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SPECIALTY SECTION

This article was submitted to
Comparative Governance,
a section of the journal
Frontiers in Political Science

RECEIVED 06 June 2022

ACCEPTED 02 September 2022

PUBLISHED 14 October 2022

CITATION

Egan M and Guimarães MH (2022)
Trade contestation and regional
politics: The case of Belgium and
Germany. *Front. Polit. Sci.* 4:962617.
doi: 10.3389/fpos.2022.962617

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Trade contestation and regional politics: The case of Belgium and Germany

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In developing an extensive network of trade agreements, the European Union has pushed for liberalization commitments that impinge on the competencies of subnational jurisdictions. This raises new challenges in federal systems as the emerging multilevel character of trade politics means subnational authorities could increasingly demand a say in the negotiation or ratification of these trade agreements. To address the tension between subnational regulatory autonomy and collective problem-solving in trade negotiations, Europe needs to avoid suboptimal trade outcomes where actions of contestation by subnational jurisdictions on the grounds of regulatory encroachment can undermine or veto collective agreement. Using the cases of Belgium and Germany, this article illustrates how the growing subnational contestation around trade agreements requires greater coordination and consensus to avoid domestic gridlock in their ratification. The article suggests normative ideas for the EU to address the overlapping authority challenges across multilevel governance. As the values of trade have changed, these normative measures should include the framing of trade narratives, addressing asymmetries of influence, enhancing subnational engagement, and mitigating the distributive costs of liberalization. These avenues for trade policymaking are to be ultimately advantageous for the EU's pursuit of greater integration.

KEYWORDS

trade negotiations, European Union, contestation, joint decision trap, overlapping authority, free trade agreements (FTAs), CETA, TTIP

Introduction

At first glance¹, the dynamics of European trade negotiations appear to have changed little with disagreements over trade liberalization commitments in relation to agricultural market access, divergent product standards, or local content requirements. Yet this misses the increased politicization of trade over the past several decades, due to both the expansion of trade agreements that encompass a broader range of policy

1 Thanks to the colleagues at NOPSA for feedback, with special thanks to Michael Carpenter, Jörg Broschek, Andrew Hagopian, and Luís Lobo-Fernandes for suggestions and ideas on earlier versions of the paper.

issues² and the changing trade policy landscape where international trade negotiations increasingly take place in a multilevel context (Freudlsperger, 2020; Broschek and Goff, 2022, p. 801).

Initially, scholarship on trade policy focused on the delegation of authority to the European level through successive treaty reforms, so that the member states allow the European Union to negotiate on their behalf “with one voice,” provided that their preferences are considered in relation to specific issues (Meunier, 2005). Much attention was given to the role of domestic politics in driving trade openness, with debates between export-oriented firms and those import-competing firms that face greater competition from foreign producers (Dür, 2010). However, this does not capture the changing pattern of trade politics that has shifted to behind the border issues, where contestation is the result of regulatory differences, leading consumer, and environment groups to mobilize against the erosion of their regulatory values (Young and Peterson, 2006). This has contributed to the increased politicization and contestation surrounding trade agreements, in which political conflicts are selectively amplified to create public visibility, as civil society has targeted specific issues to frame opposition to select trade agreements (Siles-Brügge, 2017). In response, European policymakers have sought to enhance civil society participation, which has provided invaluable insights into the deliberative forms of inclusion and exclusion in trade policy (Dür and De Bièvre, 2007; Velut et al., 2021).

Nonetheless, this focus on the changing political dynamics of trade policy has paid less attention to subnational engagement in European trade policy. Though most federal systems do not formally include subnational jurisdictions in trade negotiations, there is increased interest in the intersection of trade liberalization and domestic dynamics of power-sharing to ascertain how subnational jurisdictions can assert their preferences and interests in trade negotiations (Egan and Guimarães, 2019; Broschek and Goff, 2020, 2022). This raises an important puzzle as to why subnational constituent units in some federal systems rebel against specific trade agreements, while constituent units in other federal systems do not.³ While trade policy has always had territorial consequences, given differences in regional competitive advantages and the location of economic activity, the substantive expansion of the “deep trade agenda” has “fueled greater intergovernmental conflict over the scope of EU competences” (Freudlsperger, 2021, p. 1664).

2 These relate to social, environmental, agricultural, and consumer rights issues, labor standards, provisions on public services such as health, on investor protection, data protection, and data localization services, government procurement, transportation, or intellectual property (see Dür and Elsig, 2015).

3 Thanks to the reviewer for sharpening our arguments.

Subnational governments are concerned about the distributional and regulatory effects from increased market competition, and have sought to protect their labor, environmental and social welfare goals. As subnational governments have channeled their grievances toward specific liberalization commitments, the degree to which they are able to counter-mobilize is dependent on different domestic constitutional procedures and institutional norms (Freudlsperger, 2020, p. 13). Rather than accept encroachment on their regulatory competencies, subnational actors have expressed dissatisfaction with the political *status quo* where they are marginalized from decision making and have sought to expand the “scope of conflict” to shape trade debates (Schattschneider, 1975; Zito et al., 2019).

We argue that the pursuit of a more expansive trade liberalization has led specific - but not all - subnational jurisdictions to mobilize for certain protective measures to subordinate the market to “political constraints” (Polanyi, 1944, p. 201). These subnational concerns about markets being separated from society in a Polanyian sense have led to pressure to ensure that domestic regulations in specific areas are not undermined through trade liberalization, and for more institutionalized coordination, which - as the cases below illustrate - has differed in form, intensity, and frequency across subnational regions. Rather than hierarchical top-down governance, European trade policy must take account of the expansion of the EU policy agenda on domestic federal arrangements to avoid decision-making “pathologies,” where high levels of subnational activism and contestation can undermine or veto a collective European agreement (Scharpf, 1988; Wright, 1988; Fossum and Jachtenfuchs, 2017).

