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UK POST-BREXIT TRADE AGREEMENTS AND DEVOLUTION

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Billy Melo-Araujo

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 United Kingdom post-Brexit. It proposes a significant reform of existing inter-governmental cooperation mechanisms to ensure that devolved administrations are given a meaningful voice in the shaping of future trade agreements.

1. Introduction

For the past 40 years, the United Kingdom (UK) has been precluded from carrying out its own international trade policy. Under the Common Commercial Policy, the EU had the exclusive competence to conduct trade policy and relations on behalf of its Member States. This included the right to regulate all aspects of external trade and to conclude trade agreements as well as the obligation to assume responsibility for violations of international law. Those powers will be repatriated once the UK formally leaves the EU, meaning that the UK will now 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 (e.g., 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 British government as one of the key "red lines" in the negotiating objectives for exiting the EU¹ and the UK has already established a Department of International Trade whose remit includes the negotiation of future EU 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. 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 devolved regions, 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 devolved regions, but many of the issues that will be addressed in trade agreements will fall under the competence of devolved administration. This paper argues that a significant level of involvement of devolved regions in the development and implementation of the UK's trade policy is therefore 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 devolved administrations in the United Kingdom is governed by the Devolution Memorandum of Understanding (MoU), a non-binding instrument that spells out principles and institutions that underpin arrangements for inter-governmental relations. However, the cooperation mechanisms established by the MoU have, in practice, proved largely ineffective and much of UK inter-governmental cooperation occurs through bilateral and informal communication channels. Therefore, this paper seeks to explore the possibility of developing a cooperation structure

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

and processes which would enable 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 such as Canada and the United States. The models of inter-governmental cooperation developed in these jurisdictions may not necessarily be transposable in 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 sovereignty of parliament is maintained and powers are merely “delegated”² to territorial units and can, ultimately, be revoked by parliament.³ Nevertheless, the practical similarities between federalism and devolution mean that a comparative analysis is worthwhile. This can identify best practice developed in federal systems that could be explored in the UK context, and which could enhance the impact of devolved regions on the decision making process.

Finally, it should be mentioned that this paper is premised on the assumption that the United Kingdom will be able to conduct an independent trade policy that would encompass the entirety of the country post-Brexit. Recent events have, however, cast doubt on this assumption. In particular, with respect to Northern Ireland, the need to avoid a hard border with the Republic of Ireland⁴ has raised the possibility of the granting of special status for Northern Ireland where it would align itself with the EU customs union and certain rules of the single market⁵. It is not entirely clear, at this stage, what the notion of customs and regulatory alignment would entail in practice, but an arrangement which would require Northern Ireland to maintain the same tariffs as the EU and apply the rules of the EU single market on industrial and agricultural goods may limit the scope of the application of future UK FTAs in Northern Ireland. This would inevitably require the development of *sui generis* arrangements that would accommodate the unique position of Northern Ireland within the UK and the EU.

Section 2 of the article discusses why the repatriation of trade competences to the UK raises the question of the role to be played by devolved administrations in the development of the UK’s trade policy and, in particular, the negotiation of trade agreements. Section 3 outlines three areas of policy overlap between contemporary trade agreements and devolved matters and addresses how devolved interests in such areas could be affected in future trade agreements. Section 4 examines examples of inter-governmental cooperation practices in the area of trade policy adopted in certain federal jurisdictions with the aim of distilling the strengths and limits of available models, with a particular focus on Canada, whose well-established and effective system of inter-governmental cooperation has enabled Canadian provinces to have a significant impact on the negotiation of trade agreements. Section 4 examines current inter-governmental cooperation frameworks in the United Kingdom, arguing that these have proved ineffective in fostering cooperation between Whitehall and 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 outlines various reform proposals that should be considered in

² Sandra Day O’Connor, ‘Altered States: Federalism and Devolution at the Real Turn of the Millennium’ (2011) 60(3) *Cambridge Law Journal* 503.

³ Vernon Bogdanor, ‘Constitutional Reform in Britain: The Quiet Revolution’ (2005) 8(73) *Annual Review of Political Sciences* 84.

⁴ See Katy Hayward and David Phinnemore, “UK Withdrawal (‘Brexit’) and the Good Friday Agreement” Directorate General for Internal Policies, Policy Department for Citizens’ Rights and Constitutional Affairs, 10 November 2017. Available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596826/IPOL_STU\(2017\)596826_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596826/IPOL_STU(2017)596826_EN.pdf)

⁵ Josh Watz, ‘Ireland close to a border deal’ *The Times*, 30 November 2017; James Blitz, ‘Will a deal on Ireland be done?’ *Financial Times*, 1 December 2017.

order to establish a system of inter-governmental cooperation that is fit for purpose in the context of post-Brexit trade agreements.

2. The rational for inter-governmental cooperation in the area of trade policy

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. 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.

The strong regulatory dimension of contemporary trade agreements means that these agreements significantly 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. 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 United States. 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 standards⁶. Trade agreements are therefore characterised by a vertical tension between the use of trade agreements to regulate transnational issues and the resulting loss of regulatory autonomy and democratic accountability⁷. This tension is heightened in the context of countries that have multi-level systems of governance such as federal systems, and even the United Kingdom’s own system of devolution. 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 United Kingdom, a number of areas that fall under the competence of devolved regions 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 - 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. Under the scope of economic development policy, the ability of devolved regions to regulate public procurement or to provide state aid would also be also be constrained by international trade law. Likewise, it has been shown that the General Agreement on Trade in Services (GATS) and FTAs dealing with trade in services can undermine the ability of countries to provide public services. The need for inter-governmental cooperation 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,

⁶ Henrik Horn, Petros C. Mavroidis, André Sapir, ‘Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements’ 33(1) (2010) *The World Economy* 1565; Richard 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.

⁷ Eyal Bienvenisti, ‘Democracy Captured: The Mega-Regional Agreements and the Future of Global Public Law’ (2016) *Constellations* 58.

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 proposed EU Withdrawal Bill⁸, 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 11 of the Withdrawal Bill precludes devolved institutions from amending retained EU law, reserving that power to the UK government and Parliament. The rationale behind clause 11 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. Should the bill be enacted in its current form and used to substantially limit regulatory diversity within the UK, it would minimise the need for the involvement of devolved administrations in the negotiation of trade agreements touching on regulatory issues.⁹ However, the Withdrawal Bill has been heavily criticised by Scotland and Wales who see in it an attempt by the UK to reclaim competence in devolved matters and have indicated that they would refuse to consent to the bill in the absence of amendments¹⁰. Another area of certainty concerns the question of Northern Ireland’s status within the United Kingdom. Likewise, a scenario where Northern Ireland’s regulatory framework would be in line with the EU rather than the UK would mean a considerable increase in devolved powers for this region and that arrangements would have to be developed to ensure that the UK’s future trade agreements reflect Northern Ireland’s distinct status.

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, there is also a growing realisation that not everyone wins from trade liberalisation¹¹. 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. The negotiation of trade agreements thus involves a delicate trade-off between two conflicting goals: the desire to open foreign markets in those sectors where a country has offensive interests and the need to protect domestic industries where it holds defensive interests. This is also relevant in relation to devolution. Inter-governmental cooperation is desirable in so far as the various devolved regions of the United Kingdom 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 United Kingdom¹². For example, whilst trade in services account for the majority of the UK’s trade, services represent a small

⁸ European Union Withdrawal Bill 2017-19. Available at : <https://services.parliament.uk/bills/2017-19/europeanunionwithdrawal.html>

⁹ For an analysis of the EU Withdrawal Bill and its impact on devolved competences see: Stephen Tierney, ‘The European Union (Withdrawal) Bill: legal implications for devolution’ UCL The Constitution Unit, 2 September 2017 [<https://constitution-unit.com/2017/09/07/the-european-union-withdrawal-bill-legal-implications-for-devolution/>]; Sionaidh Douglas-Scott, ‘Short Cust,’ (2017) 39(16) *London Review of Books*, 16-17; Nicola McEwen, ‘Trust in a time of Brexit’ *The UK in a Changing Europe*, 28 November 2017 [<http://ukandeu.ac.uk/trust-in-a-time-of-brexit/?platform=hootsuite>].

