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Trade Paradiplomacy and the Politics of International Economic Law: The Inclusion of Quebec and the Exclusion of Wallonia in the CETA Negotiations

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ABSTRACT

International trade negotiations are no longer largely limited to federal government's constitutional jurisdictions. In this context, substate governments, like Quebec and Wallonia, are aware that their ability to formulate and implement policy, are subject to negotiations in trade talks. This article compares the role of Quebec and Wallonia in the CETA negotiations. While Wallonia was able to force the inclusion of an interpretative legal instrument to clarify certain parts of CETA, Quebec, like the other Canadian provinces, was able to influence the negotiation from within. Quebec's influence was felt on many issues such as regulatory cooperation, certification, labour mobility, cultural diversity, but also on issues that were ultimately left outside the agreement. The comparison provides important lessons: the inclusion in the negotiating process of substate governments, like Quebec, makes it easier for them to make important concessions during the negotiation but also to accept the outcome of the negotiation. Moreover, substate governments are important actors in legitimising these trade treaties. When they strongly oppose them, like Wallonia did, it has a deleterious effect on the legitimacy of the agreement.

KEYWORDS

Trade paradiplomacy; international economic law; inclusion and exclusion; Quebec; Wallonia; CETA negotiations

When the Canadian government and the European Union (EU) announced, in 2009, the launch of negotiations for a 'next generation' trade agreement (the Comprehensive Economic and Trade Agreement or CETA), the EU insisted that Canadian provinces have provincial representatives on Canada's negotiating team. The EU wanted the provinces to be included in the Canadian delegation basically because they were particularly interested in accessing Canadian provincial and municipal public procurement contracts, that fall under provincial jurisdiction in Canada. The EU judged that their inclusion in the negotiating process would make the provinces more willing to engage and make significant concessions in the negotiation. On top of that, representatives of the EU required provincial representatives be at some of the tables of negotiations since the provinces are responsible for the implementation of the agreement within their legislative jurisdictions. This demand came as a surprise for many, given that Canada's federal government has plenary power in matters relating international trade and commerce. CETA became the zenith of federal-provincial cooperation in trade negotiations and was not replicated after (Paquin 2013, 2020, Freudlsperger 2020).

On the other side of the negotiating table, consent from Belgium to sign CETA was blocked at the substate level by regional parliaments. In Belgium, both the Belgian federal parliament and the Flemish parliament had approved the signature of CETA, but the Walloon Parliament had not,

and neither had the Brussels-Capital Region nor the French community of Belgium. The Belgian federal government could not proceed without their support (Van der Loo 2016, Tatham 2018, Bollen, De Ville *et al.* 2020). In addition, the EU required that all 28 EU member states (this was before BREXIT) including 38 national and substate parliaments, support CETA before the full ratification of the treaty could come into force.

These two occurrences demonstrate that substate or regional governments can be influential players in international trade negotiations. Substate governments are often downplayed in the state-centric international trade literature, in particular with regard to international economic law (Kukucha 2016, Paquin 2016, Lequesne and Paquin 2017, Broschek and Goff 2020, Freudlsperger 2020). The methodological nationalism in most research on trade negotiations has led specialists of international economic law but also on multilevel governance to overlook substate governments in trade negotiations. This neglect in scholarly work contrasts uncomfortably with the impact some substate governments currently have on international trade, especially given the rise of regional authorities around the world (Hooghe, Marks *et al.* 2010, Tatham 2018).

For the CETA negotiations, the role of substate governments has been more important than in the past. Quebec, but also all Canadian provinces, were able to influence the positions of the Government of Canada from within. Quebec, for example, presented over 150 position papers or strategic position briefs and participated in more than 275 meetings with federal negotiators and their provincial and territorial counterparts. The Quebec government's chief negotiator, Pierre-Marc Johnson, also had more than twelve bilateral meetings, with the European chief negotiator, Mauro Petriccione. Overall, Quebec's influence was felt on many issues such as regulatory cooperation, certification, labour mobility, and recognition of the diversity of cultural expressions or cultural exemption, but also on issues that were ultimately left outside the agreement (Johnson, Muzzi *et al.* 2015, p. 30).

In the case of Wallonia, many concessions were made in exchange for its support. The concessions from the EU and Canada did not mean a reopening of CETA *per se* but rather the inclusion of an interpretative legal instrument to clarify certain parts of the agreement, particularly in areas touching on labour and environmental law, but also regarding environmental protection mechanisms and investor-state dispute settlement (ISDS). Wallonia also required that the investment court system be submitted for review by the European Court of Justice to assure its compliance with EU law.