To address the tension between subnational regulatory autonomy and collective problem-solving in trade negotiations, Europe needs to avoid suboptimal outcomes where the negotiating mandates in trade - which are centralized at the national level - make it difficult for regions to actively participate in EU negotiations (Freudlsperger, 2020). This requires attention to the institutional mechanisms of governance at multiple levels to see how EU policy advances in this climate of increased politicization of trade have evolved, and how different strategies and responses for avoiding gridlock influence the trade outcomes.

The Treaty of Lisbon was designed to address some of the constraints of constitutionally divided powers by transferring responsibility of trade negotiations from domestic legislators to the European level (Garcia, 2020). However, this creates an interesting paradox, as the Treaty of Lisbon increased the competences of the EU to facilitate greater effectiveness and efficiency but is now faced with the increased heterogeneity of interests and preferences of subnational actors which, depending on the type of agreement, may play a significant role in ratification and implementation processes (Garcia, 2020).

Rather than improving inter-institutional coordination, the Treaty has led to significant pushback from national and regional parliaments and subnational authorities over the expanded scope of the deeper trade agreements. If the trading regime of a proposed agreement is perceived as negatively impacting sub-national competences, one can expect sub-federal actors to mobilize opposition against it, and to make a political statement on their importance of subnational competences in trade-related issues. This raises questions about whether the pressure for internal cohesion - in which national governments seek to create common positions - was counterproductive, as these subnational entities seek side payments or concessions from general trade rules to secure their existing subnational competences and political authority, and to preserve their policy autonomy (Eaton, 2021, p. 3). As a result, the politics of trade creates a two-level game where subnational governments pursue their interests by pressuring the national government to adopt favorable policies, while national governments seek to maximize their own ability to satisfy domestic pressures at the international level.

While the gradual extension of EU “exclusive” competences over trade was designed to streamline decision-making in trade negotiations, if an agreement includes ‘mixed competences,’ ratification is required by each member state’s parliament(s), in accordance with its domestic rules (Woolcock, 2010; cf. Eschbach, 2015). In some cases, national parliaments vote to ratify the agreement, in other cases, trade policy takes place in multilevel settings where subnational jurisdictions play an increasingly crucial role in shaping and legitimizing trade pacts, from monitoring negotiating mandates to authorizing ratification of agreed texts (Fafard and Leblond, 2013; Omiunu, 2017; Broschek and Goff, 2020). Thus, mixed agreements – those that touch on the competences of member states – offer the opportunity for national and subnational parliaments to influence trade policy through parliamentary scrutiny, and such scrutiny and oversight have been perceived as necessary safeguards in federal systems.

We illustrate this subnational mobilization and contestation through case studies of specific trade agreements where the negotiation of TTIP with the US, the negotiation and ratification of CETA with Canada, and the conclusion of the EU-Mercosur trade agreement created a wave of opposition and contestation at the institutional level with different patterns across European federal states. This paper connects the literature on subnational mobilization in trade politics with that of joint decision and overlapping authority models, focusing on the cases of Germany and Belgium. The choice of these two federal systems draw on a most-different case selection (Gerring, 2008, p. 671) as it allows us to identify the two countries’ contrasting strategies of subnational involvement and influence in trade agreements decision-making that produce distinctive outcomes in terms of subnational trade contestation. The cases highlight significant cross-national variation in trade federalism

in two EU member states: Belgium is an outlier as sub-federal units may veto federal trade policy, resulting in contentious trade federalism; whereas Germany has collaborative avenues for joint-decision making that mediate contestation, avoiding vetoes through negotiated compromise. We compare the dynamics of subnational engagement in the two countries and suggest normative measures to overcome suboptimal outcomes in the context of different regional configurations of overlapping powers. This means addressing the subnational asymmetries of influence, the framing of political narratives to mobilize support and limit contestation, the enhancement of subnational engagement, and addressing the differential material and economic consequences of trade liberalization at the subnational level.

Joint decision-making and overlapping authority in trade politics

In this section we highlight both Scharpf’s joint-decision trap and Wright’s overlapping authority models to demonstrate the effects of subnational variation in shaping contemporary trade agreements in EU member states (Scharpf, 1988; Wright, 1988; Freudlsperger, 2020). While decision-making in the EU has been portrayed as presenting a joint decision trap, as national actors can block decisions unilaterally, the overlapping authority model highlights the dynamism and complexity of shared powers, which adds a new institutional layering to the existing trade framework (Broschek, 2014). We engage these two strands of literature to enrich our understanding of the changing nature of trade politics in Europe. Both highlight the complexities of trade policy in an environment where there is a “reverberation effect” across levels of government, and where national governments need to satisfy domestic pressures while simultaneously pursuing cooperative integration at the European level, due to the interactions of negotiations across domestic and international levels (Putnam, 1988). In this two-level game, subnational governments pursue their interests by pressuring the national government to adopt favorable policies, while national governments seek to maximize their own ability to satisfy domestic pressures at the international level (Putnam, 1988).