¹⁰ Joint statement from First Minister of Scotland Nicola Sturgeon and First Minister of Wales Carwyn Jones, 3 July 2017. Available at: <https://news.gov.scot/news/eu-withdrawal-bill>

¹¹ Dani Rodrik, *Straight Talk on Trade: Ideas for A Sane World Economy* (Princeton University Press, 2018).

¹² Jonathan Tongue, “The Impact of Withdrawal from the European Union upon Northern Ireland”, *The Political Quarterly*, 87(3) (2016), 341.

proportion of Northern Ireland 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 sector¹³. Equally, Northern Ireland is far more reliant on access to the EU internal market than the rest of the United Kingdom¹⁴. The differing economic profiles of territories within the United Kingdom means that it is not beyond the realm of possibility that the negotiation of a trade agreement that creates broad economic benefits for the United Kingdom as a whole may lead to losses in devolved regions.

The overlap and potential areas of interaction between trade agreements and devolved matters mean that devolved regions 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. Firstly, 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 devolved administrations' interests and concerns are heard and taken into account in trade negotiations, the United Kingdom 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 these agreements¹⁵. This is not an insignificant concern. Trade agreements have often been used by governments to circumvent domestic opposition and push through controversial regulatory reforms (so-called "policy laundering"¹⁶). In the UK, whilst an Act of Parliament would be required to give effect to the treaty under domestic law, the ratification process itself is a crude instrument which offers limited leeway for parliamentary scrutiny. 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 agreement must be approved or rejected in its totality. Parliament may therefore be placed in an uncomfortable situation 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.¹⁷ It is therefore not beyond the realm of possibility 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 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,

¹³ Paul Mac Flynn, "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.

¹⁴ Ibid.

¹⁵ Richard Rawlings, 'Brexit and the Territorial Constitution' The Constitution Society, November 2017, 20. Available at: <https://consoc.org.uk/publications/brexit-territorial-constitution-devolution-reregulation-inter-governmental-relations/>.

¹⁶ Peter Yu, 'The Political Economy of Data Protection' (2010) 84 *Chi.Kent L. Rev.* 786-788.

¹⁷ Marise Cremona 'International Regulatory Policy and Democratic Accountability' in Marise Cremona et al (eds) *Reflections on the Constitutionalisation of International Economic Law* (Martinus Nijhoff Publishers, 2014) 166

by understanding devolved interests and the potential impact of trade rules on devolved economies, the United Kingdom will be better placed to further mitigate the negative economic consequences of trade agreements.

These concerns have been echoed by devolved administrations. The Welsh government specifically calls 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”.¹⁸ 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”.¹⁹ Whitehall partially acknowledged these concerns in the recent paper, “Preparing for our future UK trade” published by the United Kingdom 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 4 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.²⁰

The UK has thus recognised the need to craft a trade policy that reflects the interests of devolved administrations and is committed “to seek the input of the devolved administrations to ensure they influence the UK’s future trade policy”. No clear indication is given as to whether specific 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. Firstly, the recently established Joint Ministerial Council on European Negotiations²¹ – an inter-governmental forum intended to ensure devolved administrations are engaged in the process of negotiating the United Kingdom’s departure from the EU – has been severely criticised. Devolved administrations have dismissed it as a box ticking from Whitehall which is used primarily to disseminate minimal information whilst not truly engaging the governments in a consultation or negotiation process.²² Secondly, the recently published Trade Bill, which sets a framework for the renegotiation of trade agreements that the United Kingdom is currently party to as an EU Member State – does not foresee a role for devolved administrations beyond certain implementation powers. In short, the question of whether devolved administrations will be involved

¹⁸ Brexit and Devolution – Securing Wales Future, January 2017, 15. Available at: <https://beta.gov.wales/sites/default/files/2017-06/170615-brexit%20and%20devolution%20%28en%29.pdf>

¹⁹ Scotland’s Place in Europe (2016), para 187. Available at: <http://www.gov.scot/Resource/0051/00512073.pdf>.

²⁰ Department for International Trade, “Preparing for our future UK trade policy” October 2017. Available: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/654714/Preparing_for_our_future_UK_trade_policy_Report_Web_Accessible.pdf

²¹ HM Government, *The United Kingdom's Exit from and New Partnership with the European Union*, Cm 9417, 2017, p. 17.

²² Alan Greer, ‘Brexit and Devolution’ (2017) *The Political Quarterly*, 2.

in decision making processes underpinning the negotiation of trade agreements, and the nature of such involvement, remains an open one.

3. Interaction between devolved matters and post-Brexit UK trade agreements – three case studies

3.1 Procurement

Once the United Kingdom leaves the EU, procurement is a matter which should fall wholly within the competence of devolved administrations²³. It is also a matter that is typically regulated in trade agreements with varying degrees of success. In practice, countries have proved reluctant to agree binding rules to liberalise procurement markets because of the belief that discriminatory procurement policies can provide a useful tool to promote economic development and domestic industries²⁴. The reluctance of countries to open up domestic procurement markets is illustrated by the limited success at WTO level in regulating procurement. There is a WTO agreement focusing on procurement issues – the Government Procurement Agreement (GPA)²⁵ - but the agreement is plurilateral rather than multilateral. This means that the GPA does not apply to the entirety of the WTO membership but rather only to those WTO Members that have signed on to it. Thus far, GPA membership has been limited to a small subset of WTO Members – mostly developed countries. With the wider WTO membership proving resistant to the idea of a multilateral agreement on procurement, advocates of procurement liberalisation have tended to complement the GPA by concluding regional or bilateral trade agreements that include procurement rules²⁶.

The unease towards procurement liberalisation is also reflected by the actual design of the GPA. Although there is a national treatment obligation (non-discrimination) in the agreement, GPA members are entitled to significantly limit the scope of this obligation in accordance with three parameters: entities covered; value thresholds; and coverage in regards of goods, services and construction services²⁷. With respect to type of entities covered by the GPA, countries are entitled to choose the extent to which their market access commitments apply to procurement from central government entities, sub-central entities governmental entities and other governmental entities²⁸. Federal countries such as

²³ Northern Ireland Assembly, 'Public procurement after the European Union Referendum', Public Finance Scrutiny Unit, research and Information Service briefing paper 25 August 2016, 12. <http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2016-2021/2016/finance/5716.pdf>; Richard Rawlings, supra footnote 15, 9;

²⁴ Bernard Hoekman, 'International Cooperation on Public Procurement regulation' in Aris Georgopoulos, Bernard Hoekman and Petros Mavroidis (eds) *The Internationalization of Government Procurement Regulation* (OUP, 2017) 577-578.

²⁵ The text of the agreement is available at: http://www.wto.org/english/tratop_e/gproc_e/negotiations_e.htm.