Substate governments can thus be involved in trade negotiations through trade paradiplomacy. As reflected in the Introduction to this Special Section, trade negotiations today increasingly involve broader cross-border regulatory issues and are clearly no longer restricted to areas under the constitutional jurisdiction of central or federal governments. In this era of 'deep integration', all spheres of government activity, including matters under the exclusive constitutional jurisdiction of substate governments, come under the purview of at least one and often several chapters of these type of trade agreements. International trade negotiations address issues such as services, government procurement, regulatory cooperation, public health, cultural diversity, business subsidies, treatment of investors, investor-state dispute settlement (ISDS), removal of non-tariff barriers, agriculture, labour mobility, the environment and climate change, etc. (Kukucha 2016, Tatham 2018, Bollen, De Ville *et al.* 2020, Broschek and Goff 2020).

In this context, substate governments, like Quebec and Wallonia, are conscious that their political power and sovereignty – in other words their ability to formulate and implement policy – depend on what is negotiated in trade agreements. Excluding them from trade negotiations can become a problem given the importance of some of the issues at stake. As the editor's note, there are 'growing frictions' between substate governments and international trade agreements.

As a result, the number of substate governments actively engaged in international activities – a phenomenon known as paradiplomacy – and trade negotiations has risen considerably since the 1970s and 1980s, notably in federal states (Michelmann 2009, Crikemans, 2010, Paquin 2019). While Quebec, but mostly Wallonia, have received significant international media attention, they are not the only case of substate governments increased involvement in trade negotiations. In

Austria, for example, all the Austrian Länder, have passed unanimous resolutions on the Transatlantic Trade and Investment Partnership (TTIP) and CETA, rejecting TTIP and opposing CETA's provisional application. Despite their unanimous opposition to CETA, the Austrian government has ignored their concerns and ratified the agreement anyway. In Germany, Länder were divided in their support of CETA. But, in any case, the Bundesrat could be used to block the ratification of mixed agreements like CETA. While Spanish regions are constitutionally limited in terms of their ability to engage in international trade negotiations, Spanish regional parliaments have begun asserting themselves in the new politics of trade. In the United States and Mexico, the influence of the federated states is less important than in Canada and Belgium, but there is still growing participation and influence over the negotiation thru intergovernmental mechanisms. In the case of the United States, some states, like New York, Washington State or Pennsylvania even have bureaucratic resources committed to international trade (Kukucha 2017, Broschek and Goff 2020, p. 10, Egan *et al.* 2020).

The importance of substate governments in trade negotiation has also increased social mobilisation and political pressure on them (Bollen, De Ville *et al.*, 2020). The sense of exclusion from trade negotiations of several substate governments has the effect of fuelling resentment among part of the population about socio-political issues of redistribution raised by the editors against trade agreements. Substate governments are key players in the process of legitimising trade agreements because when they oppose them, as in the Walloon case, it jeopardises the negotiations and risks provoking chain reactions. Some substate governments want to change the institutional processes and structures that drive trade policy, they want to be included in the multi-level dynamics of trade negotiations (Broschek and Goff 2020, Freudlsperger 2020, Paquin 2020).

This article compares the role in the CETA negotiations played by the provinces of Quebec in Canada, and the region of Wallonia, which was supported by Brussels-Capital and the French community in Belgium, in order to explain why and how substate governments are involved in trade negotiations. These cases can be considered as contrasting ones. Although both cases represent French-speaking federated states, involvement of each in the negotiation of the CETA is distinct: the negotiating process in Europe excluded the parliaments of Wallonia, but also Brussels-Capital and the French community, while Quebec, and other Canadian provinces, obtained a role within the Canadian delegation. Since substate parliaments in Belgium could not, like Quebec, influence the negotiating process from within, some of them chose to block the process in order to voice their opposition and force concessions.

The comparison provides important lessons: the inclusion in the negotiating process of substate governments makes it easier for them to make important concessions during the negotiation and also accept the outcome of the negotiation. Moreover, substate governments are important actors in legitimising these trade treaties. When they strongly oppose them, like Wallonia did, it has a deleterious effect on the legitimacy of the agreement (Freudlsperger 2020). This article presents a review of the literature and findings from semi-structured interviews we conducted throughout the CETA negotiations with officials, advisors and experts from Ottawa, Quebec and the EU who were directly involved in trade negotiations. In total, the interviews represent more than 24 h of discussion with key players during and after the negotiations. The interview guide was approved by the Ethics Committee of the École nationale d'administration publique.

Substate Governments and International Trade Negotiations

Since the 1970s, substate governments have taken on more active roles in international affairs, notably in order to avoid becoming mere implementers of agreements negotiated by central governments. In 2020, the Government of Quebec operated 33 representations in 18 countries, while Wallonia-Brussels International is the substate government with the largest number of trade offices on a per capita basis in the world, with 18 delegations and links to nearly 70 countries in 2018 (Paquin, Reuchamps *et al.*, 2015, Wallonie-Bruxelles international 2018).