The characteristics of the two frameworks make them relevant to contemporary European trade policy. As trade negotiations create a fundamental tension between continued domestic regulatory autonomy and collective problem solving, any resulting rule transfer can impact the dynamics of intergovernmental relations and multi-level governance (Scharpf, 1988, p. 255; Wright, 1988, p. 49; Fossum and Jachtenfuchs, 2017; Freudlsperger, 2020). Wright describes how intergovernmental relations have evolved through substantial negotiation and bargaining to an overlapping model, in which

there is neither exclusive authority nor hierarchical modes of governance. He focuses on the evolving nature and workings of intergovernmental relations in which the federal level has expanded significantly, but subnational jurisdictions have substantial independent political resources to limit the scope and extent of central federal influence. Scharpf, in turn, is concerned with the consequences of intergovernmental policymaking where problems of joint decision-making reflect the institutional self-interest of different constituent units, which may block or hinder collective agreement (Scharpf, 2006, 846). Scharpf focuses on the institutional traits that constrain decision-making, leading to prolonged and complex negotiations that require a problem-solving style, so that decision-making and implementation processes are not derailed by withholding assent (Scharpf, 2006; Héritier, 2015). Subnational governments may try to prevent decisions from violating their preferences through strategic veto power. Given that this is likely to be inefficient from a problem-solving level, the goal is to find solutions that are acceptable to all players, which is difficult given the heterogeneity of preferences as well as the asymmetries of influence (Scharpf, 2006).

Although subnational governments are involved in implementation, ensuring compliance with negotiated rules, they have also become aware that free trade agreements tend to strengthen federal actors at the expense of lower branches of government. Therefore, they have been increasingly keen on seeking to redress this imbalance due to the perceived material and institutional costs of compliance with ever-widening trade commitments. Though efforts to negotiate trade agreements have led to shifts in power, the patterns of authority migration between territorial jurisdictions are not uniform (Bednar, 2009; Broschek, 2014). Intergovernmental relations are of special significance, particularly in strongly decentralized or federalized polities where there are shared powers guaranteed by the constitution, whereas unitary states are less dependent upon constituent units for conferred ratification and implementation powers (cf. Blom-Hansen, 1999). In federal systems, trade negotiations and ratification processes are shaped by decision rules and decision styles that often require formal or informal coordination, as few issues remain in the realm of one jurisdiction. The reality of shared overlapping authority and the challenges associated with involving subnational governments in trade negotiations can lead to processes of intergovernmental decision-making that can involve material inducements and threats to secure agreement. Ironically, procedural agreements or constitutional reforms intended to increase the role for the federated subnational units may make federations *less* capable of joint decision-making (Benz, 2011).

Applying these frameworks to the case studies of Belgium and Germany, we illustrate two different strategies of subnational involvement in trade agreements. Both the institutional culture and decision-making of consensus-seeking in Germany, and the competitive dynamics and partisan politics

in Belgium, have involved contestation, as the domestic politics have become entangled in international trade negotiations. Trade agreements are the product of multilevel governance where the institutional self-interest of subnational regions can be interpreted as a concern for participation and influence, leading to concessions over specific outcomes that are inefficient from a problem-solving perspective (and the reason trade policy was centralized!) (Scharpf, 2006, p. 849–50).

Contentious trade federalism in Belgium

Belgium is a federal state that, following constitutional reforms, has transferred greater competences to its regions and linguistic communities.⁴ All these sub-federal entities play a substantial role in trade negotiations based on specific constitutional provisions regarding shared competences of the communities and regions. It follows from Article 167 (paragraph 1) of the Belgium fundamental law that a process of multilevel coordination should occur “for those matters that fall within their competences in pursuance of or by virtue of the Constitution.” However, regional involvement is dependent on the type of agreement, so subnational entities can ask to be a party to a treaty on foreign trade if it affects their field of jurisdiction, and subsequently are thus involved in the negotiation and ratification processes (Paquin, 2010). If this is a “mixed agreement” all levels of affected power must approve and ratify the deal and give their consent for signature to the Belgium government. Under the Belgian Constitution, the national government cannot formally sign a trade deal unless all five subnational parliaments, namely three regional parliaments (Brussels-Capital, Wallonia, and Flanders) and two community-language parliaments (French and German) provide unanimous agreement (Paquin, 2010, p. 185). If there is not unanimous agreement, then the trade deal is blocked. Nowhere was this more in evidence than during the recent EU-Canada Comprehensive Economic and Trade Agreement (CETA) and with the Transatlantic Trade and Investment Partnership (TTIP) negotiations, where each of the regional parliaments held hearings on these trade agreements and passed resolutions that often-reflected party political dynamics within each region (Bollen et al., 2016). In fact, all five regional parliaments took official positions on CETA and TTIP. The Parliament of Wallonia and the Parliament of the French-speaking Community rejected the CETA treaty, as did subsequently the Parliament of Brussels-Capital. By contrast, the German community and the Flanders region Parliaments gave their permission for signature to the federal government. Until then parliamentary attention toward trade policy had been

4 Constitutional revisions in 1970, 1980, 1988, and 1993 transformed Belgium from a unitary into federal state; the latter reform also transferred external trade competences to the regions.

low in salience, in part as trade was not subject to significant parliamentary scrutiny or debates, and those interested often used informal channels to promote their views (Bollen et al., 2016; Interview, 2018d, 2021).

