

The Federalization Of Trade Policy

Abstract

Sub-federal units increasingly engage in international trade politics, a policy domain that is an exclusive jurisdiction of the federal level in most federations. This article conceptualizes this process as an instance of federalization, that means a shift from a mode of governance in a policy domain previously dominated by the federal level towards a mode where both tiers are simultaneously active. While the federalization of trade policy seems to be a more general trend across federal systems, the patterns of sub-federal participation and, eventually, the power of sub-federal units to shape trade policy differ significantly. Building on insights from a collaborative research project, this article discusses the causes of sub-federal mobilization and how the institutional configuration of federalism affects sub-federal units' options to influence trade policy agreements. In the final section, the article speculates about the conditions that may reinforce or undermine this trend in the future.

Introduction

The goal of establishing an economic union represents an important rationale, if not the main rationale, for the creation of federal systems. It is therefore hardly surprising that in most federations the federal level was vested with exclusive jurisdiction over important powers related to the economy, like customs, currency, as well as international and internal trade (Watts 2008: 90). Recent developments, however, indicate that federal predominance in one core area of economic policy, international trade, can no longer be taken for granted. Wallonia's threat to not sign the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) in October 2016, which could have derailed the trade deal that had been negotiated over seven years, found widespread media attention. But Wallonia is no singularity. The Brussels-Capital Region and the French Community, for example, adopted similar resolutions on CETA. The German and Austrian *Länder* have become increasingly involved in international trade policy since 2013, and the Swiss cantons already since the early 1990s (Ziegler 2020). For Canada and Australia, a growing importance of sub-federal units in the field of trade policy can even be traced back to the 1980s (for Australia see, for example, Ravenhill 1990, for Canada Doern and McDonald 1999; Kukucha 2008).

Australia and Canada are early manifestations of a more general trend: the federalization of trade policy. Building on Mireille Paquet (2019), by federalization I mean a transformative shift in the mode of governance within a policy domain: From a mode dominated by one governmental tier (here: the federal level) towards a mode where both governmental tiers are simultaneously active (see Paquet 2019 for the case of immigration policy in Canada). Federalization of trade policy takes very different forms. Moreover, it remains to be seen whether the new sub-federal activism in federations like Germany and Austria is durable, or only a temporary phenomenon. Existing research is rare, and scholars of federalism and regionalism have only recently begun to explore these trends through comparative analysis (see for example Broschek and Goff 2018; 2020; Egan and Guimarães 2019; Freudlsperger 2018). This contribution summarizes preliminary findings from a major collaborative research project funded by the Canadian Social Sciences and Humanities Research Council (SSHRC) (see also Broschek and Goff 2020). It discusses three questions. First, why are sub-federal units become increasingly engaged in trade policy? Second, how do they participate in trade policy, despite the fact that they usually have only limited, if any, constitutional powers directly related to this policy domain? And, finally, what are the implications for trade policy governance?

Why Sub-Federal Units enter the Trade Policy Field

Since the early 1980s, sub-federal units have become increasingly involved in trade politics. This trend was first observed in Anglo-Saxon federations, most notably Australia, Canada and, to some extent, the United States. The Canadian provinces, for example, gradually emerged as new stakeholders in trade politics since the negotiations of the Canada-United States Free Trade Agreement (CUSFTA), which became the North American Free Trade Agreement (NAFTA) including Mexico in 1994 (Kukucha 2008). In Australia, tensions between the Commonwealth and the states arose over trade policy agreements already during the late 1970s and early 1980s (Ravenhill 1990). The American states began to voice concerns about a lack of responsiveness of the federal level in trade agreement negotiations in the mid-1990s in the context of the General Agreement on Trade in Services (GATS) (Sager 2002). In Europe, sub-federal units' efforts to enter the trade policy field are a more recent development. The Belgian regions and communities, as well as the Austrian and German *Länder* were particularly active on the now stalled trade negotiations between the European Union and the United States, the Transatlantic Trade and Investment Partnership (TTIP) and CETA. The first major resolution on trade policy by the German *Länder*, however, was already passed earlier on a different agreement, the European Union-Colombia/Peru Trade Agreement, in May 2013 (Broschek, Bußjäger and Schramek 2020). Finally, the Swiss cantons took on a more active role in trade policy during the early 1990s in the context of the negotiations for the European Economic Area (EEA) and - similar to

the United States – the conclusion of the Uruguay Round and the creation of the GATS (Ziegler 2020).