A very large range of public policy tools is available to subnational governments in international relations: they send delegations abroad, develop bilateral and multilateral policies with other substate governments (or even sovereign countries), participate in trade fairs and international forums such as the Davos forum, finance public relations campaigns to increase exports and attract investments, and arrange official visits with other regional or national leaders. Some even have a ministry responsible for international relations, such as Quebec's *Ministère des Relations Internationales et de la Francophonie* or Wallonia-Brussels International. Substate governmental officials can also participate in their country's delegation to meetings of international institutions like the OECD, UNESCO, WHO and sometimes outside like in La Francophonie where Quebec and Wallonia have a distinct representation. It is now common for substate government officials from Belgium to speak in the name of their respective countries in international forums, and participate in drafting international agreements when the subject matter falls within their constitutional jurisdiction (Paquin 2019).

Their ambiguous international status, which is, in the words of James Rosenau, both 'sovereignty-bound' and 'sovereignty-free' (Rosenau 1990, p. 36) has led substate governments to develop two main approaches to influencing trade negotiations. Being sovereignty-bound, or located within a sovereign state, as Quebec is within Canada, or Wallonia in Belgium, gives them access to federal government decision makers, including trade negotiators. Unlike non-governmental organisations (NGOs), they have privileged access to diplomatic networks and international trade negotiations, with the ability to influence outcomes. This approach relies on intrastate channels, which were available to Canadian provinces, but proved difficult during the CETA negotiation in Belgium.

On the other hand, substate governments also enjoy a 'sovereignty-free' status in global politics. Since they are not recognised as sovereign states in their own right, substate governments are able to act more freely than sovereign countries, thereby enjoying some of the benefits of civil society actors or NGOs. In the European context, regions like Wallonia or Brussels-Capital, can use extra-state channels to engage with European institutions, in particular through the Committee of the Regions. According to Tatham, in the EU context, extra-state channels tend to be mobilised more frequently than intrastate channels (Tatham 2018). The opposite holds true in the North American context, since the federated states of the three North American federations – Canada, Mexico and the United States – have no supranational institutions to lobby. They thus prioritise internal intergovernmental mechanisms, but also conduct discussions among themselves in an increasing number of substate networks.

In dealing with Europe, federated states such as Quebec can make representations to EU institutions or trade policy actors. The Delegate General of Quebec in Brussels, Christos Siros met with Peter Mandelson, the EU trade commissioner to explore the idea of launching trade negotiations with Canada, for example. Quebec Premier, Jean Charest, was also able to meet with Nicolas Sarkozy, who held the rotating presidency of the council of the EU in 2008, to convince him to support the idea of launching free trade negotiations between Canada and Europe. Sarkozy became a promoter of the deal in Europe. During the negotiations, the Government of Quebec's chief negotiator for CETA, Pierre Marc Johnson, had numerous face-to-face bilateral meetings with the chief EU negotiator, Mauro Petriccione (Panetta, 2013, Johnson, Muzzi *et al.* 2015, p. 30).

The Case of Wallonia, Brussels-Capital and The French community

In Europe, trade policy has long been a competence of the EU, but in some cases, national parliaments retain the power to ratify trade agreements. The Treaty of Lisbon (signed 2007, in force 2009) extended the EU's competence in this area, meaning that, in theory, the need for ratification by national parliaments was supposed to be much less important. The role of the European Parliament was enhanced to ensure that treaties negotiated by the EU were perceived as legitimate (European Union 2018, Bollen, De Ville *et al.* 2020).

Put simply, three institutions are currently important in EU trade negotiations: the European Commission, the Council of the European Union and the European Parliament. The Commission negotiates international treaties, and the Council decides jointly with Parliament on the approval of trade agreements and authorises the signature by the EU of agreements. When trade treaties deal with issues under the competence of the EU, no intervention by national parliaments is required. When an agreement is declared 'mixed', meaning that responsibility is shared between the EU and EU Member States, the EU can provisionally apply the agreement, but it must have been previously signed by Member States and be subsequently ratified by national parliaments. On top of that, in some cases, regional parliaments need to give their consent to the federal government to sign and ratify CETA, in accordance with national procedures, before it can be fully implemented (Van der Loo 2016, EU 2018). CETA was classified as a 'mixed agreement' by the European Commission in July 2016 and the Council agreed.¹ This meant that all 28 EU member states with their 38 national and substate parliaments had to support CETA before it could fully enter into force. The classification of CETA as a mixed agreement meant that Belgium had to sign and ratify it according to Belgian national procedures.