Yet sub-federal actors in Belgium are unique in having a high degree of autonomy over specific external trade policy issues. To promote collective action there is a formalized and constitutionally recognized framework for joint participation between the central and regional governments, each of whom operates within its sphere of authority. This is particularly salient within inter-ministerial meetings, aimed at promoting information exchange and dialogue among representatives of different authorities at the political and administrative level to avoid conflict (Paquin, 2010). As Paquin (2010) notes, this mode of decision-making puts pressure on those involved to arrive at a joint collective position. In Belgium, the decision style is one of competitive federalism, where its regions potential veto generates bargaining to accommodate regional sensitivities and interests. While Belgium has created institutional procedures to promote coordination and coherence, the decision process is often partisan and deeply reflective of domestic party politics, with coalition politics making collective agreement difficult (Bollen et al., 2016). This became salient when the Belgian region of Wallonia, with an opposition party in power, managed to delay the signature of the CETA agreement in April 2016. The Walloon region threatened non-ratification, which would make the treaty unenforceable once it had received provisional application. As the TTIP negotiations with the US were on hold, Wallonia concerns were about the prospect that the CETA would allow Americans to access European markets through the Canada-EU agreement, which had become increasingly controversial (Tatham, 2018). The Walloon Parliament acted as a strategic veto player, in which its then president-minister Magnette argued that the regional parliament had a constitutional power similar to member states (Ducourtieux and Stroobants, 2016). In effect, Wallonia had a 'national ratification power' even though the Belgian federation had well-established patterns of intergovernmental coordination and had previously undergone processes of constitutional amendment to deal with governance pressures from its multilevel polities (Bollen et al., 2016). The recent EU-Mercosur agreement seems to confirm Belgium's contentious trade federalism, as the Walloon Parliament already adopted a resolution rebuffing the deal.

As a result, the ratification issue reflects the decision rules in Belgian context, with resistance by the subnational Walloon parliament based on concerns about regional decision-making autonomy, social protection, and investment arbitration. As an economically depressed region, with high unemployment relative to the rest of the country, Wallonia's opposition reflects the competitive dynamics of federalism where diverging economic and cultural interests have empowered different ideologically positioned parties in the different parts of the country. While Belgium has a center-right coalition firmly in

favor of CETA, the Flanders region is supportive as it represents a majority of Belgian foreign exports and inward investment. The Walloon region with the center-left social democrats as the dominant political group has opposed the neoliberal consensus at the European level. Consequently, the risk of ratification failure introduced a measure of unpredictability into the process. The efforts to escape the constitutional joint-decision trap generated a flurry of debates, hearings, and dialogues, leading to negotiations between the Walloon government and their Belgian, Canadian, and European trade counterparts. Though the EU Trade Commissioner Malmström went to the Wallonia Parliament to address questions, which was the first such instance of direct negotiations with a region, it was interpreted by Magnette (2016) as intended to silence any challenge coming from the regional parliament to the signature of the trade deal. The federal government partially acquiesced to the regional parliaments' demands on issues of health and environmental standards, investment arbitration, and protection of public services, outlined as interpretative guidelines, which the Wallonia government insisted were as legally binding as the rest of the agreement (Tatham, 2018; Paquin, 2021). For strategic reasons, such a renegotiation sought to address the joint decision-making trap by circumventing the political impasse through concessions and compromises (Héritier, 2015). To avoid a deadlock, which was the worst possible outcome for the European Union as it prevents ratification of a trade deal, the side-payments and resulting compromise might not be an optimal outcome for the European Union but minimizes the adverse consequences of gridlock, which is a suboptimal outcome (Benz, 2018). To speed up the ratification process, a mixed agreement could be concluded later as the Court's judgement (2/15) provides an opportunity for the Commission to seek two separate agreements, splitting the agreements between those that have exclusive competence and those that have mixed competence reducing the ability of Belgian regions – such as Walloons - to threaten to derail an agreement.

Mediated contestation in Germany

Germany is a federation with provisions for subnational jurisdictions in federal policy-making institutions, through representation of the sixteen Länder governments in the Bundesrat, the upper chamber of the federal parliament (Panara, 2010; Rowe, 2018). The German constitution, the *Grundgesetz* or "Basic Law," sets out the precise role for the Länder in European affairs (Article 23) and international affairs (Articles 24 and 32). However, in Germany the Länder have less constitutionally defined authority over matters of trade than their counterparts in Belgium (Walker, 2017). The federal government represents all the Länder in external relations matters, including trade and international agreements, whose negotiation falls under the responsibility of the federal government. However, the

Länder governments can resort to their shared competencies to influence the design of external trade policy through the Bundesrat, as they have the right to participate directly in the federal level decision making process. The federal government must consider the Bundesrat conclusions and resolutions, and in trade agreements they must be given the “greatest possible respect” if the issue under consideration is one in which the Länder have primary legislative competence. Article 32 of the Basic Law requires that the federal government consult Länder authorities “in sufficient time” ahead of the conclusion of any agreement which affects areas of Länder competence, and therefore the rights of subnational entities are expressly guaranteed in German constitutional law.

Germany has a highly networked system of interlocking and cooperative federalism with collaborative frameworks in place for the involvement and representation of subnational interests in international negotiations (Jensen, 2014). When a bill affects matters the Länder are responsible for, intergovernmental negotiation on federal legislation is required to coordinate the majorities in both the Bundesrat and the Bundestag. A Permanent Treaty Commission of the Länder, composed of officials from each Land, meets regularly to discuss Länder negotiating priorities, and it must reach a consensus for approval prior to the ratification by the chambers (Walker, 2017; Interview, 2018a, 2019). Once the Commission has communicated its approval, both chambers provide for formal ratification. Therefore, Germany has a strongly institutionalized system of intergovernmental relations, as German law establishes clear and tight procedures, mostly guided by the principle that the Länder cannot depart from the fundamental guidelines of federal foreign policy.

However, there are obvious shortcomings with this system of cooperative federalism and joint decision-making. It can cause delays given the need to generate broad consensus, which may result in policy solutions at the lowest common denominator (Scharpf, 1988). In addition, though the Länder have the final word when state competencies are affected, the decision rules vary, so that if the issue is related to European policymaking, *majority* decisions are the norm, while if classified as foreign policy, the German Länder must formulate their positions in terms of *unanimity* in the Bundesrat (Rowe, 2018). Moreover, German Basic Law, requires the consent of both chambers, thus also of the Bundesrat, if the decision pertains to European policies that infringe on the competences of Länder governments (Article 23). This new article emerged post-Maastricht in response to what the Länder perceived to be their increased marginalization in decision-making because of Europeanization.⁵ As authority migrated from the federal to the supranational level, they were able to wrest major concessions

from the federal government to have co-decision rights in matters related to the European Union (Rowe, 2018; Broschek and Goff, 2020). Therefore, it seems the decision-making style that fosters cooperative federalism and joint decision-making is one of incremental adjustment to multilevel governance (Benz, 2008; Behnke and Benz, 2009; Jensen, 2014; Benz and Sonnicksen, 2018).

