the highly centralised nature of legal sovereignty in the UK and the resulting lack of leverage available to UK the devolved administrations in the exercise of foreign affairs is

[184]Fafard and Leblond, above n 56, p 13.

[185]A Henderson et al 'How Brexit was made in England' (2017) 19(4) The British Journal of Politics and International Relations 631.

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precisely the reason why the UK must go further than the Canadian model to ensure a meaningful role for the devolved administrations in the shaping of future trade agreements. In order to achieve this, the UK should move away from its loose brand of inter-governmental cooperation based on ad hoc meetings and informal relations, and replace it with a legally-binding institutionalised mechanism of vertical cooperation. Such a mechanism would include the establishment of a JCT between ministerial representatives of the Department for International Trade and the devolved administrations, which would be required to hold regular meetings and which would be further complemented by specialised working committees focused on more technical issues of trade that overlap with devolved matters. In addition, it is proposed that the devolved administrations' rights should not be limited to simply being consulted, but should include active engagement all in stages of negotiation and implementation of a trade agreement.

There is, of course, a broader context within which the seemingly mundane question about the role to be played by the devolved administrations in future trade agreements is being played out. This discussion feeds into a broader debate concerning the role and constitutional and political status of devolved territories in the UK post-Brexit. The idea that the UK's ineffective inter-governmental relations mechanisms should be overhauled is not new. A reform is long overdue. But the case for reform has been reinforced by Brexit, the repatriation of powers and the inevitable tensions that result from conflicting views between the devolved administrations and Whitehall with respect to the allocation and exercise of such powers. Calls for greater devolved powers and differentiation[186] run against an instinctive inclination from Whitehall towards the centralisation of powers to protect the integrity of the UK's internal market.[187] Finding the correct balance between these two conflicting agendas will be one of the main constitutional challenges faced by the UK in the coming years. So far, based on the Trade Bill and the poorly-executed attempts to involve the devolved administrations in the Brexit negotiations, the general direction of travel suggests that the balance may be skewed towards centralisation. The upshot, if this approach is followed with respect to trade policy, would be the conclusion of trade agreements that are entirely unmoored from the politics, interests and preferences of the devolved territories.

[186]Greer, above n 49, at 4.

[187]Rawlings, above n 40, p 5.

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