Regions and communities in Belgium have developed greater interest in the EU's trade negotiations as next generation trade treaties affects areas under their constitutional competence. According to Paul Magnette, the minister-president of Wallonia who led the charge against CETA:

this new generation of international trade treaties goes far beyond trade. They affect, at least potentially, very sensitive national and regional competences (labour, health and environmental laws, public services and social protection, local agriculture ...). The European Commission should have understood that treaties with such wide-ranging effects would not leave public opinion in the nations and regions indifferent. (Magnette 2016)

Before consenting to CETA signature and ratification, Belgium needed to gain approval from all nine subnational parliaments (Bursen 2016, Van der Loo 2016). Belgian federalism, defined by the first article of its 1993 Constitution as 'a federal state composed of communities and regions', has important consequences for the conduct of international relations. The constitutional revision of 1993 enables regions and communities to become real international actors, with representation abroad and the power to sign real treaties with sovereign states.

The Belgian state, which had sole power over international relations before 1993, retains its role, but holds it 'without prejudice to the power of communities and regions to regulate international cooperation, including the conclusion of treaties, concerning subjects arising from their powers under the Constitution or by virtue of it'. The powers of communities in international relations are 'cooperation among communities, as well as international cooperation, including the conclusion of treaties for subjects foreseen in paras. 1 and 2 (cultural matters, education [with exceptions])' (Alen and Ergec 1998, p. 57). With the Lambermont Accords of June 29, 2001, which are of constitutional nature, even power over foreign trade (or trade promotion) was regionalised.

Since the constitutional revision of 1993, the organisation of Belgium's international relations has been fundamentally adapted to suit the new federal state structure. The autonomy of the Belgian federal states regarding external policy is unique in the world and arises from recognition of the constitutional principle '*in foro interno, in foro externo*', which means that the Belgian regions and communities are also externally competent for all matters for which they are internally competent (article 167, § 3, Constitution of Belgium). There is also an absence of hierarchy between different levels of administration. Thus, the federal government does not take precedence over the regions and communities in Belgium.

The communities and regions each operate within the limits of their respective powers, including with regard to the conclusion of treaties. The Constitution recognises that the federal states of Belgium, including communities and regions (which in the case of Flanders have merged together) are sovereign within their fields of competence, and that this arrangement also applies to international relations. For this reason, the Belgian federal states possess a true international legal personality, and in practice, this means that foreign countries and international

organisations must accept that they are negotiating and concluding treaties with the federated states of a federal state.

The constitutional revision of 1993 made three categories of treaty possible in Belgium: (1) treaties that exclusively involve the powers of the federal government and are concluded and ratified by the federal government; (2) treaties related exclusively to community or regional powers that are concluded and ratified by communities and regions; and finally (3) mixed treaties, which involve a combination of federal powers and either community or regional powers. In this last case, the treaty is concluded according to a special procedure convened among the different orders of government, and must be approved by all the parliaments involved.

In order to avoid conflicts and ensure coherence in Belgian foreign policy, an Interministerial Committee on Foreign Policy (ICFP) was created. The committee was supposed to bring together representatives of different authorities at the highest political and administrative level and was conceived as an institution for permanent dialogue to avoid conflict. The ICFP was designed to provide a forum for the exchange of information and dialogue, where decisions are made by consensus. The ICFP Secretariat is maintained by the Foreign Service in Charge of Relations with Communities and Regions, which organises and manages working groups and committees that are active in the context of the ICFP. It is through this system that mixed treaties are concluded (Paquin 2010). This is the theory; the fact is that ICFP does not meet very often. Most of the work is done at the working group level. When there are political problems, because of time management, the issue goes very often immediately to the Concertation Committee comprised of the Belgian federal Prime Minister and the regional minister-presidents. This was the case when Wallonia blocked the CETA signature process, although it was a legislative matter, it did have an effect upon the position of all the executive powers in Belgium.

In other words, Belgium cannot move on international issues unless Wallonia, Brussels-Capital and the French community, but also the other subnational governments like Flanders, have agreed on a common position. Without consensus, Belgium must abstain. Needless to say, this situation has created its share of frustrations. The Belgian system of foreign policy coordination privileges the executive and administrations to the detriment of the legislative branch, since real decisions are made within the administrations during inter-ministerial negotiations. With regard to trade negotiations conducted by the European Commission, regional Belgian parliaments have only a very limited role. Except for the signature and ratification of mixed treaties, regional parliaments are completely excluded from EU trade negotiations, even where they would need to amend their legislation to bring it in line with the agreement (Bollen, De Ville *et al.* 2020).

That said, regional parliaments can use other means to influence the course of negotiations. The sensitivity of new trade agreements, particularly the Transatlantic Trade and Investment Partnership (TTIP), has prompted regional governments to develop expertise and networks of influence on these issues. Regional parliaments have invited specialists to parliamentary committees to explain the effects of trade agreements on their areas of competency, enabling them to hold debates on ISDS, regulatory cooperation and also the liberalisation of public services. Regional parliaments can also adopt resolutions and seek to mobilise the population around a specific issue in order to put pressure on the national government and the EU (Tatham 2018, Bollen, De Ville *et al.* 2020).