Despite Germany’s formal constitutional structure for shared competences, the ratification of mixed agreements has become increasingly contentious (Hübner et al., 2017; Broschek, 2021). In the case CETA, which was ultimately treated as a mixed agreement in part due to pressure by Germany, subnational governments were able to exercise their right to be involved in the negotiation under Article 23 of the Basic Law on the role of Länder in European affairs.

However, the federal government and the Länder have differing views on the extent of Länder involvement in the negotiation of areas of “mixed competences.” Although the Länder are consulted before the conclusion of a mixed treaty, as domestic implementation in specific areas is frequently their responsibility, the federal government is arguing that the ratification process should follow a European Union policy negotiation, where the Länder engage collectively through the Bundesrat, and where individual Länder are subject to the constraints of majority voting (Rowe, 2018). The Länder have disagreed, arguing that the procedural basis should be those provided under Article 32 of the Basic Law, along with the 1957 Lindau Agreement, which allows them, in theory, the potential of a veto (Panara, 2010; Rowe, 2018). Indeed, the Länder governments came under increased pressure to block ratification in the Bundesrat (Broschek and Goff, 2020). With social mobilization among civil society organizations against the TTIP and CETA, seeking to pressure Länder governments to reject ratification, the increased contestation over specific policy issues has undermined consensus among the Länder governments.

Increased Länder engagement is also driven by concerns about specific issues within the new trade agreements, notably their opposition to the establishment of investor-state dispute settlement (ISDS) mechanisms, as well as potential constraints on their right to regulate in areas of data privacy, environmental standards, and food safety (Broschek and Goff, 2020). In the wake of recent challenges under ISDS, where Germany has itself been sued for domestic action, public opinion has voiced increased concerns that such provisions would be used to attack higher European consumer and environmental protection standards (Siles-Brügge, 2017). As a result, during both TTIP and CETA negotiations, there were concerns that further liberalization would facilitate the onset of privatization of social services and infrastructure and undermine *Daseinsvorsorge* (“public service”) norms, with the Länder expressing opposition to any changes in the provision of critical social services and public goods (Broschek and Goff, 2022, p. 811).

⁵ Act on the Cooperation of the Federation and the Länder in Matters Related to the European Union, with further amendments in light of the Lisbon Treaty.

The question of the ratification process remains politically sensitive, especially given the legal debate on the conditional transfers of powers that have evolved within Germany (Panara, 2010; Rowe, 2018)⁶. In fact, the federal government is still assessing whether the CETA ratification will be by consent, which would give the Bundesrat a veto power. The highly institutionalized system of intergovernmental relations is also challenged by the fragmentation of the party system, where party politics and the policy preferences of the Länder are divided over whether to support the new trade agreements, and what role they should play in ratification of unpopular trade deals. Several Länder governments, bolstered by coalitions of Social Democrats and Greens, opposed the strong provisions for market access in agriculture, procurement and public services that did not provide corresponding strong commitments for labor, social, environmental and consumer rights (Broschek and Goff, 2020). With respect to the EU-Mercosur agreement a degree of contestation is emerging as several Land governments including Lower Saxony and Bavaria have expressed opposition while others such as Baden Württemberg, have voiced their reservations.

While the governance structure of trade policy has allowed Länder governments to seek to safeguard their interests, through signaling their concerns toward specific trade commitments, the system of cooperative federalism places pressures on them to support ratification. Overlapping authority creates a joint decision trap that can lead to no agreement if there is not sufficient subnational support. Thus, Land and Federal negotiations seek to find a common position and evoke avoid a veto through negotiated compromise (Benz and Sonnicksen, 2018). One of the consequences of Länder participation in European governance has been additional cooperation between the Federation and the Länder. But Länder governments controlled by different parties or coalitions can make collective action difficult if their preferences on European trade issues diverge.

Subnational engagement: Between assertiveness and compromise

For any given trade issue there is a wide range of negotiation objectives and legal obligations in European politics. Both Germany and Belgium face considerable difficulties in their efforts to ensure the ratification of EU free trade agreements, despite their overall continued support for European trade liberalization. Paradoxically, even in trade policy – which is one of the few economic areas where member states transferred national powers to the EU – federal authorities must address the dynamism and complexity of domestic shared powers. To deal

with authority migration to the European level both Germany and Belgium have responded by developing a system of more formal and institutionalized engagement of regional authorities in trade policy making. The need to address institutional hurdles has led Germany to enhance participation rights at the Länder level to facilitate ratification, while Belgium has conferred approval rights to regional parliaments to accept agreements that touch upon their competences (Gehring, 2018). To overcome the joint-decision trap, the German response is more procedural, while Belgium is more politicized and substantive in terms of impacting and amending trade outcomes.