²⁶ Asako Ueno, 'Multilateralising regionalism on Government Procurement' OECD Trade Policy Paper No. 151, OECD Publishing Papers (2013). Stephanie J. Rickard, 'PTAs and public Procurement' in Andreas Dur and Manfred Elsig (eds) *Trade Cooperation* (CUP, 2015) 275-294; Robert D. Anderson, Anna Caroline Muller and Phillipe Pelletier, 'Regional Trade Agreements & Procurement Rules: facilitators or Hindrances?' EUI Working Papers 2015/81. Available at: http://cadmus.eui.eu/bitstream/handle/1814/38271/RSCAS_2015_81.pdf?sequence=1.

²⁷ Article II(2) GPA

²⁸ Article II(4) GPA.

Canada and the US have thus been able to exclude provincial/state and local government procurements from non-discrimination requirements under the GPA²⁹. GPA members can also set the minimum value of public procurement contract above which the non-discrimination obligation applies. For example, the GPA threshold for the supply of goods or services to sub-central government entities is set at 200.000 SDR for the EU and 350.000 SDR for Canada and the US³⁰.

The impact of market access commitments under the GPA is also limited because the MFN obligation is based on system of “restrictive reciprocity”³¹. Unlike the GATT or the GATS, there is no obligation on GPA members to extend market access commitments to the rest of the membership on a non-discriminatory basis. Rather, each GPA member will make an initial general offer which will then be negotiated bilaterally with other members on the basis of reciprocity. In other words, the level of market access granted by a GPA party can vary from one GPA party to another. For example, whilst regional and local authorities in the EU are subject to market access commitments inscribed in the EU’s schedule, the EU has excluded US operators from participating in procurement services delivered by EU regional and local authorities in response to the US’s practice of exempting state-level procurement from the GPA³².

Procurement is also typically covered in trade agreements entered into by GPA members. When such agreements are signed between GPA parties, they often go beyond the GPA by including additional market access commitments. By contrast, GPA parties entering into agreements with non-GPA parties tend to replicate GPA commitments and have sometimes included market access commitments that do not go as far as the GPA. For example, while the EU applies GPA rules to sub-central entities,, such entities are excluded from the procurement rules included in agreements such as the EU-CARIFORUM Economic Partnership and the EU-Mexico FTA.³³

The United Kingdom has already signalled its intent to participate in the GPA as a member in its own right once it leaves the EU. There is some debate as to how the UK can accede to this agreement given that it is not mentioned as a signatory. Some have argued that under state succession rules, the UK could remain a fully-fledged party to the GPA after it leaves the EU³⁴, whilst others have contended that the UK may have to re-apply for membership from scratch³⁵. Should the UK apply for membership, it will have to submit an initial coverage proposal which will then be negotiated on a bilateral basis. If, however, the UK is considered to already be a GPA party in its own right, it will merely be required to submit its coverage through a rectification procedure. Under the rectification procedure, GPA parties

²⁹ David Collins, ‘Globalized Localism: Canada’s Government Procurement Commitments under the CETA’ (2016) (2) *Journal of Transnational Dispute Management* 6.

³⁰ Asako Ueno, *supra* footnote 26, 16.

³¹ Kamala Dawar, ‘The WTO Government Procurement Agreement: The Most-favoured Nation Principle, the GATS and Regionalism’ (2015) 42(3) *Legal Issues of Economic Integration* 262-264.

³² Steven Woolcock and Jean Heilman Grier, ‘Public Procurement in the Transatlantic Trade and Investment Partnership’, CEPS PaperNo.100, February 2015, 20 [available at: <https://www.ceps.eu/system/files/SR100PublicProcurementandTTIP.pdf>];

³³ Sue Arrowsmith, ‘The implications of Brexit for public procurement law and policy in the United Kingdom’, (2017) 1 *Public Procurement Law Review* 13

³⁴ Lorand Bartels, ‘The UK’s status in the WTO after Brexit’ 18. Available at: <https://ssrn.com/abstract=2841747>

³⁵ Ping Wang, ‘Brexit and the WTO Agreement on Government Procurement, (2017) 1 *Public Procurement Law Review* 37.

are entitled to object to any suggested modifications and, if no compromise is found, trigger an arbitration process or remove concessions granted under the GPA³⁶. In either scenario, it is expected that the UK's new proposed GPA coverage will be at the very least in line with the existing EU GPA commitments³⁷. Indeed, any proposal to reduce access to the UK procurement market would be unlikely to be looked upon favourably by GPA membership, not least because the UK represents a smaller market than that on the basis of which the EU GPA coverage was negotiated. There is, then, little scope to reduce the market access commitments negotiated on the UK's behalf by the EU in the GPA in a manner that would, for instance, provide exemptions to devolved administrations.

The EU has also indicated that it is hoping to "roll-over" EU FTAs – that is, to sign FTAs with countries that already have FTAs with the EU and replicating such agreements. Again, for the same reasons outlined above, it is unlikely that the UK would be able to reduce the market access commitments agreed in such agreements. However, with respect to new post-Brexit trade agreements, the UK will have more flexibility in terms of deciding the level of market access that can be granted to trading partners with respect to procurement. For instance, devolved administrations may wish to limit the coverage of FTAs on local procurement. They may choose to exclude certain goods or services that are considered sensitive, or preference programs that are designed to promote local interest, small and medium sized enterprises or even minorities. For example, as previously mentioned, US firms are not covered by the EU's market access commitments under the GPA. The US may, therefore, request improved market access to the UK procurement market in the context of GPA or FTA negotiations. Likewise, if the UK chooses to negotiate FTAs with countries such as Australia, China or India, that are currently not parties to the GPA, it will have the latitude to negotiate market access commitments that deviate from GPA commitments. It is crucial that devolved administrations interests are taken into account in such negotiations, in order to determine the extent to which devolved procurement markets should be further opened to competition.

3.2 Services

The regulation and operation of services and, in particular, public services such as health and social care, education, tourism, transport and culture count amongst the major devolved powers. Trade agreements on services could potentially have an impact on the regulatory autonomy of devolved administrations and their ability to supply relevant public services. At the WTO level, services are regulated under the General Agreement in Trade in Services (GATS). Further trade liberalisation commitments can be made in free trade agreements at the bilateral, regional or plurilateral level, but these agreements mostly replicate the obligations contained in the GATS. There are two main types of obligations which can reduce the regulatory autonomy of countries in regulating the supply of public services. Firstly, the national treatment obligation - that is, the obligation not to discriminate between domestic and foreign services suppliers of like product³⁸. An application of this requirement in the context of a public service would impede relevant national authorities from favouring local service suppliers in the provision of public services. Secondly, there are market access obligations which prohibit the maintenance of monopoly or exclusive service supply arrangements, the imposition of limits on the number of service suppliers or the application of economic needs tests which would enable

³⁶ Ibid 47.

³⁷ Sue Arrowsmith, *supra* footnote 33, 18.

³⁸ Article XVII GATS.

authorities to limit the number of service suppliers in order to maintain high standards of quality of services³⁹.

There are various ways through which countries can exempt public services from such obligations⁴⁰. They can rely on general or sector-specific public services exemptions which exclude, for example, services associated with the exercise of governmental or official authority or public utilities. The extent to which parties to trade agreements agree to subject specific services to national treatment and market access obligations will depend on whether such commitments are inscribed in the individual schedules annexed to the agreements. Trade agreements can adopt a positive list approach to scheduling in services, where these obligations only apply if a specific commitment is made in the schedule, subject to any limitations formulated by the party. Alternatively, schedules can adopt a negative list approach, where obligations apply to all service sectors except those non-conforming measures that are identified in the schedule.

