

European and External Relations Committee

Treaties, Devolution and Brexit

Briefing paper by Professor Sionaidh Douglas-Scott

Brexit raises concerns for Scotland in the foreign affairs field. This is because, in the course of Brexit, competences will be returned from the EU to the UK and devolved nations, but the UK will also need to negotiate a series of trade and other foreign agreements both with the EU and also other states, some of which will be likely to impact on Scotland's competences.

The field of foreign relations is generally regarded as the obvious domain of federal or central government. However, in practice there exists great variety in both treaty-making powers and treaty implementation. Under devolution legislation, the UK Government remains responsible for international relations and treaties, including relations with the EU. But the Scottish Government clearly has an interest in international policy making that affects its devolved powers. Further, under devolution legislation the Scottish Government is responsible for observing and implementing international obligations relating to devolved matters.

There are 3 main issues to consider:

- 1) *who has the power to conclude treaties – do sub-state entities have the power to conclude treaties?*
- 2) *what is the scope of central government treaty-making power – to what extent may it infringe sub-state autonomy?*
- 3) *what are the implications for sub-state autonomy of treaty implementation?*

By looking at examples from other states, this paper examines how domestic law on treaty-making and treaty-implementing affects the balance of power between central and sub-state governments. Some of these provide useful examples for Scotland.

1. Sub-state treaty making powers

In 1923, the *Wimbledon* judgment of the Permanent Court of international Justice characterized the right to conclude international agreements as 'an attribute of State sovereignty.'

However, it can no longer be said that treaty-making power is an attribute exclusive to state sovereignty. Sub-state, supranational, and extra-national bodies all engage in treaty-making in their own names.

Sub-state actors are semi-autonomous territorial entities that are legally dependent upon, or associated with, independent sovereign states. At present, Scotland qualifies as a sub-state actor. Schedule V Scotland Act 1998 reserves all aspects of foreign affairs to the UK Government and Parliament including relations with the EU. Although foreign affairs and treaty making is reserved, and Scotland does not presently have any independent treaty making powers, the UK Government and devolved administrations have agreed international relations and EU concordats to

ensure effective co-operation between the UK and Edinburgh governments. This relationship is managed by a Memorandum of Understanding.

Other States have accepted that sub-state actors may have a role in treaties. For example, sub-state actors have concluded treaties themselves - Ukraine and Belarus joined the UN Charter while part of the Soviet Union, as did India and the Philippines prior to independence. The German and Austrian Länder, Swiss Cantons, Hong Kong, Bermuda, Jersey, The Cook Islands, New Caledonia, Puerto Rico, Tatarstan, Quebec, Wallonia and Flanders (all sub-state actors) have also all concluded treaties

Generally, international law sets two prerequisites for sub-state treaty-making: that the state responsible for the sub-state actor consents, and that the sub-state actor's treaty partners to regard it as capable of entering into treaties.

A. Sub-state actor agreements authorised by State

Increasingly, states have formalized treaty-making capacity of sub-state entities through national law. So, for example, the German Constitution authorizes German Länder to make treaties, and there have been over 100 agreements between German Länder and neighbouring European countries. In 1988, Austria amended its Constitution to authorize a similar arrangement. Since 1993, Belgium has authorized its constituent 'regions' to enter into treaties on matters within their exclusive competence (eg water and environmental resources). And, while the U.S. Constitution prohibits U.S. states from treaty making, it does authorize them to enter into 'compacts' with foreign powers, provided they obtain approval of the U.S. Congress.¹ The UK has used an 'Instrument of Entrustment' to authorize overseas territories such as Bermuda, the British Virgin Islands, and Jersey to conclude certain treaties with the United States and Canada.

Unauthorised agreements

However, there are quite a few examples of sub-state actors concluding unauthorized agreements with foreign powers. For example, in 2000, Missouri concluded a Memorandum of Agreement with Manitoba on water issues without Congressional authorization. Quebec has concluded over 250 'ententes' with foreign governments. However, the status of these unauthorized sub-state arrangements is sometimes unclear, especially if the sovereign state refuses to recognize the validity of agreements of its sub-state entities.

B. External Consent to Sub-State Treaty-Making

The other prerequisite for recognition in international law is the other treaty partners' acceptance of the sub-state actor as treaty partner. So, in 2001, the US confirmed first with the UK that Guernsey, the Isle of Man, and Jersey had authority to conclude bilateral tax information exchange agreements with the US.

Sub-state participation in multilateral agreements is less common because the other states usually refuse to consent to the sub-state actor's participation. However, there

¹ Art. 1, §10, cl. 3 US Constitution: 'No State shall, without the Consent of Congress . . . enter into any Agreement or Compact . . . with a foreign Power.'

are exceptions. Article 305 of the 1982 UN Convention on the Law of the Sea has allowed some associated states and territories to sign and ratify the Convention providing they have competence in the relevant matters, including competence to enter into treaties in those matters. Further, WTO Agreement Article XII authorizes any 'customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements to accede on terms agreed to between it and the WTO.' Prior to their reversion to China from the UK and Portugal, both Hong Kong and Macau joined the WTO under Article XII, and have continued their independent membership despite China's accession to the WTO.