The Belgian federal system requires compromises between the various regions to clear existing political hurdles, as trade agreements may change the structure and composition of the Belgian economy and because the effects of trade exposure will differ across regions. Such concerns have led skeptics to hold trade agreements responsible for undercutting employment opportunities, resulting in different economic and material interests among regions, as well as reflecting ideological differences among political parties at the regional and federal level. This creates competing preferences in trade negotiations that require both horizontal and vertical coordination, given the intergovernmental nature of decision-making within Belgium (Bollen et al., 2016). While the Belgian central government is dependent on the consent of constituent regional authorities, given their potential veto power, the German federal government has more strategic autonomy over trade negotiations, even though the Länder have sought to ensure that their constitutional competences are respected through joint decision-making (Scharpf, 1988). Though it appears the Länder have been more moderate in their claim to have leverage in trade policy issues, driven in part by the prevailing decision style in Germany, the Länder governments have become increasingly divided over trade policy, much like their Belgian counterparts (Broschek and Goff, 2020). Despite the diffuse interests of the Länder toward specific trade provisions, Länder governments may have to accept a suboptimal outcome to avoid ratification failure at the federal level as opposed to Belgium where Wallonia won concessions so the EU may have perceived the agreement as suboptimal. In Germany, the Länder must make concessions in order for the federal government to ratify CETA. If we consider all three levels, the Belgian case seems to discount the state as mediator, while the German case emphasizes the state as mediator between sub- and supranational governance.

In both countries, the political sensitivity of trade issues has generated legal challenges at the national and European level, stalling ratification of recent trade agreements. Germany's Constitutional Court rejected a legal challenge from activist groups claiming that the provisional application of CETA before its parliamentary ratification undermined basic rights in the German Constitution [ISSD (International Institute for Sustainable Development), 2016]. The Court ruled that

⁶ This dates to the Federal Constitutional Court Case of 22 October 1986 Solange II, which guarantees federal rights protection.

the federal government could provisionally sign CETA in areas within the scope of EU competences, but the non-exclusive competences were subject to democratic legitimation. In particular, the Court raised doubts about the competence of the EU in relation to investor protection in certain areas. Belgium followed suit with a request for an EU Court of Justice Opinion about the compatibility of the proposed investment court system with the EU treaties. These legal challenges and their outcomes have delayed the full entry into force of CETA in terms of ratification, with only 14 out of the 27 EU member states having ratified the deal so far.

On addressing overlapping authority and trade policy deadlock

Mindful of the criticism that erupted over CETA and TTIP negotiations, the European Commission hoped to avoid the regional mobilization that nearly derailed the trade pact with Canada, with the agreements with Chile, Mexico, Singapore, Vietnam, and Australia (Siles-Brugge, 2015).⁷ However, strong opposition to the EU-Mercosur agreements has emerged in Belgium at the subnational level over environmental and agricultural issues. Having outlined the ways in which subnational jurisdictions have affected trade negotiations, the central challenge is to determine how the new politics of trade can address concerns about the impact of overlapping models of authority and joint decision-making, to avoid policy gridlock during the different phases of the negotiations and in the ratification stage. Given the new deep and encompassing trade agreements we identify strategies for dealing with the changes in economic governance, in which overlapping authority and joint decision-making have led to pushback for protection against market pressures.

The challenge is whether it is possible to ensure that the decision-making structure to which the new trade agreements in Europe have given rise, can address the institutional, ideational, and material effects of multilevel governance in trade policy. Four aspects are identified that may improve coordination, increase legitimacy, and strengthen effectiveness to escape contestation and policy deadlock in a polity with overlapping authority and joint decision making: (a) addressing asymmetrical influence across regions; (b) framing trade narratives; (c) reinforcing subnational engagement; and (d)

⁷ After Opinion 2/15 delivered by the Court of Justice of the European Union on 16 May 2017, the Commission may now opt for mixed or split agreements (European Court of Justice, 2017). As it has excluded portfolio investment and investor-state dispute settlement from new FTAs, as for example in negotiations with New Zealand and Australia, this means CETA may be the last EU mixed FTA. The EU-Mercosur agreement could be split into an “EU only” trade agreement, with a separate investment agreement.

addressing distributive and material consequences of increased competition and market access. In 2018, the Council established that FTAs concluded in the context of Association Agreements will be mixed, therefore these normative suggestions are useful to address potential subnational opposition to these deals. But they are also relevant for “EU only” deals, as these require the approval of two-thirds of the member states.

Addressing asymmetrical influence

Across federal systems there is significant variation in the territorial allocation of powers and resources, so there is no uniformity in the role played by subnational jurisdictions on trade issues. The challenge is how to insert political input into a decision-making structure where there are so many diverse subnational authorities with varying powers, resources, and responsibilities. When specific member states play an outsized role due to their intense popular opposition to trade agreements, there is an assumption that flexible models allow for further integration that would otherwise be blocked by the lack of political will in those member states. Yet differences in trade policy capabilities do not fit the predominant normative concepts and policy prescriptions for flexible integration in the EU. It can have the obverse effect of further political marginalization within the EU, as the rules and procedures allowing for greater accountability and oversight in “mixed agreements” create differentiation among different constituent units. Similarly, keeping dialogue open to regional input at all stages of the negotiations is vital, as it is counterproductive to allow select regions to exercise their “strategic veto power” due to specific domestic constitutional norms and decision-rules. As the mandate given to the European Commission is the starting point for trade negotiations, there should be provisions to explicitly engage regions, including those that do not have the constitutional authority to vote on the agreement.

While the nature of the obligations taken on international trade have evolved dramatically in recent decades, there are signs that growing frustration is generating subnational political mobilization that might push the relevant European Commission officials, along with their negotiating partners, to include subnational input into the negotiations, which could improve ratification as well as implementation. Close cooperation between the various levels of government in each member state may generate a greater political commitment to the agreement, even though the EU is the only one legally responsible for negotiating international trade agreements. The European Commission needs to assuage regional parliamentarians, as well as other subnational actors, as those with “veto” power at the ratification stage can voice their views on negotiating positions, otherwise attention focuses only on federal states, such as Belgium and Germany. For trade agreements to avoid such domestic constraints, it may warrant

splitting trade and investment negotiations, as vast majority of trade agreements falls under the exclusive competence of the EU, which would only be ratified by the European Parliament and European governments within the European Council (Burchard, 2017; Lester, 2017; Interview, 2018b).