FTA parties can use a number of methods to carve out pockets of regulatory autonomy⁴¹. FTAs that follow a positive list approach to scheduling can set out conditions, qualifications and limitations to national treatment and market access commitments made in relation to specific service sectors. FTAs that follow a negative list approach can identify non-conforming measures that would otherwise be deemed incompatible with the trade liberalising obligations. FTAs can therefore reserve the right of parties to maintain existing non-conforming measures and to adopt non-conforming measures in the future. Such non-conforming measures can include measures adopted at the national and the sub-national level. The US-Australia FTA, for example, identifies non-conforming measures at central, regional and local levels of government that do not have to conform to the national treatment, market access and local presence obligations with respect to cross-border trade in services⁴². US FTAs will typically reserve the Alaskan state the right to adopt or maintain measures that contravene the national treatment obligation in order to protect socially or economically disadvantaged minorities in accordance with the Alaskan Native Claims Settlement Act⁴³. EU and Canadian FTA schedules are also populated with limitations and reservations that apply to individual provinces. For example, in relation to the recently concluded EU-Canada Comprehensive Economic Trade Agreement (CETA), Belgium listed several limitations on market access obligations on transport services that are currently applied by its federal regions⁴⁴. Likewise, the Canadian province of Alberta limits the scope of the market access obligations by listing a number of reservations that apply to cross-border trade in recreational, cultural and sporting services. The province thus reserves the right to restrict the number of service suppliers by imposing numerical quotas, exclusive service providers or the requirement of an economic

³⁹ Article XVI GATS.

⁴⁰ For an overview see Markus Krajewski, 'Model Clauses for the Exclusion of Public Services from Trade and Investment Agreements' (February 2, 2016). Available at SSRN: <https://ssrn.com/abstract=2892522>.

⁴¹ Sebastien Miroudot, Jehan. Sauvage and Marie Sudreau (2010), 'Multilateralising Regionalism: How Preferential Are Services Commitments in Regional Trade Agreements?' (2010), OECD Trade Policy Working Papers, No. 106, OECD Publishing. <http://dx.doi.org/10.1787/5km362n24t8n-en>

⁴² Article 10(6) Australia-United States FTA. For an analysis see Tania Voon, 'Balancing Regulatory Autonomy with Liberalisation of Trade in Services: An Analytical Assessment of Australia's Obligations under Preferential Trade Agreements' (2017) *Melbourne Journal of International Law*. Forthcoming. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3041682.

⁴³ See Annex II KORUS FTA.

⁴⁴ EU Annex II CETA.

needs test⁴⁵. Therefore, there is scope for devolved administrations to preserve policy and regulatory in the area of services by securing the exemption of certain measures and specific service sectors from future trade agreements.

3.3 Agriculture

Agricultural policy is a devolved matter and one where the trade interests of devolved administrations may run counter to those of the rest of the country. For example, the EU currently applies relatively high tariff rate quotas on the import of agricultural products such as beef and sheep meat⁴⁶. In the framework of future bilateral trade negotiations, the United Kingdom could consider, as suggested in some quarters⁴⁷, the removal of such barriers in exchange for concessions from its trade partners in areas such as financial services, where it has greater offensive interests. This would undoubtedly have significant repercussions in terms of the long term viability of the farming sectors of Northern Ireland and Wales.

Another example can be found in the area of food safety regulation. Currently, as an EU Member State, the UK must comply with minimum standards and regulations set at EU level. This includes rules such as the EU ban on chlorinated chickens or the application of the precautionary principle with respect to the approval of genetically modified foods and crops. However, once the UK leaves the EU, the power to regulate such issues should be transferred back to the devolved administrations. This could lead to domestic friction if devolved administrations opt for different regulatory approaches, and in the formulation of common positions in the negotiation of international trade agreements. For example, in the context of a future US-UK free trade agreement, the US could demand that the UK approximate its regulatory approaches on this issue, in order to secure greater access to the UK market. Wilbur Ross, the acting US Commerce Secretary, suggested as much when he indicated that a US-UK trade agreement would require the UK to remove “unnecessary regulatory divergences”, notably in areas such as food safety⁴⁸. Such demands may not be well received by devolved administrations such as Northern Ireland and Wales, who have already expressed their desire not to deviate too far from EU rules, given their reliance on access to the EU internal market.

4. Sub-national entities and trade agreements

4.1 Role of sub-national entities in international trade law

(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

⁴⁵ Canada Federal Annex II CETA.

⁴⁶ House of Lords, European Union Committee, Brexit: Agriculture, 20th Report of Session 2016-17, 16. Available at: <https://publications.parliament.uk/pa/ld201617/ldselect/ldauc/169/169.pdf>.

⁴⁷ Legatum Institute, ‘Developing a True Transatlantic Partnership —a High Standard Trade Agreement to Propel the Global Economy’, June 2017, 3. Available at: <https://lif.blob.core.windows.net/lif/docs/default-source/default-library/truetransatlanticpartnershipweb.pdf?sfvrsn=0>

⁴⁸ Richard Partington, ‘Trump adviser Ross says UK-US trade deal will mean scrapping EU rules’ The Guardian 6 November 2017. Available at <https://www.theguardian.com/business/2017/nov/06/trump-ross-says-uk-us-trade-deal-eu-brexit-chlorinated-chicken>.

trade agreements. Federal 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 federal entities, rather than the central government. A trade policy that ignores sub-national entities can lead to a number of difficulties. For example, the consultation of sub-national entities during the negotiation process increases 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. 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.

The nature and level of involvement of sub-national entities in trade policy decision-making processes will vary depending on the model of federalism. In some intra-state federal systems, sub-national interests are represented at the federal level through state parliamentary representatives⁴⁹. Australia, Germany and the United States provide classic examples of such models. Both countries have bicameral systems where legislators are subdivided into two powerful parliamentary assemblies, one of which 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. 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 United States or Germany 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 elected⁵⁰. The upshot is that the federal executive is far more engaged with the provincial executives when dealing with matters that affect the latter. Canada has thus developed a system of executive federalism based on cooperation between the federal and provincial executives⁵¹.

In practice, however, irrespective of whether they are categorised as intra-state or inter-state systems, most federal countries have developed frameworks under which inter-governmental cooperation (or executive federalism) can take place on foreign policy. The United States 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. 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]”⁵². However, neither mechanism has proved particularly effective in enhancing state influence on US trade

⁴⁹ Cristian Freudlsperger, ‘More voice, less exity: sub-federal resistance to international procurement liberalization in the European Union, the United States and Canada’ (201), *Journal of European Public Policy* 5

⁵⁰ Christopher Kukucha, ‘International relations theory and Canadian foreign trade policy (2014) 69(20) *International Journal* 223

⁵¹ Ibid.

⁵² 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>.

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. Firstly, 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 documents⁵³. This has meant that few states have participated in the process⁵⁴ 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 has only met infrequently⁵⁵. Australia has also sought to involve states in the treaty making process by establishing a Treaties Council – a consultative mechanism comprising the prime minister of the country and the prime ministers of all states and territories. However, the central government has proved reluctant to use the Treaties Council and convened only one meeting, in 1997⁵⁶.

By contrast, Germany, also an intra-state system, has developed a more effective system of inter-governmental cooperation. Firstly, there is a constitutional obligation on the federal government to consult the Länder (the federal states) prior to the conclusion of any international treaty that would affect the latter⁵⁷. Secondly, the Länder participate in the conduct of Germany's foreign relations through a well-established formal system of cooperative federalism. The Länder have a permanent body of high ranking Land representatives in charge of coordinating all interaction with the Federal Foreign Office⁵⁸. 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"⁵⁹. These bodies are then complemented by multiple federal-Länder committees that focus on specific issues that affect foreign policy. 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 Bundesrat⁶⁰. This representative takes a lead role on negotiations in the Council of Ministers and acts "with the participation and in coordination with" the federal government⁶¹. For all other matters falling within the Länder's exclusive competences, the federal government has an obligation to involve and

⁵³ Cristian Freudlsperger, *supra* footnote 49, 9.