The regional parliaments of Wallonia, but also Brussels-Capital and the French Community therefore had different ways of influencing CETA negotiations. As early as May 2015, the Parti socialiste (Socialist Party) of Wallonia presented a resolution clearly indicating its concerns about CETA. Many issues were outlined, but ISDS was central to the problem. On the issue of ISDS, Paul Magnette declared 'There is an asymmetry between the power of money that is constantly being strengthened and the public interest, which is finding it increasingly difficult to defend itself' (Our translation from French, interview cited in RTBF, 2017).

Adopted in April 2016 with support of all parties but one (Mouvement réformateur), the motion compares CETA to the Trojan horse in relation to the TTIP. As late as October 2016, the Walloon Parliament reaffirmed its opposition to CETA, arguing that the government should not give its consent

to the federal government to accept the agreement. This situation caused an intra-Belgian, but also European and even international crisis, since it meant that the Belgian government could not sign CETA (Ducourtieux and Stroobants 2016, Van der Loo 2016).

Under pressure from the European institutions, the Walloon and Belgian governments began to negotiate. As well, Wallonia – completely outside prior EU practice – conducted direct negotiations with the Canadian Minister for International Trade, Chrystia Freeland, in the presence of the European Commission's chief negotiator, Mauro Pettriccione. The latter had a mandate from the President of the European Commission, Jean-Claude Juncker. The President of the European Parliament, Martin Schultz, was also involved in the negotiations for a while. After several days of tense negotiations, an agreement was reached (Magnette, 2017).

The 12-page compromise (CETA counts more than 1600 pages in total) was approved by Canada, ambassadors of the 28 EU countries, as well as by Wallonia, Brussels-Capital and the French community (Ducourtieux and Stroobants 2016, Van der Loo 2016). In this final compromise, concessions were made to Wallonia in exchange for its support. The concessions did not mean a reopening of CETA *per se* but rather the inclusion of an interpretative legal instrument to clarify certain parts of the agreement, particularly in areas touching on labour and environmental law, but also regarding environmental protection mechanisms. The most important clarification is probably the one concerning the potentially negative effects of ISDS on the government's right to regulate public policy (Van der Loo 2016, Tatham 2018, p. 641). The joint interpretative instrument states that the EU and Canada will 'continue to have the ability to achieve the legitimate public policy objectives that their democratic institutions set, such as public health, social services, public education, environment [etc]' and that CETA 'will not lower our respective standards and regulations related to food safety, product safety, consumer protection, health, environment or labour protection' (cited in Van der Loo 2016, p. 2). Wallonia also required that the investment court system be submitted for review by the European Court of Justice to assure its compliance with EU law. On April 30, 2019, the European Court of Justice confirmed that CETA's ISDS mechanism was compatible with EU laws (European Court of Justice 2019).

For some, one of the key problems is that Paul Magnette and those opposed to CETA took too long to express their grievances. According to Magnette, it was not the case. He said:

We received the final version [of CETA] less than a year ago and I alerted the Commissioner to all the problems it posed to us as early as October 2, 2015. The first reaction came to me on October 4 ... 2016, twenty-three days before the summit with Canada. (our translation from French, cited in Ducourtieux and Stroobants 2016)

In his account of the events surrounding the negotiation of the agreement, Magnette concludes that the strategy of ignoring the demands of the Walloon Region was deliberate. According to Magnette, Commissioner Malmström wanted the Walloon Region to give in under pressure from its Belgian partners, Canada, several European heads of state, European social democratic party leaders, but also from the European institutions (Magnette 2017).

The Case of Quebec and the Canadian Provinces

Although there is no explicit treaty-making provision to be found in the 1867 Constitution act. and the Constitution Act 1982, Joanna Harrington argues that, 'it is generally recognised under Canadian constitutional law that the power to make treaties resides with the executive branch of the government that represents Canada as a whole, namely the federal government based in Ottawa' (Harrington 2005, p. 474). The Constitution also gives the federal government of Canada full powers over international trade. However, the fact that international trade is a federal responsibility does not preclude deep provincial involvement in the negotiation of trade agreements. And there is evidence that Canadian provinces, despite the asymmetry between them, have become increasingly involved in trade negotiations in recent years (Kukucha 2008, 2013, 2016, Paquin 2013, 2020, VanDuzer 2013).

Trade negotiations in Canada can be conceived as a multi-level governance process where actors in a federal state structure are interlinked (Paquin, 2020). Multi-level governance scholars stress that there are ‘imperatives of cooperation’ between central and substate governments. Implementation of a coherent foreign policy inevitably entails consulting with – and even providing a significant role for – federated states through intergovernmental mechanisms.