Policy shapes politics (Schattschneider 1935; Pierson 1993). The changing nature of trade agreements, therefore, offers a useful starting point for analyzing the roots of the federalization of trade policy. Free trade agreements like the CUSFTA/NAFTA or the EEA heralded a major transformation of international trade policy: the emergence of so called “mega”, “deep” or “second generation” free trade agreements (FTAs) (Ravenhill 2017; Young, 2016;). The number of such FTAs has doubled between 2005 and 2015, from 132 to 260 (Mattoo et al. 2017). More importantly, new FTAs differ from traditional trade agreements in terms of their scope and depth. The reduction or elimination of tariffs and quotas is no longer the main purpose of new FTAs. Rather, they are designed to encourage and regulate market transactions in an increasingly fragmented global economy. First, FTAs have become broader in scope as they seek to liberalize trade in new areas such as the service sector, government procurement and intellectual property in a digital economy. Second, new FTAs are “deeper” as they seek to reduce or eliminate non-tariff trade barriers and promote harmonization through “regulatory regulation” with potential implications for sensitive regulatory areas like health care, consumer protection, infrastructure, cultural policy or the environment. Third, some new FTAs, like CETA or the “new” NAFTA, the Agreement between the United States of America, the United Mexican States, and Canada (USMCA), increasingly include policy goals that are not directly related to trade policy like gender equality, labour rights or climate change.

These paradigmatic policy changes have profound implications for domestic politics. New FTAs create behind-the-border effects (Young 2016), directly or indirectly affecting sub-federal jurisdictions. Accordingly, federal governments have an incentive or even a legal obligation to include sub-federal units in trade agreement negotiations, albeit in very different forms, ranging from informal consultation to allowing them more direct involvement. In Canada, for example, the federal level enjoys exclusive jurisdiction over international trade policy. However, since the federal government cannot enforce compliance with international trade policy commitments if they affect exclusive provincial jurisdictions, Ottawa often seeks to ensure provincial support for FTAs (Hederer and Leblond 2020). In the case of CETA negotiations, provinces and territories were even invited to participate directly in certain negotiation rounds with the European Commission (Kukucha 2016). While anticipated implementation problems encourage sub-federal inclusion in trade politics in Canada, it remains, however, at Ottawa’s discretion whether and, if so, how the provinces and territories participate (Paquin 2020). By contrast, in Germany a legal obligation may require the federal government to secure Länder support for trade agreements under certain conditions. The nature of such conditions is still debated among legal scholars. The dominant view among legal experts assumes that ratification through the second chamber, the Bundesrat, needs to take the form of a consent bill (i.e. effectively a co-decision right) whenever a “mixed agreement” triggers an approval requirement according to the Basic Law (Broschek, Bußjäger and Schramek 2020).

But the federalization of trade policy not only results from an incentive or legal obligation of the federal government to open the door for sub-federal involvement “top down”. New FTAs also affect different interests of sub-federal actors, mobilizing them to participate “bottom up”. In other words, sub-federal units not only passively respond to trade policy change, but sometimes also actively assert a new role in this policy domain. We identified three types of interests that prompt sub-federal actors to take a more active stance in trade politics: regional economic, institutional and political interests (Broschek and Goff 2020b). The literature on regional economic geography suggests that sub-federal units engage in trade politics because they seek to protect and further develop their regional economy. Accordingly, factors such as the size of sub-federal units’ economy, the dominant economic sectors and their integration into the global economy shape sub-federal units’ preferences towards trade policy agreements and, ultimately, mobilize their engagement.

New institutionalism emphasizes the importance of bureaucratic self-interest, that means the capacity of political and bureaucratic institutions to sustain or even expand their autonomy to regulate and to implement political goals. Accordingly, sub-federal units can also be driven by a desire to avoid authority migration through trade agreements, for example to non-elected bodies in charge of monitoring and enforcing trade agreement provisions like committees for regulatory cooperation or investor-state dispute settlement (ISDS) tribunals.

Finally, sub-federal units also develop political-ideological preferences towards trade policy. Accordingly, sub-federal

governments seek to participate in trade politics in order to shape FTAs in line with their political preferences. Political interests also indicate the importance of multilevel party politics and the role of interest groups and social movements for understanding the patterns of trade policy federalization.