⁵⁴ On 17 November 2017, the IGPAC counted only 19 members.

⁵⁵ Christopher 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.

⁵⁶ Anne Twomey, 'Commonwealth of Australia', in Hans Michelmann (ed.) *supra* footnote 56, 49; Jurgen Brohmer, 'The External Affairs Power in Australia and in Germany: Different Solutions, Similar Outcome', 24 *Giornale di Storia Costituzionale* 49, 64 (2012), 53

⁵⁷ Carlo Panara, 'In the Name of Cooperation: The External relations of the German Lander and Their Participation in EU Decision-Making' (2010) 6 *European Constitutional Law Review* 64.

⁵⁸ Rudolf Hrbek, 'The Federal Republic of Germany' in Hans Michelmann (ed.) *supra* footnote 56, 151.

⁵⁹ *Ibid.*

⁶⁰ Carlo Panara, *supra* footnote 57, 80-81.

⁶¹ Rodolph Hrbek *supra* footnote 58

work in coordination with a Länder representative appointed by the Bundesrat in all negotiations and discussions held at EU level⁶².

Germany's approach of inter-governmental cooperation presents at least two features that render it more effective than the systems adopted in Australia and the United States. Whereas the consultation of Australian and 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 United States and Australia have 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

In sum, sub-national involvement in external trade policy will vary from one system to another. Most federal systems do have in place some model of inter-governmental relations, but the nature and the effectiveness of the model depends to a large degree on historical, political and constitutional factors⁶³. The contrast between the Australian and American systems and that of Germany shows that the existence of constitutional guarantees protecting sub-national entities, as well as strong institutional frameworks through which cooperation can occur, are factors that can enhance the role of sub-national entities. That being said, it must be noted that, even in the case of Germany, there are limits to what can be achieved through inter-governmental cooperation. In most cases, federal governments retain the final say in the determination of trade policy with the role of sub-national entities being limited to that of consultation. As Fafard 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".⁶⁴

(b) Canadian system of inter-governmental relations and trade – an outlier

One reason for the unique role played by Canadian provinces in the development of foreign policy (including trade policy) relates to the constitutional limitations imposed on the federal government. The federal government has the exclusive competence to negotiate and commit Canada to international law obligations. However, the duty to implement international obligations falls on the entity with constitutional jurisdiction over the matter⁶⁵. 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. 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. 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

⁶² Ibid.

⁶³ Alan Trench, 'Intergovernmental Relations: In Search of a Theory', in Scott Greer (eds) *Territory, Democracy and Justice* (Palgrave Macmillan, 2006) 224.

⁶⁴ Patrick Fafard and Patrick Leblond, 'Twenty-First Century Trade Agreements: Challenges for Canadian federalism' *The Federal Idea*, September 2012, 13. Available at: <https://ideefederale.ca/documents/challenges.pdf>.

⁶⁵ Anthony Van Duzer, 'Could an intergovernmental agreement increase the credibility of Canadian Treaty commitments in areas with provincial jurisdiction' 68(4) 2013 *International Journal* 538.

with international rules negotiated by the federal government which are considered to go against their own interests. Indeed, the inability of the federal government in Canada to guarantee provincial compliance with international obligations has, in the past, led to collapse of bilateral trade negotiations.⁶⁶

The particular constitutional make up of Canada raises concerns regarding its reliability as an international partner⁶⁷. This is especially so in the context of the negotiation of international trade agreements, which touch on so many areas that fall within the competence of provinces. 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 in the framework of the Federal-Provincial committee on Trade (C-Trade), 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 agreements⁶⁸, to discussions on specific trade topics of relevance to the provinces⁶⁹. 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 promote⁷⁰. 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 executives⁷¹.

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 committee⁷². Similarly, there are several ad hoc sectoral committees dealing with mutual recognition arrangements⁷³. In addition to these consultative mechanisms, the provinces maintain regular dialogue with the federal government on trade policy matters. Cooperation occurs through informal communication channels

⁶⁶ See Anthony Van Duzer and Melanie Mallett, 'Compliance with Canada's Trade and Investment Obligations: Addressing the Gap between Provincial Action and Federal responsibility' (2017) 54(1) *Alberta Law Review* 102-104.

⁶⁷ Ali 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; Va Duzer

⁶⁸ Stephane Paquin, *supra* footnote 76, 547.

⁶⁹ Christopher Kukucha, *The provinces and Canadian Foreign Trade Policy* (UBC Press, 2008) 54.

⁷⁰ Anthony Van Duzer and Melanie Mallett, *supra* footnote 66 92.

⁷¹ Ohio 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.

⁷² Christopher Kukucha, *supra* footnote 69, 54.

⁷³ *Ibid.*

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 issues⁷⁴. 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 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 government⁷⁵.

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"⁷⁶ 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 TransPacific Partnership (TPP) where, at the request of the United States, provinces were not allowed to present 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 competence⁷⁷.

The foregoing discussion clarifies the significant role played by provinces in the formulation of Canada's trade policy and, in particular, the negotiation of trade agreements. The Canadian model of inter-governmental cooperation presents a number of distinctive 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 has had little choice but to develop mechanisms that have integrated provinces and amplified their voice in trade policy making. Therefore, the Canada model is not one that could be easily emulated in systems where sub-national are legally bound to implement international obligations that overlap with their competences. 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 must meet on a quarterly basis. Moreover, 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

⁷⁴ Gregory Inwood, Carolyn Johns and Patricia O'Reilly, *Intergovernmental Policy Capacity in Canada: Inside the Worlds of Finance, Environment, Trade, and Health* (McGill-Queen's University Press, 2011) 250

⁷⁵ Christopher Kukucha, *supra* footnote 69, 54.

⁷⁶ Stephane Paquin, 'Federalism and the governance of international trade negotiations in Canada: Comparing CUSFTA with CETA' 68(4) *International Journal* 550.

⁷⁷ Cristian Freudlsperger, *supra* footnote 49, 12.

to articulate positions in advance of meetings, and that minor issues can be addressed at 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 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"⁷⁸. Together these unique 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 obligations⁷⁹ by the provinces.

5. Devolution and post-Brexit trade agreements

5.1 The limited effectiveness of the UK's current system of inter-governmental cooperation

The United Kingdom is not a federal system but rather a territorially devolved constitutional system. By comparison with federal states, the United Kingdom remains a relatively centralised state, where devolved territories enjoy far less autonomy and fewer constitutional guarantees than sub-national federal entities⁸⁰. This can be seen in the very limited role played by devolved administrations in foreign policy. Foreign affairs are a reserved⁸¹ (or 'excepted'⁸²) matter, meaning that the negotiation and conclusion of international treaties fall under the exclusive competence of the Crown. Furthermore, the United Kingdom adopts a strong dualist approach, whereby international treaties must be incorporated into domestic law in order to be given effect⁸³. 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.⁸⁴ In accordance with the Sewel Convention, 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 matters⁸⁵. 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*⁸⁶, the UK

⁷⁸ Christopher Kukucha, 'Provincial/Territorial Governments and the Negotiation of International Trade' Agreements (2016) 10 IRPP Insight, 12. Available: <http://irpp.org/research-studies/insight-no10/>.

⁷⁹ Cristian Freudlsperger, *supra* footnote 49, 12.