There are two main reasons for provincial involvement in trade negotiations. First is that, the ‘new generation’ of trade agreements increasingly involves areas of provincial jurisdiction. This evolution of trade agreements has called for greater provincial involvement (Kukucha 2008, 2013, 2016, Paquin 2013, 2020). Second, while the federal government has constitutional responsibility for international trade and can negotiate in areas under provincial jurisdiction, it cannot legislate in the fields of jurisdiction of the Canadian provinces to implement ratified trade agreements. The Canadian government can put maximum political pressure, including the withholding of transfer payments, to induce compliance but cannot legislate on behalf of the provinces.

The trade treaty-making process in Canada, when it affects areas of provincial jurisdiction, involves two basic steps: the conclusion of a treaty (i.e. negotiation, signature and ratification) and its implementation. The federal executive has a monopoly on the first step. Concerning the second step, because Canada has a dualist system, the treaty must be implemented into domestic law through a law of incorporation or a change of regulation at the competent level, making provincial buy-in essential (Cyr and de Mestral 2017, Barnett 2018). If the law is already compatible with the treaty, there is no need for new legislation. This is often the case, as provincial and federal laws are often stricter than international trade standards. When domestic law is incompatible with the trade treaty, an implementing law is needed and can take various forms, ranging from a legislative text appended to the treaty that gives it the force of law, to a distinct law that more or less faithfully reproduces the provisions of the treaty. Hugo Cyr and Armand de Mestral have identified more than 13 ways to integrate treaties into domestic law at federal level. Judges rely on Canadian laws and not treaties to render judgements, though some judgements refer to pertinent treaties (Cyr and de Mestral 2010).

In the case of a treaty that touches on Québec jurisdictions (Québec differs from other provinces where procedures are simpler and an executive decree or regulatory change is generally sufficient), Québec Parliament must approve the treaty before government gives its assent. An international commitment must be approved by the Québec Parliament when it is described as ‘important’, meaning it requires the adoption of a law, the drafting of a regulation, the imposition of a tax or government acceptance of a financial obligation, or it concerns human rights or international trade (LeDuc 2009, p. 550–1). This step is not necessary at the federal level or in any other province.

In the vast majority of cases, the vote to approve is unanimous. In the case of CETA however, the National Assembly voted 84 in favour and 5 against, with 24 abstentions. The Parti Québécois, the centre-left sovereigntist party, abstained, and Quebec Solidaire, a far-left sovereigntist party, voted against. The right-leaning anti-nationalist Liberal Party, and the right-leaning nationalist Coalition Avenir Quebec (CAQ) voted in favour (Paquin 2020).

It should be noted that the debate and the vote in Quebec Parliament occur after the Government of Canada has signed the treaty. Quebec parliamentarians therefore have few means to influence the content of the treaty at this stage: they can only adopt or reject it. If Quebec’s Parliament refuses to give its approval, the executive could argue that the treaty is urgent and pass a decree, though that would make it difficult to adopt implementing legislation. At the earlier stage of negotiations, there is nothing to prevent members of the Quebec National Assembly from sending their federal counterparts signals on the mood of Quebec parliamentarians. During CETA negotiations, Quebec parliamentarians twice invited Pierre Marc Johnson, chief negotiator for Quebec for CETA, to a parliamentary commission. This mechanism enabled parliamentarians to raise their concerns publicly. Unlike Wallonia, which was able, for a time, to block signature of the CETA, Quebec’s only recourse is to refuse to implement a treaty in its areas of jurisdiction (Paquin 2020).

The federal government can commit Canada to a treaty, but it cannot guarantee that the treaty will be implemented if the subject matter falls within provincial jurisdiction (De Mestral and Fox-Decent 2008, p. 644). That situation explains why the EU insisted on provincial representation in the on Canada's negotiating team. Given these difficulties, the federal government must be careful when it commits Canada on the international stage, because it risks being undermined by provincial actions. Various strategies have been used historically to avoid such a situation. The first is to limit international negotiations to areas of federal competence. During negotiation of the Canada-Colombia Free Trade Agreement and the Canada-Peru-Free trade agreement, the Government of Canada excluded from these treaties all provincial measures that predated the conclusion of these agreements in areas of services and investment (VanDuzer 2013). Another strategy is to create intergovernmental mechanisms for trade negotiations that enable provinces to collaborate in the negotiating process. As it became increasingly aware of its limitations through the 1970s and 1980s, the federal government developed a number of consultation mechanisms between federal and provincial governments. With regard to trade negotiation, the most recent intergovernmental mechanism is known as the C-Trade Forums (Kukucha 2008, 2016, Paquin 2020).