2. Treaty making power and sub-state autonomy

Many EU competences are in areas that have been devolved – such as agriculture, fisheries, or criminal justice - and post Brexit would be matters for devolved governments and parliaments. What would be the position, however, regarding international agreements on these matters, given that foreign affairs is reserved to the UK? In many federal or otherwise devolved states, the notion that central government can employ the cover of foreign treaties to invade devolved competences has been very controversial.

As noted, although foreign affairs is reserved to the UK Government, there exist concordats to ensure effective co-operation between central and devolved governments. Under these concordats, UK government must consult devolved administrations over formulation of the UK position, involve devolved administrations in negotiations relating to devolved matters and formally notify devolved administrations once agreed. The problem is that the concordats are not legally binding, so Scotland's position is not ensured, and Scotland thus seems to be in a weak situation when it comes to international treaties. What lessons can be drawn from other jurisdictions?

First, *Belgium* provides perhaps the strongest example of protection of sub-state rights, because treaty making power is divided between central government and sub national units (ie the regions and communities) paralleling their actual respective competences, so sub-national units have protected treaty making powers and roles. Such a situation would not be possible in Scotland without considerable further devolution legislation.

Under the *German* Constitution, 'relations with other states are...conducted by the Federation' (Art. 32(1)) but Länder specifically concerned must be consulted, and as already mentioned, Länder have some treaty making power. Under the principle of federal loyalty or comity (*Bundestreue*) the Federal Government is obliged to take into account the opinion of the Länder. In 1957 Federation and Länder concluded the 'Lindau Agreement', which provides that if the Federation concludes a treaty in a matter that Länder deem to fall within their exclusive jurisdiction, the consent of Länder is required before the treaty can become binding in international law (however, it should be noted that constitutionality of the Lindau Agreement is not universally accepted). Nonetheless, Länder are in a stronger position than Britain's devolved nations.

The US is an interesting example. Under the US Constitution, the President has full power to make treaties. However, under Article II(2) US Constitution, such treaties require the concurrence of 2/3 of the Senate present, and there are also certain limits on federal treaty power requiring that it not encroach on constitutional autonomy of the States. A central principle underlying American federalism is that the national government is one of limited, enumerated powers. A corollary of this principle is that when the federal government makes federal law, it is restrained in what it can do either by inherent limits in the scope of its delegated powers, or by the Tenth Amendment's reservation of powers to the states, or both.² Litigation is being pursued more and more to protect states' rights.

Canada and *Australia* are well worth examining as examples of jurisdictions where the British Constitution and British law have historically been particularly influential. They also provide a neat contrast when it comes to sub-state participation in foreign affairs. *Australia* is a federal state with Commonwealth (ie national) and state governments. However, Australia's Constitution deals with treaties only vaguely. Section 61 Constitution vests executive power with the Governor General, and significantly, judicial interpretation of treaty making power has attributed an almost unlimited function to the Commonwealth. Such highly centralized treaty powers provided an avenue for central government to encroach on federal subunits.

The position is somewhat different in *Canada*. As in Australia, the Canadian Constitution is not explicit on treaty-powers, but under Canadian constitutional law more generally, conduct of foreign affairs is treated as a federal function of the Executive on the basis of Letters Patent of the Crown 1947 (which delegate to the Governor General the royal prerogative to conclude treaties). However, practice has been somewhat different. Because provinces must implement treaties where they relate to their competences, provinces have tended to be involved in treaty negotiations to ensure later compliance. Consultations take place within a wide ranging network of intergovernmental relations. Unlike Australian states, Canadian provinces have a *de facto* veto over treaties concerning their jurisdiction. Quebec has claimed provinces can conclude treaties in their areas of jurisdiction through Lieutenant Governors. Quebec has also pursued foreign policy through non-binding agreements, or *ententes*, which the Canadian Supreme Court found permissible. Further, the provinces have pressed for a more active role in treaty-making, and the federal government has been compelled to concede some provincial demands. In some instances, provinces have even taken the lead in international negotiations. For example, the negotiation of an integrated Canadian-American energy plan was led largely by Alberta.

So Canada is an interesting example for Scotland, because, although there is no explicit constitutional protection for provinces in the treaty process, in practice it has gained a greater role than the strictly legal provisions might suggest. This suggests widespread legislation is not always necessary for constitutional change.

² See eg *New York v. United States*, 505 U.S. 144, 155-56 (1992).