Reinforcing subnational engagement

Trade policy should draw on an array of mechanisms and channels for engaging different regional authorities rather than wait for the disagreements to emerge at the end of the negotiations. There is also an advantage in ensuring a continued place at the bargaining table, given that overlapping authority allows regions to preserve their voice in generating future benefits and avoid disempowerment of different subnational entities. A more obligatory consultation should be the rule not the exception, along with publishing key negotiating texts from all negotiations, given pressures by subnational jurisdictions for increased transparency (Interview, 2018d). On a formal level, there could be representatives of the subnational level in the preparation of a specific negotiation mandate, as well as in the negotiating teams themselves, so that whenever their powers were affected, they would normally have a right to such representation, thus increasing their commitment at the implementation stage. This would mimic the logical progression of provincial voices in Canadian trade negotiations, where provincial involvement has become more critical, stemming from a European Union requirement that such participation was a condition for launching free trade negotiations (Paquin, 2013). In seeking to bolster support, now that subnational jurisdictions are more active in trade politics, extensive consultation, policy engagement, and negotiated compromises may be important given that parties and civil society organizations view institutional access at this level as a crucial venue to shape trade politics (Young, 2017).

Regions themselves can be more proactive and use channels available to them to promote their interests in the decision-making process. Regions can leverage their contacts within the European institutions, lobby their national parliaments, as well as engage with the European Parliament to advocate their regional interests, especially if their views do not coincide fully with those of the national government, given the diversity of parliamentary representation and ideological interests within different European parliamentary committees. While some regions have long-established representative offices in Brussels, most regions can - and often do - make strategic use of multiple institutional channels (Beyers et al., 2014). Horizontal collaboration among different regions can also be effective, as Catalonia organized its regional interests on cosmetics, chemicals and audiovisual, in conjunction with Lombardy, Scotland and Flanders during the EU-Japan trade negotiations (Interview, 2018c). Some regions have used a multi-pronged

strategy, promoting their interests not only in Brussels but also in engaging with negotiating partners in Japan, Canada, and the United States. While earlier advocacy by subnational actors avoids the prospect of later stalemate, member states could use such 'tied hands' negotiating strategy for greater leverage in negotiations (Putnam, 1988, p. 450; Meunier, 2005). That said, some subnational jurisdictions may have few institutional and resource capacities to evaluate the effects of these agreements on their regulatory activities, which prevents them from participating fully in FTAs decision-making.

Framing trade narratives

Getting the politics of trade agreements right matters as much as getting the policies right. Since regional authorities have strong incentives to be responsive to constituent views and interest group advocacy, variation in the partisan breakdown of voter attitudes and in the types of interest groups involved in an issue can be influential in determining whether to unite in opposition to, or support, specific policies. Thus, trade politics is also a clash of narratives where the framing of issues can be effective in mobilizing support or opposition to specific legislative intentions (Siles-Brügge, 2017). Member states need to assess alignment on different trade issues to avoid being blindsided by the surge of opposition. This was the case with the investment state dispute mechanisms - an obscure element of international trade agreements - that became a lightning rod for mobilizing reaction against both CETA and TTIP (Siles-Brügge, 2017). This bore fruit as opponents worried that it would circumvent national judicial procedures, privilege private investor interests and undermine specific European social welfare and environmental regulations, leading to substantial financial damages. Opponents shifted the narrative away from efforts to depoliticize state-to-state disputes regarding mistreatment of investors into one that focused on the privileged position of corporations. The framing of issues may be critical in shifting the debate about the desired future direction of trade given the discursive struggle over sustaining the EU as the indispensable champion of free trade as in the past. The European Commission in its reflection paper on "harnessing globalization" has framed the need to address the effects of increased competition, highlighting "safeguards" from market forces to ensure that the new trade agreements do not undermine protective regulatory policies (European Commission., 2017; Young, 2017, p. 915). These areas are the ones where there is most friction in the trade narrative, as concerns about domestic regulatory liabilities have pushed subnational jurisdictions to seek exemptions, derogations, or delaying costly measures, which can avoid policy gridlock, but may lead to suboptimal outcomes in terms of liberalization commitments.

Distributive and material consequences

The logic of trade negotiations may have differential impacts across sectors and regions, as liberalization has made its way into policy areas that were previously sheltered from international competition. Member states may need to subsidize or compensate subnational jurisdictions negatively impacted by the new FTAs, as policy changes may be difficult without administrative and financial support. While trade adjustment assistance would also enhance the capabilities of subnational governments to ensure effective enforcement, the concept of assisting groups disadvantaged by globalization, would compensate those negatively affected to quell the anticipated backlash through specific instruments to assist the socio-economic restructuring of regions negatively impacted by trade liberalization agreements.⁸ But it is possible that increasing funding and eligibility by providing greater spending directed toward trade adjustment would require those subnational jurisdictions to demonstrate that they had experienced losses directly from trade concessions.

Thus, to avoid joint decision traps, negotiations could be linked to broader package deals and side-payments, to facilitate acceptance of any negotiated agreement, although compromises are constrained by the limited budget available (Scharpf, 2006; Héri-tier, 2015; Interview, 2018b). Trade adjustment assistance could be targeted at regions impacted by increased competition, providing resources to offset any losses caused by increased market competition. But distributive bargaining in “mixed agreements” favors those regions with veto power, giving them more options for side payments and package deals. While this may have a disciplining effect on decision-making, it provides a competitive edge for some subnational jurisdictions, relative to those that have less “state capacity” to bring to bear on trade negotiations that impact their domestic competences and material interests (Skocpol, 1985; Scharpf, 1988).