Canadian Provinces and CETA Negotiations

Provincial participation in CETA trade negotiations stemmed from an EU requirement that was imposed as a condition for launching negotiations (Paquin 2013). The EU considered that provincial representatives needed to be present for negotiations to have a chance of success, especially given their interest in public procurement, an area that falls under provincial jurisdiction and is not covered in commercial treaties or by the WTO Agreement on Government Procurement. The pursuit of this goal served as a catalyst for internal Canadian discussions, driven by Quebec's Premier Jean Charest, which raised the possibility of provincial participation in the CETA negotiations. Prime Minister Stephen Harper eventually extended this invitation as part of his commitment to 'open federalism' (Panetta 2013, Paquin 2014).

Negotiations with the EU are particularly important for the precedents they set. For the first time in the history of Canadian trade negotiations, the provinces were represented in the Canadian delegation, and even participated directly in negotiations on several subjects (Kukucha 2013, 2016, Paquin 2013, VanDuzer 2013). A typical trade negotiation in Canada is led by the federal government, even when it deals with an area that falls under provincial jurisdiction. However, there are many precedents for provincial government participation in trade discussions. In almost every case, intergovernmental negotiations take place between senior officials and sometimes between ministers. However, Canada lacks a comprehensive framework agreement for federal-provincial consultations related to international negotiations, and there is very little consistency in approaches (de Mestral 2005, VanDuzer 2013, Broschek and Goff 2020, Paquin 2020).

Compared to previous negotiations on trade liberalisation, including NAFTA with the United States and Mexico, CETA saw the provincial role increased at virtually all stages of negotiations. Although they were not consulted about the selection of the chief negotiator, Steve Verheul, they were involved in the critical stages of drafting the joint report and formulating the negotiating mandate. During preparation, the provinces were also consulted about issues related to their fields of expertise. In addition, they had access to the negotiation documents and were extensively consulted throughout the negotiations.² Quebec, for example, presented over 150 position papers or strategic position briefs.³ In addition, more than 275 meetings between federal negotiators and their provincial and territorial counterparts, many meetings involving provinces and territories with common interests, and bilateral meetings in camera between a province or territory and federal negotiators' were held (Johnson, Muzzi *et al.* 2015, p. 30).

The provinces did not have access to all negotiating areas. They participated actively in discussions on technical barriers to trade, regulatory cooperation, investment, including ISDS, cross-

border trade in services, mutual recognition of professional qualifications, public procurement, public monopolies and state corporations, sustainable development (labour and environment), wine and spirits, and cooperation (raw materials and innovation, and research in science and technology). However, they were largely excluded from discussions related to agriculture, customs procedures and trade facilitation (rules of origin and procedures of origin), sanitary and phytosanitary measures, trade remedies, subsidies, issues relating to maritime transport and temporary records, financial services, telecommunications, electronic commerce, intellectual property (geographic and patent names), competition policy, institutional issues, and bilateral cooperation on biotechnology (Paquin 2013).

This distribution of subjects in negotiations raises some questions, because the provinces were excluded from discussion of areas in which they have shared constitutional jurisdiction, such as agriculture and financial services (regulation of securities), or significant interest, such as intellectual property. The reason why is not clear to all provincial representatives. According to some, accessing some of the negotiating tables was such a victory that the provincial negotiators did not want to insist on further participation.⁴ Regarding the regulation of securities, this issue was added during negotiations. In this case, the Government of Canada's ambition to create a national commission to replace the 10 provincial commissions explains the exclusion of the provinces: Canada wanted to use the CETA negotiations to repatriate jurisdiction. In practice, however, the provinces were extensively consulted on specific issues (Ontario on the automotive sector, Alberta on beef, for example). In addition, some issues, such as the diversity of cultural expression, were not subject to formal negotiations, but were discussed as particular areas of interest to Quebec, for example.⁵

During negotiations, provincial representatives sat in the room alongside Canadian negotiators. This was somewhat awkward given that two or three people represented the EU, with its 28-member states, while the Canadian delegation numbered between 20 and 30. The provinces could not intervene directly during the actual negotiations, but could pass notes to Canadian negotiators. They were also able to request a pause in negotiations to allow Canadian negotiators to arrive at a position that satisfied all concerns. Provincial participation was therefore limited during formal negotiating sessions: provincial officials were only able to speak if invited to do so by a federal representative. In addition, provincial officials were not consulted during final decisions.⁶

During the process, Canada's chief negotiator, Steve Verheul, repeatedly recognised the invaluable contribution of the provinces, and notably of Quebec. Quebec greatly influenced negotiations on certification issues, labour mobility, and recognition of the diversity of cultural expressions, or cultural exemption. Thus, the role of the provinces became increasingly important, and even, in the opinion of one key European negotiator, had a decisive impact on the success of the negotiations.⁷ Without a clear commitment from the most important provinces (i.e. Quebec, Ontario, Alberta and British Columbia), the chances of concluding the CETA agreement would have been very low. Throughout the negotiations, provincial representatives maintained relations not only with Canadian negotiators, but also with European negotiators.