The types of interests prevalent in individual federal systems varies (Broschek and Goff 2020c). In the Anglo-Saxon federations as well as Switzerland regional economic interests are the main driving force behind sub-federal units' efforts to shape trade policy. The overall pattern in these federations is similar: Sub-federal units are usually supportive of liberalization through FTAs, but seek to ensure provisions that exempt certain sectors, most notably agriculture, fisheries or public procurement. In these federations, international trade policy is also often closely linked to internal trade policy (Anderson 2012; Hederer and Leblond 2020; Kukucha 2015; Egan 2015; Egan and Guimaraes 2019). For example, parallel to CETA negotiations Canadian provinces negotiated several bi- and multilateral intergovernmental agreements to address internal trade barriers through harmonization of standards (Kukucha 2015). In the Continental European federations, regional economic interests are not entirely meaningless, but institutional and political interests are clearly predominant and sometimes reinforce each other. For example, concerns about ISDS mechanisms and regulatory cooperation surface consistently in sub-federal parliamentary and intergovernmental resolutions in Belgium, Austria and Germany. Sub-federal actors anticipate an irreversible loss of political authority through such mechanisms, which are core elements of most recent FTAs. In addition, they fear an erosion of regulatory standards and dismantling of the precautionary principle, with negative implications for labour and environmental standards, public infrastructures or consumer protection (see for example Broschek, Bußjäger and Schramek 2020).

How do Sub-Federal Actors Participate in Trade Policy?

Sub-federal actors' capacity to shape trade policy varies significantly. The Austrian Länder, for example, were united in their opposition of CETA, regardless of the coalition of parties in power. Yet, the federal government was able to ratify the agreement in June 2018. The German Länder, by contrast, are divided in their position towards CETA. Coalition governments including the Christian Democrats (CDU/CSU) or the liberal FDP usually support CETA, while coalition governments formed by left-leaning parties (SPD, Greens, and/or the Linke) tend to oppose it. In some instances, coalition partners agreed to abstain in case the ratification bill is introduced. In effect, this means that a ratification bill would most likely not be approved through the Länder in the second chamber, the Bundesrat. And indeed, Germany's ratification of CETA is still pending.

Institutional differences among federal systems matter for understanding the relative strength of sub-federal units in trade politics. For example, the comparatively strong role of the German Bundesrat provides Land governments the opportunity to veto trade agreements under certain circumstances, while the Austrian Länder lack such an institutional resource. More generally, three institutional elements of the federal architecture variously afford sub-federal units with leverage to take on a role in trade politics: Competencies (directly or indirectly related to trade policy), the system of intergovernmental relations (IGR) and the second chamber.

Direct competencies related to trade policy place sub-federal units in a strong position. They are, however, the exception. The Belgian regions and communities are unique in this respect: The Belgian constitution lacks a hierarchy of constitutional norms and assumes that governmental tiers are both sovereign in domestic and international elements of jurisdiction assigned to them (Bursens and Massart-Piérard 2009). Unlike in most federations, trade policy in Belgium is not an exclusive federal jurisdiction. Accordingly, the regions and communities enjoy constitutionally entrenched participation rights, which explains why the Government of Wallonia was able to threaten Belgium's ratification of CETA. The Swiss cantons are in a similarly strong position. While unlike in Belgium the federal level is responsible for foreign relations, the constitution provides the cantons with consultation or even participation rights whenever their competences are affected. This includes trade policy, where the federal level has to consider cantonal interests in the formulation of the negotiation mandate and the negotiation process itself (Ziegler 2020).

In most federations, however, sub-federal units are empowered rather indirectly if trade agreement provisions impinge upon their competencies. With the rise of new “deep” FTAs, this is more often the case than in the past. Where sub-federal units have many exclusive powers, like in Canada, FTAs likely affect their competencies. But even in more centralized federations, like Australia, the federal level may have an incentive to consult sub-federal units to ensure compliance with trade agreement provisions in the implementation phase. Two factors are important in this respect: First, institutional ambiguity entailed within the division of powers can help sub-federal units to make a case that trade provisions have an impact on their regulatory domain. Second, the existence (or lack thereof) of federal overriding powers. For example, in the United States the states must comply with trade provisions once they are in effect as binding federal law, which pre-empts state level regulations. The Canadian federal government lacks such an overriding power whenever exclusive provincial jurisdictions are affected.