⁸⁰ Nicola McEwen, Wilfried Swenden and Nicole Bolleyer, 'Intergovernmental Relations in the UK: Continuity in a Time of Change?' (2012) 14 *The British Journal of Politics and International Relations* 332-333.

⁸¹ Schedule 5 Scotland Act 1998; Schedule 2 Government of Wales Act 1998.

⁸² Schedule 2 Northern Ireland Act 1998.

⁸³ 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 Murray Hunt, *Using Human Rights Law in English Courts* (Hart, 1997) 297-324.

⁸⁴ Anthony Aust, *Modern Treaty Law and Practice* (CUP, 2017), 170.

⁸⁵ David Feldman, 'Case Note and Comment: Pulling a trigger or starting a journey? Brexit in the Supreme Court' (2017) 76(2) *Cambridge Law Journal* 22.

⁸⁶ *R. (Miller) v Secretary of State for Exiting the European Union* (Birnie and others intervening) [2017] UKSC 5; [2017] 2

Supreme Court dismissed the idea of the Sewel Convention as a “legal rule justiciable by the courts”⁸⁷, viewing it instead as a political convention aimed merely at “facilitating the harmonious relationships between the UK Parliament and the devolved legislatures”⁸⁸. In doing so, *Miller* confirmed the notion that, compared to federal systems, in the UK’s system of devolution, sovereignty in foreign affairs remains very much centralised.

However, devolved administrations are not completely excluded from the process. They have a responsibility to enact implementing legislation, where an international obligation falls wholly within a devolved matter⁸⁹. However, central government have the power to order devolved administrations not to adopt a measure or to revoke a measure which it considers to be incompatible with international obligations⁹⁰. There is, therefore, a very limited role for devolved administrations in the shaping and implementation of UK foreign policy. Nevertheless, to the extent that the foreign policy conducted by the UK government could impact on devolved matters, the UK has developed a series of agreements which provide guidelines and mechanisms to ensure cooperation and coordination in policy making in matters that fall within the sphere of competence of the devolved administrations⁹¹. 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 administrations⁹².

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. 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, as well as 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 devolved administrations, which are held upon request of the relevant administrations.

The concordat on international relations sets out a number of guidelines for cooperation between the UK government and devolved administrations in international relations. Firstly, there are requirements

W.L.R. 583.

⁸⁷ *Ibid* para. 148.

⁸⁸ *Ibid* para. 151. For a critical appraisal of the *Miller* judgement and its approach to the Sewel Convention see: Mark Elliott, ‘The Supreme Court’s Judgment in *Miller*: In Search of Constitutional principle’ (2017) 76(2) *Cambridge Law Journal* 275-277; Christopher McCrudden and Daniel 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].

⁸⁹ Sionaidh 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 ; A Austen, 171-172.

⁹⁰ Northern Ireland Act 1998 s 21 and. 26; Scotland Act 1998, s. 58; Government of Wales Act 2006, s. 82.

⁹¹ Andrew Scott, ‘The Role of Concordats in the New Governance of Britain: Taking Subsidiarity Seriously?’ (2010) 5(1) *Edinburgh Law Review* 21-58.

⁹² Memorandum of Understanding and Supplementary Agreements between the United Kingdom 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>.

relating to information exchanges. The UK government is required to make devolved administrations aware of international developments that touch on devolved matters, and devolved administrations must also inform the government of developments in devolved regions that may affect international relations. Secondly, with respect to the shaping and development of foreign policy, the UK government must consult devolved administrations on matters of foreign policy that will affect devolved matters. Devolved administrations may also “hold working level discussions”⁹³ 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”⁹⁴. Thirdly, with respect to implementation, the concordat recalls that devolved administrations are legally bound to implement all international obligations undertaken by the UK, even in areas that pertain to devolved matters. The UK government must notify any new international obligations to devolved administrations whose implementation falls within their remit. Although 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. 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. Devolved administrations can, if the cases relate to the implementation of devolved matters, contribute to such proceedings by issuing instructions to council and participating in hearings. In relation to the issue of liability, the devolved administrations are responsible for the payment or any compensation and costs awarded against the UK for their failure to implement or enforce an international obligation.

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 in the United Kingdom 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 devolved administrations. Representatives of devolved administrations viewed the JMC as a forum that is used to air broad political grievances rather than discuss practical issues in a constructive manner⁹⁵. 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. The relative 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 others⁹⁶. Even here, however, it was noted that the views of ministers of devolved administrations were heard but routinely ignored⁹⁷.

Clearly then, the UK’s system of inter-governmental cooperation, as it currently stands, would not provide devolved administrations the type of influence on trade policy and trade negotiations that is bestowed on Canadian provinces. This should come as no surprise, as the UK devolved administrations

⁹³ Ibid 53.

⁹⁴ Ibid 54.

⁹⁵ House of Lords, Select Committee on the Constitution, ‘Inter-governmental relations in the United Kingdom’ 11th Report of Session 2014-15, 18. Available at: <https://publications.parliament.uk/pa/ld201415/ldselect/ldconst/146/146.pdf>.

⁹⁶ Ibid.

⁹⁷ Ibid, 19.

lack the leverage of Canadian provinces, which results from their exclusive competence to implement international obligations that fall within their competences. Without this, the UK devolved administrations are left mostly reliant on the goodwill of the central government to establish frameworks and adopt a cooperative approach which is inclusive and actively seeks to engage with devolved administrations and reflect their viewpoints in national policy. However, in reality, the concordats are designed in a manner that minimises the potential impact of devolved administrations. Firstly, the fact that the concordats are not legally binding, and therefore create no obligation to cooperate, means that the cooperative frameworks are based entirely on the political goodwill of the relevant parties. This is aptly illustrated by the fact that no JMCs were held from 2002 to 2008. There are also numerous examples where the United Kingdom has simply decided against involving devolved administrations in any type of consultative process, even in devolved matters, in order to avoid having to accommodate their views⁹⁸. 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 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 an 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 devolved administrations has occurred through informal channels and the development of personal relationships between administrations⁹⁹. However, this reliance on informal forms of cooperation has been criticised and presents a number of deficiencies. Again, the effectiveness of informal cooperation depends to a large degree on the goodwill of parties involved as well as the make-up of the current administration. This creates the danger 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. 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.

5.2 A new framework for inter-governmental cooperation in trade?

In Canada, the exclusive jurisdiction of provinces in the implementation of international obligations, as well as the huge attention given to federal matters in the media, means that there is a strong emphasis on the need to develop mechanisms that accommodate differences between the federal and provincial executives. The situation in the United Kingdom is different. The central government is not subject to the same type of constitutional constraints and can force devolved administrations to implement international obligations. Therefore, presently, the devolved administrations stand to have a fairly limited role in shaping the content of its trade agreements once the United Kingdom leaves the EU.

The United Kingdom's loose form of inter-governmental relations also make sense when one considers the highly asymmetrical nature of devolution which, firstly, forces the United Kingdom central government to "double up as the de facto representative of England" and, secondly, which varies the nature of the cooperation with central government from one devolved administration to the next¹⁰⁰. A system that would enable specific devolved administrations too great an influence over the development of

⁹⁸ Daniel Kenealy, 'Concordats and International relations: Binding n Honour Only' (2012) 221(1) *Regional and Federal Studies* 69.