The important role of the provinces, and of Quebec in particular, has been recognised and encouraged by the federal government of Justin Trudeau. Former Quebec Premiers, Philippe Couillard, Jean Charest and Pierre Marc Johnson, all of whom were involved in the CETA negotiations at some point, were even invited to travel to Belgium alongside the Canadian Prime Minister for the formal signing of the agreement (Bouvier-Aclair 2016). The Government of Canada also coordinated with Pierre Marc Johnson, Quebec's chief negotiator, to convince the French and Walloon MPs not to block the signature process. Pierre Marc Johnson met with members who were against the agreement in Quebec and abroad, and continues discussions to assist with the treaty's implementation. No other province has played a similar role. Pierre Marc Johnson provided a follow-up on negotiations, reporting progress at both provincial and federal levels, and produced strategic position papers that are distributed within the Canadian government.⁸

Conclusion

Trade negotiations are a regular occurrence in today's global context, and questions around the role of substate governments in these negotiations are likely to resurface. The lessons to take away from the cases of Quebec and Wallonia, are straightforward. Trade agreements today have greater impact on areas under the jurisdiction of substate governments. Moreover, substate governments have, over the past few decades, become increasingly important actors in the lives of citizens. It is therefore not surprising that they are protective of their sovereignty in trade negotiations.

In the last 40 years, Canada has tended to give provinces an increasingly significant role in trade negotiations in particular through the C-Trade forums. During the CETA negotiations, the Government of Canada also reached an agreement with the United States on the issue of 'Buy America' or state government procurement, initiated trade negotiations with India, concluded a trade agreement with South Korea, joined the TPP negotiations and completed the negotiation of USMCA or NAFTA 2.0 with Mexico and the United States. In none of these negotiations has the CETA model been replicated. Canada's provinces were not formally part in the negotiations, but it is clear, according to provincial and federal negotiators, that the CETA negotiations helped improved the very flexible intergovernmental trade negotiation processes (Kukucha 2008, 2016, Paquin 2020).

In trade negotiation, several Canadian provinces complain about the Government of Canada's attitude towards information sharing. However, Canadian provinces are much more involved than the European regions of the EU. Difficulties with access to European Commission negotiators, particularly to better understand the effects of trade agreements on the sovereignty of substate governments, explains why federated states of Belgium decided to block the signature of Belgium. Some argued that Paul Magnette also acted in his own interests in order to make political gains. But Magnette was the spokesman for much more than just his own cause. For the record, the motion against CETA adopted in April 2016 received the support of all political parties but one. The substate parliaments in Belgium who blocked the signature process, did so because they too felt they had no other option.

The Lisbon Treaty was supposed to simplify the European Commission's trade negotiations. Experience with CETA reveals that the trend for new trade agreements to touch on areas of substate government's competence, along with new issues such as regulatory cooperation and ISDS, increase the risk that agreements negotiated by the EU will be classified as 'mixed' and that the Belgian federated states will again block the signature and ratification process if they do not have a more important role in future negotiations. The case of Canada tends to confirm that the inclusion of provinces in the negotiating process makes it easier for them to accept the outcome of the negotiation (Paquin 2010, Freudlsperger 2020).

In short, despite the Lisbon Treaty that gave the European Commission and the EU more power in trade negotiations, the Belgian federated states still hold a very important card. The EU's idea, based on the opinion of the European Court of Justice (2017), to exclude ISDS from trade agreements might provide an answer to this problem, but the EU could also learn from the Canadian experience and take steps to increase the role of regions in trade negotiations especially regarding information sharing.

Since Belgian federalism is unique, some might think it is a problem that needs to be fixed at the Belgian level. However, it is also possible that other regions of Europe, like the German Länder, might, at some point, simply refuse to comply with the legislation if they are not consulted during the negotiations, or try, as Quebec did, to influence negotiations from within. The lesson of Wallonia confirms that substate governments are important actors in legitimising these trade treaties. When they strongly oppose them, like it has a deleterious effect on the legitimacy of the agreement and the negotiation process.

Notes

1. In may 2017, the European court of Justice in the case of the Free trade agreement with Singapore ruled that some part of the agreements – portfolio investment and dispute settlement between investors and state – cannot be ratify without the EU member state consent.

2. Anonymous interview on Toronto, June 2017.
3. Anonymous interview, June 2014.
4. Anonymous interview in Québec city, June, 2014.
5. Anonymous interview in Montréal and Québec city, June 2014.
6. Anonymous interview Montréal, Mai 2009 and June 2014.
7. Anonymous interview in Brussels January 2011 and 2016.
8. Anonymous interview on Toronto, Montréal and Quebec City, June 2017.

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