In addition, the system of IGR offers sub-federal units opportunities to engage in trade politics. Through intergovernmental councils, sub-federal units can try to coordinate their interests horizontally among each other and cooperate vertically with the federal level. Most generally, variation in IGR pertain to the degree of institutionalization. The mature Continental European federations Austria, Germany and Switzerland feature a comparatively high degree of IGR institutionalization, both horizontally and vertically. The Austrian and German Länder used the system of IGR primarily horizontally to formulate several resolutions on trade policy provisions, in particular on TTIP and CETA (Broschek, Bußjäger and Schramek 2020). In Switzerland, the cantons coordinate their trade policy interests horizontally through the Conference of Cantonal Governments and interact vertically with the federal government through a rather informal dialogue (Ziegler 2020). By contrast, IGR in the Anglo-Saxon federations and, to some degree in Belgium, are less institutionalized (Broschek and Goff 2018). When former minister-president of Wallonia, Paul Magnette, explained the region’s opposition to CETA in October 2016, he blamed the federal government for its failure to cooperate with the regions and communities early on in order to address their concerns (Magnette 2016). In Canada, the provinces and the federal level sought to institutionalize IGR in trade policy in the 1990s through the so-called CTrade committee system, where trade officials meet and exchange information on a regular basis (Kukucha 2008; Paquin 2020). In addition, and more importantly, both governmental tiers coordinate and cooperate through informal means whenever specific FTAs that potentially affect the provinces are negotiated. Whether and how the provinces are included, however, depends on the willingness of the federal government. In addition, the provinces have also been very active individually. The former premier of Ontario, Kathleen Wynne, for example, met with 33 US state governors and with senators over the course of NAFTA renegotiation (Inside U.S. Trade 2018), and Quebec has developed an ambitious trade policy agenda as part of its larger state-building strategy (Schram 2019; 2020). Finally, one function of second chambers in federal system is the representation of regional interests at the federal level. With the important exception of the German Bundesrat, however, we found that second chambers play a minor role for sub-federal units’ efforts to shape trade policy. The Bundesrat is not elected, but composed of Land governments. In other federations, senators are usually elected. Party politics often superimposes regional interests, but even if senators seek to articulate regional concerns, as is often the case in the US Senate, they often do not speak primarily for regional units themselves (Broschek and Goff 2018).

Towards a New Multilevel Politics of Trade?

These trends suggest that the federalization of trade policy is a more general, but not a unilinear trend. Sub-federal units’ involvement in trade politics displays various patterns, which are caused by the interplay of different factors (Broschek and Goff 2020c).

The patterns of trade policy federalization are manifold. Variation of sub-federal engagement pertains, for example, to timing. Timing not only refers to the difference between early trendsetters like the Australian states or Canadian provinces and the more recently emerging sub-federal units in the trade policy field like the Austrian or German Länder. Timing also

points to variation in the policy cycle, that means if sub-federal units are actively engaged in the formulation of trade policy agreements, or if their role is more limited to the ratification process.

Sub-federal engagement also seems to be mobilized by various interests, with regional economic interests as main drivers of sub-federal participation in the Anglo-Saxon federations and Switzerland, while institutional and political interests carry more weight in Continental European federations. Sub-federal units are also variously furnished with institutional resources that shape their strategies and, ultimately, their power vis-à-vis the federal level. Finally, party politics, interest group dynamics and the degree of social mobilization affect the federalization of trade policy in different ways. While party politics and social mobilization reinforce sub-federal units' attempts to exert influence on trade agreements, or to prevent them altogether as is the case in European federations, these factors are rather negligible in Australia, Canada or Switzerland (see for example Bollen, De Ville, and Gheyle 2020; Siles-Brügge and Strange 2020; Schram 2020).

These observations open a fascinating research agenda for scholars of comparative federalism and regionalism. We not only need to better understand how different factors interact in individual cases, but also if we are witnessing a major and lasting transformation of trade policy governance. Regarding the long-term consequences, it remains to be seen if sub-federal units are increasingly able to consolidate or even formalize a new role in trade politics. Limited bureaucratic capacities, for example, can hamper such efforts. In addition, the nature of trade policy agreements may change again, with the potential of foreclosing possibilities for sub-federal units' participation in the future. The EU, for example, appears to have learned from the experience with CETA's challenging ratification process, avoiding provisions that could render an agreement as "mixed" (i.e. touching upon member states competencies) more recently (van der Loo 2018). Even in Canada, where provinces have played a role in trade politics since the 1980s, the level of provincial engagement varies from agreement to agreement, with no formal intergovernmental framework in place that could clarify and institutionalize trade policy governance. The Swiss cantons or Belgian regions and communities, by contrast, have constitutionally entrenched participation rights, which means that we should expect an ongoing role for sub-federal units in this domain. Finally, Wales and Scotland are in the process of developing an ambitious trade policy agenda, which suggests that the federalization of trade policy may only be part of a larger transformation towards multilevel trade politics in which devolved units in unitary states will take on a role in trade policy as well.

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