⁹⁹ Nicola McEwen, Wilfried Swenden and Nicole Bolleyer, 'Intergovernmental Relations in the UK: Continuity in a Time of Change?' (2012) 14 *The British Journal of Politics and International Relations* 327

¹⁰⁰ Nicola McEwen et al supra footnote 99, 333.

national policy would prove controversial. There is also no doubt that the reliance on informal bilateral relations between Whitehall and devolved administrations is in part due to the fact that the UK's system of inter-governmental relations was set up by the Labour Government in the early 2000s at a time where the Labour party dominated the central government as well as the devolved governments in Scotland in Wales. In this specific context, the scope for disagreements between administrations was significantly reduced, thus rendering the need for more formal types of cooperation needless.

In short, simply transposing the Canadian system of inter-governmentalism into the United Kingdom would not be a magic bullet given the sui generis characteristics of UK devolution. However, the current system is arguably no longer fit for purpose. There have been multiple calls for the reform of this system to allow for a more institutionalised form of inter-governmental relations and whilst some of these calls have been heeded, several deficiencies remain. Such deficiencies will be made all the more problematic in the context of the United Kingdom's post-Brexit trade policy, as EU powers are repatriated and subject to increasing domestic public scrutiny.

The constitutional restrictions on the powers of devolved administrations mean that the leverage available to devolved administrations to force the central government to take their interests and views into account when formulating trade policy and objectives in trade negotiations will be limited. Without the threat of non-implementation, the power relations between central government and devolved administrations are strongly skewed in favour of the former. And as the experience of inter-governmental relations in Australia and even in the United Kingdom 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 goals¹⁰¹. To redress that balance, the United Kingdom 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 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, and the identification of areas where trade agreements should reflect the specific circumstances of devolved territories. Inter-governmental cooperation in this area should be made legally binding to ensure that cooperation occurs on a continuous basis rather than on an ad hoc basis. 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. The regular dialogue would also build trust between the parties which is more likely to lead to constructive cooperation.

The formal institutionalised mechanisms of cooperation should also reflect the complex nature of contemporary trade agreements. The complexity relates to the subject matters regulated in trade agreements as well as the processes involved in negotiating, concluding and implementing them. Cooperation should encompass all areas covered in trade negotiations that overlap with devolved matters. The JCT should be granted the power to establish working committees focused on key areas of strategic interests for devolved administrations. These sub-committees would be composed of civil service staff with expertise on specific trade issues from both central government and devolved administrations, and would be used to carry out more technical discussions. Secondly, cooperation should take into

¹⁰¹ Supra footnotes 56 and 98

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, 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. This is the case of the CETA, which establishes a Regulatory Cooperation Forum for regulatory policy issues and initiatives that may affect trade. A similar mechanism was also considered in the context of the negotiations for the EU-US TTIP, leading some to refer to the agreement as a “living agreement” where regulatory approximation can be discussed and new norms developed¹⁰². Where negotiations are being held in regulatory areas that overlap with devolved matters, the input of devolved administrations should be sought.

Consideration must also be given to the right of devolved administrations to participate in trade negotiations. 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 devolved administrations would add a layer of legitimacy to the negotiation process and improve the chances of successful outcome. Devolved administrations are more experienced and attuned to the complexities of matters that fall wholly within devolved competence and would be better placed to put forward solutions and break deadlocks that may arise in relation to such matters. Again, the involvement of devolved administrations should cover the entire life-span of a trade agreement; from negotiation to implementation and talks held in working committees established by the agreement. In short, allowing for such representation would reflect the fact that devolved territories are also responsible for matters addressed in trade agreements, further reinforcing buy-in for such agreements at devolved levels to.

A system along such lines would not be a panacea. Firstly, there is a lot more that devolved administrations can do to enhance their influence. A significant investment will have to be made by devolved administrations to improve their capacity in dealing with trade policy issues. There is very little point in giving 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 and the implementation of mechanisms that allow for coordination of expertise of policies across internal departments and the further development of para-diplomatic activities¹⁰³.

Secondly, there are limits to what can be achieved through cooperative frameworks. There is no guarantee, nor should there be one, that devolved territories will secure all of their respective objectives in future trade agreements. As it negotiates trade agreements, the United Kingdom will inevitably face

¹⁰² Karel 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]; Marise Cremona, “Negotiating the Transatlantic Trade and Investment Partnership (TTIP) - Context and scope of TTIP” (2015) 52 *Common Market Law Review* 352; Davor Jancic, ‘TTIP and legislative–executive relations in EU trade policy’ (2017) 40(1) *West European Politics* 208.

¹⁰³ See for example Elin Royles ‘Small, Smart, Successful: A Nation Influencing the Twenty-First-Century World? The Emerging Welsh Paradiplomacy’ (2010) 23(1) *Contemporary Wales* 142-170; Hubert Rioux Ouimet, ‘From Sub-state Nationalism to Sub-national Competition States: The Development and Institutionalization of Commercial Paradiplomacy in Scotland and Quebec’ (2015) 25(2) *Regional and Federal Studies* 109-128; Elin Royles, ‘Substate Diplomacy, Culture, and Wales: Investigating a Historical Institutional Approach’ (2016) 46(2) *Publius* 224-247.

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 United Kingdom 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.

Finally, it must be noted that formal cooperation also presents certain drawbacks. One obvious and valid 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 United Kingdom 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 the reality is that any attempt to exclude 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 devolved regions 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 United Kingdom wishes to be in a post-Brexit world.

Conclusion

There is no argument that, post-Brexit, the United Kingdom 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. 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 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 United Kingdom's membership of the EU is that it is a heterogeneous country composed of nations with sometimes starkly different interests, politics and values. 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 devolved administrations would be a recipe for further division and fragmentation.

The question thus raised is how to develop internal mechanisms that give devolved administrations a real voice and influence in shaping the UK's future trade agreements without inhibiting the United Kingdom'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 seamlessly be transposed in the United Kingdom. Each cooperative framework is the result of the particular specificities of the constitutional and political system of the country. As discussed, the Canadian system, which is typically held as the paragon of inter-governmental relations in the area of trade policy, would not necessarily yield the same results if emulated in the United Kingdom, for the simple reason that the power and leverage of 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 devolved administrations in the exercise of foreign affairs is precisely the reason why the United Kingdom must go further than the Canadian model to ensure a meaningful role for devolved administrations in the shaping of future trade agreements. In order to achieve this, the United Kingdom 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, *inter alia*, the establishment of a Joint Committee on Trade between ministerial representatives of the Department for International Trade and 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 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 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 United Kingdom post-Brexit. The idea that the United Kingdom'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 devolved administrations and Whitehall with respect to the allocation and exercise of such powers. Calls for greater devolved powers and differentiation¹⁰⁴ run against an instinctive inclination from Whitehall towards the centralisation of powers to protect the integrity of the United Kingdom's internal market.¹⁰⁵ Finding the correct balance between these two conflicting agendas will be one of the main constitutional challenges faced by the United Kingdom in the coming years. So far, based on the Trade Bill and the poorly-executed attempts to involve 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 devolved territories.

This article has analysed the expulsions of Roma EU citizens from France in 2010 with the aim of showing the challenges this situation posed to the concept of EU citizenship. Despite the claims that the right of free movement is a fundamental and universal right of EU citizens, this article has attempted to show that this is not the case for every EU citizen. The Roma expelled from France were singled out as an ethnic minority and purposively targeted. This situation violated the Racial Equality Directive, the Citizens' Rights Directive and ultimately human rights (notably the non-discrimination rights). This example is one of 'securitization' and of creation of an ethnic identity from above. The expelled Roma saw their identity named, framed and associated with delinquency and crime.

Moreover, after this initial stage, a blame game started and the responsibility was passed from one level to the other. Immediately after the events, a powerful European discourse condemned the expulsions and stated the importance of free movement and non-discrimination. Nevertheless, the 2011 EU Roma Framework passed the ball to the national courtyards. While it can be argued that it was done for the sake of involving Member States, it can also be claimed that EU institutions found their

¹⁰⁴ Alan Greer, *supra* footnote 22, 4.