Conclusion

As European policy has become more contested over the past decades, much of the scholarly debate has focused on the new politicization of trade. The debate revolves around whether contestation and disruptions are occasional and confined to specific trade negotiations (Young, 2017), or indicate a more general phenomenon as trade has gained increased public salience (Tatham, 2018; Velut et al., 2021), or whether they reflect a longer-term pattern of member states engaged in a political struggle over competences and interests

(Meunier and Nicolaidis, 2019). As trade policymaking takes place in a multilevel context, significant scholar interest has emerged on the different types of subnational mobilization that have acquired increased salience in the EU. Existing studies have focused on the changes in the contents and scope of the trade agenda, whether an agreement is mixed or of EU exclusive competence, on the impact of public opposition toward specific trade policies, and on the expansion of competencies resulting from treaty reforms. By contrast, we draw attention to variation in subnational participation in trade policy to understand the causes and consequences of mobilization, as well as we explain the circumstances that have driven increased politicization among subnational actors in the trade realm (Broschek and Goff, 2022).

As the Lisbon Treaty provided a progressive expansion of competencies, the effect has been to highlight the shift of authority upwards, with the increased delegation of trade power to the European level. Yet there has also been a corresponding shift of authority downwards in terms of the ratification and implementation of trade agreements, leading to the greater involvement of subnational actors in the EU policy process, who are increasingly sensitive to the impact of the deeper trade agenda on their own policy jurisdictions. Empirically, this study demonstrates how subnational authorities in both Belgium and Germany are concerned about trade policy encroachment on their autonomy, and by extension their ability to regulate their own social and environmental policies - issues that have become part of deeper trade deals. The result is heterogeneous patterns of politicization. In the Belgian case, Wallonia seemed to have won concessions, so the EU may have perceived the agreement as suboptimal. But, in Germany, the *Länder* would have to make concessions for the federal government to ratify the trade agreement with Canada.

As a result, subnational contestation challenges much of what we understand about the structure and scope of trade policy. The institutional “self-interest” of subnational jurisdictions complicates trade policy negotiations by adding a new layer of complexity. Although regions can engage at the national and EU levels through parliamentary scrutiny mechanisms or direct lobbying, “mixed agreements” offer the opportunity to leverage their regional ambitions and capabilities in pushing back against specific European trade policy provisions. This has been evident with the mobilization around the TTIP and CETA negotiations, where subnational opposition emerged across different member states. This contestation does not guarantee that regions will successfully shape (or veto) trade outcomes, as such fragmented rule-making authority – whether the product of constitutional provisions or decentralization reforms – is not uniform across federal systems. In Germany, *Länder* governments have actively sought to shape trade politics, pushing for greater influence in the formulation and ratification of agreements, using the highly institutionalized system of intergovernmental relations

⁸ The European Globalization Fund was set up to deal with displaced workers to deal with challenges of labor market restructuring, our suggestion is to tie trade adjustment assistance more directly to those that lose jobs due to foreign trade.

to promote their institutional self-interests. However, while the German decision style is one of cooperative federalism, the decision rules on ratification were contested for TTIP and CETA “mixed agreements.” In Belgium, the decision style is one of competitive federalism, as decision rules generate bargaining to accommodate regional interests, as occurred with the Walloon demands on the CETA agreement, leaving the federal government hostage to one constituent regional parliament, which in practice had a national-like ratification power.

That said, acceptance of any trade deal increasingly needs to take account of the new political dynamics that are emerging not only during negotiations, but also at the signatory and ratification stage. In the case of “mixed agreements,” decision rules can serve an offensive function, as instruments for the external assertion of subnational influence. Such developments have sparked new interest in the role of regions, and indeed in their “actorness” in trade policy, prompting us to focus explicitly on how subnational jurisdictions can be part of the broader context of policy engagement, and overlapping authority.

While the proliferation of actors in trade negotiations could be viewed as hindering decision-making by increasing the number of veto players, such policy engagement also has some normative benefits. The overlapping authority and institutional layering that has emerged in new trade agreements promises to enhance opportunities for broader, more active sub-national participation in economic governance.

We highlight some strategies for improving collaborative exchanges and joint decision making to avoid gridlock. We suggest that the extent to which there is a willingness to adopt a problem solving rather than a bargaining style of decision-making in trade negotiations, negotiators may overcome marked differences in subnational preferences, thus raising the prospect of agreement where there is overlapping authority and joint decision making. The challenge to ensure specific regulatory outcomes has mobilized subnational governments to address concerns about the diminution of political autonomy granted to them in domestic political arrangements, as well as the potential economic effects at the subnational level.

Given the variation in political and legal strategies used by subnational entities to contest deep and complex trade agreements, and as trade narratives increasingly recognize that the values of trade have changed, trade policy should address asymmetrical influence and the distributive impacts

of trade agreements across regions, reinforce subnational engagement, and thus framing trade issues to enable subnational support. These changes would facilitate vertical and horizontal coordination and prevent contestation and policy deadlock in a polity characterized by overlapping authority and joint decision making.

Data availability statement

The original contributions presented in the study are included in the article/supplementary material, further inquiries can be directed to the corresponding author.

Author contributions

All authors listed have made a substantial, direct, and intellectual contribution to the work and approved it for publication.

Funding

The open access publication fee was covered by the Social Sciences and Humanities Research Council (SSHRC) of Canada (Agency award number: 611-2021-0015), awarded to Michael Carpenter.

Conflict of interest

The authors declare that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

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