¹⁰⁵ Richard Rawlings, *supra* footnote 22, 5.

scapegoat by doing this. In regard to formal aspects, the Framework was criticized for lacking real targets, having a non-binding nature and lacking an enforced monitoring mechanism. On more substantive matters, it can be criticized for failing to tackle the ethnic discrimination faced by Roma communities while exercising their right of free movement.

Overall, the responsibility shift was accompanied by a priority shift. The integration of Roma migrants in their home countries took priority over the protection of their free movement. On the one hand, this testifies to the weakness of EU citizenship, as it proves how the right of free movement is not equally applying to all EU citizens. The opposite seems to actually be the norm, as some of these citizens are invited to integrate at home rather than move abroad. On the other hand, the failure to tackle the ethnic discrimination at any level weakens the protection of Roma EU migrants who are caught between the two levels.

Epilogue: Northern Ireland – throwing a spanner in the works

As the withdrawal negotiations have progressed, it has become increasingly evident that the UK's future trade policy may be constrained by the need to comply with the 1998 Good Friday Agreement¹⁰⁶. 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 the Ireland which is underpinned by the Common Travel Area and EU law¹⁰⁷. 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 outcome¹⁰⁸. On 8 December 2017, a 'Joint Report from the EU and the UK on progress during phase 1 of negotiations under Article 50 TEU' (Joint Report)¹⁰⁹ was released which posited three possible scenarios for the UK's future relations with the EU that could address the need to avoid a hard border between Northern Ireland and the EU whilst, simultaneously, preserving the integrity of the UK's internal market. The first scenario evokes the possibility of a EU-UK agreement that would obviate the need for a hard border¹¹⁰. The second scenario refers to the development of specific solutions to address the unique circumstances of Northern Ireland¹¹¹. And the third scenario contemplates the possibility where no solution is found and the UK unilaterally commits to ensuring full alignment with relevant internal market and customs union rules¹¹².

The first and third scenarios, depending on how they are implemented, would have a significant impact in the scope of future UK trade agreements. The first scenario – an agreement that would remove the need to put in place a hard border – can only realistically achieve its objective if it includes some form of customs union agreement where the United Kingdom would agree to maintain EU tariffs on goods and replicate EU anti-dumping duties and a trade agreement where the United Kingdom agrees to replicate all internal market rules on agricultural and industrial goods. In this scenario, the UK would have to align its trade policy with the EU's Common Commercial Policy (which includes the common external tariff and EU FTAs) with respect to trade in goods. This would inevitably constrain the EU's regulatory autonomy as well as its ability to sign trade agreements in the area of goods. A similar – but more limited – arrangement exists in the EU-Turkey Customs Union which covers industrial goods and

¹⁰⁶ 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

¹⁰⁷ Anthony Gordon, 'Brexit and the Irish Border: Legal and Political Questions' Royal Irish Academy –

British Academy Brexit Policy Discussion Paper October 2017. https://www.britac.ac.uk/sites/default/files/BrexitandtheIrish-BorderLegalandPoliticalQuestions_0.pdf

¹⁰⁸ 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 [https://ec.europa.eu/commission/sites/beta-political/files/guiding-principles-dialogue-ei-ni_en.pdf].

¹⁰⁹ European Commission, 'Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union' 8 December 2017 https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf.

¹¹⁰ Joint Report para. 49

¹¹¹ Ibid.

¹¹² Joint Report para 50

requires Turkey to automatically grant access to third countries that have signed a FTA with EU under the preferential terms of the EU FTAs¹¹³. Turkey can conduct parallel negotiations with these third countries to secure reciprocal access but this has proven difficult, not least because EU FTA partners may wish to maintain their privileged access to Turkey whilst shielding their markets from competition. To the extent that the UK's own trade policy would have to mirror that of the EU, the scope for devolved administrations to shape FTAs with respect to goods would also be limited. They would, however, have a role to play with respect to other areas of trade agreements (e.g., services, intellectual property rights, procurement, competition) where the UK would maintain its autonomy.

The third scenario creates similar problems. The commitment from the UK to unilaterally ensure "full alignment" with EU internal market and customs union rules would mean that the UK would also be constrained in its ability to negotiate trade in goods component of its future trade agreements. In any event, scenario three is unlikely to be of much relevance given that, in the absence of any trade agreement, even if the UK agrees to follow all relevant EU internal market and customs union rules, border checks would still be required between the UK and the EU¹¹⁴.

The second scenario relates to the possibility of creating specific solutions to address the unique circumstances of the island of Ireland. Specific solutions for Northern Ireland could include, for example, the scenario where Northern Ireland remains within the EU customs union and the single market through continued EU membership¹¹⁵. Another possibility would be for Northern Ireland to become a separate customs territory¹¹⁶ to remain within the EU customs union. From a constitutional perspective, this would require the significant devolution of powers to Northern Ireland to allow it regulate in areas falling within the scope of EU competence. From a trade perspective, the question would arise as to the ability of the Northern Ireland to influence the negotiations of EU FTAs if it is no longer a EU Member State and therefore unable – like Turkey – to have any say in the formulation of the EU's Common Commercial Policy. One possibility here would be to use the existing North-South Ministerial Council established under the Good Friday Agreement to allow for cooperation and consultation between Northern Ireland and the Irish government on areas of mutual interest¹¹⁷. The North/South Ministerial Council currently cooperates in the areas of agriculture, education, environment health tourism and transport¹¹⁸. Cooperation could also be extended to the area of trade policy to provide the Northern Ireland executive with a forum to discuss EU trade negotiations with the Republic of Ireland, which can then put forward the former's interests in Brussels. It must be noted, however, that both options outlined under scenario two may prove unpalatable as they require the implementation of a hard border between Northern Ireland and the rest of the United Kingdom. This would run counter to another central commitment made in the Joint Report to maintain the integrity of the UK's internal market.

¹¹³ Krisztina Binder, 'Reinvigorating EU-Turkey bilateral trade: Updating the customs union' European Parliament Briefing PE599.319.

¹¹⁴ Jim Rollo and Peter Holmes, 'Softer Brexit, Softer Irish border?' UK Trade Policy Observatory 8 December 2017. <https://blogs.sussex.ac.uk/uktpo/2017/12/08/softer-brexit-softer-irish-border/>

¹¹⁵ Niko Skoutaris, 'Territorial Differentiation in EU law: can Scotland and Northern Ireland remain in the EU and/or the Single Market?' 19(2007) Cambridge Yearbook of European Legal Studies 287-31-

¹¹⁶ John Campbell, 'NI could be 'autonomous customs territory' after Brexit' BBC 27 October 2017. <http://www.bbc.co.uk/news/uk-northern-ireland-41783827>

¹¹⁷ Strand Two Good Friday Agreement *supra* footnote 106

¹¹⁸ See <https://www.northsouthministerialcouncil.org/areas-of-cooperation>.

The Joint Report identified the goal of avoiding a hard border within Ireland, but has not spelled out realistic solutions in any great deal. It is, however, clear at this stage that the need to avoid a hard land border in the island of Ireland and the desire for the UK to carry out an independent trade policy and maintain the integrity of its own internal market cannot be reconciled. An agreement between the EU and the UK where either the UK, as a whole, or Northern Ireland, on its own, agree to comply with EU customs and internal market rules on goods is the only way to ensure the avoidance of a hard border. Either approach will have a significant impact on UK trade policy and Northern Ireland's place in it.

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