3. What are the implications for sub-state autonomy of treaty implementation?

To fully appreciate Scotland's role here, we need to look at how treaties are implemented into national law. In the UK, because of our 'dualist' system, treaties do not usually become part of domestic law (EU law has been the exception) unless specific legislation is enacted to implement their rights and obligations. So if the UK concluded a treaty that concerned devolved powers (eg agriculture or criminal justice matters) Scotland might have to implement its provisions to give it full effect. But what if the terms of the treaty conflicted with Scotland's domestic law? Let us look at some of the more relevant comparisons.

In *the US*, valid treaties are 'law of the land' under Art 6(2) Constitution. So-called 'self executing' treaties³ do not need implementation by legislation, although other treaties must be legislated. *Missouri v. Holland* (1920) held Congress could enact legislation implementing a treaty even if such legislation was otherwise outside scope of its constitutional authority. However, this precedent has been challenged, on the basis that it conflicts with the fundamental constitutional principle that federal government can only act within its enumerated powers, and the Supreme Court has more recently been policing the boundaries of Congress's power. *Bond v. United States* (2014) presented the Court with an opportunity to assess whether the Treaty Power could be used to increase Congress's legislative powers. *Bond* concerned the Chemical Weapons Convention which obligated the US to outlaw the use, production, and retention of weapons consisting of toxic chemicals. In *Bond* a unanimous Supreme Court held that a litigant had standing to argue that a federal statute enforcing the Chemical Weapons Convention intruded on areas of police power reserved to the states (although the claim did not ultimately succeed because the Supreme Court concluded that Congress had not intended the Act to reach a 'run of the mill' assault case using a skin irritating chemical, and so the Supreme Court found it unnecessary to decide treaty power issue, which still remains controversial). But this example illustrates that even where there is a written constitution, the extent to which treaties may encroach on sub-state rights is controversial.

In *Canada*, in keeping with British constitutional theory and in contrast with US law, treaties do not establish rights and obligations unless enacted into domestic law by appropriate legislation. Canada's treaty-implementation power has become decentralized. In the *Labour conventions case* of 1937 it was ruled that the federal government lacked the power to implement treaties unless the subject matter of the treaty fell within federal government competences. So the provinces need to adopt legislation in fields of their competence to implement international obligations.

While it has been argued that Ottawa may use its spending power to induce provincial compliance, the *Social Union Framework Agreement*⁴ has in practice constrained Ottawa in matters of fiscal transfers. The safest strategy has been to seek provincial approval prior to ratification, or Ottawa risks provincial refusal to implement a treaty, which would place the federal government in breach of a treaty.

³ Ie those that are judicially enforceable on ratification.

⁴ This Agreement was signed by the federal and provincial governments (except Québec) in February 1999 creating a new framework for social policy making. It sets out principles of equity and fairness in social programs; codifies rules for the federal spending power; and promises collaboration, accountability and transparency.

Furthermore, 'federal state clauses' are inserted in treaties, which enable Canada to become a party to international conventions, such as the 1980 Hague Convention on International Child Abduction, and to designate the provinces to which the convention applies - in practice this means provinces that adopt necessary implementing legislation.

Mechanisms regulating relations between Ottawa and provinces, however, remain largely informal and are carried out through executive federalism. Perhaps the most notable example was the negotiation of NAFTA, which dealt with numerous provincial jurisdictions. Though provincial demands for full representation were rejected by Ottawa, the federal government agreed to increased cooperation to ensure provincial support. This included: holding a first ministers' conference every three months during negotiations; increasing meetings between provincial and federal officials; including provinces in the meetings to determine the negotiator's mandate; and, a federal government pledge to attain provincial approval prior to obliging itself. The federal government also permitted Quebec to opt out of a side deal and make a separate treaty with the US in recognition of its distinct pensions system. This set a standard that has since been adhered to, and international relations have become a *de facto* concurrent jurisdiction. However, given the divergence of provincial interests, this relationship is not always harmonious when consensus does not exist. The softwood lumber dispute⁵ between Canada and the US, in which provinces have raised the issue but the federal government is recognized as the sole claimant, demonstrate how acrimonious intergovernmental relations can be.

In *Australia* the legislative implementation of treaties is highly controversial. It is similar to Canada in that treaty obligations must be legislated into effect. However, caselaw has taken a different direction, and the courts have placed the federal government in a rather strong position. For example, in the *Dams case of Tasmania* in 1983, the High Court established that the Commonwealth can also legislate on the implementation of foreign treaties in fields that cover powers that otherwise belong to states. Furthermore, in *Victoria v Commonwealth*, the High Court explicitly stated that, even in the contemporary context of broadening treaty obligations, the Commonwealth's treaty-power was supreme. States may be allowed to implement treaty legislation (normally when they are perceived as better equipped than Canberra to oversee compliance). Yet, even in these cases, ostensibly identical statutes are passed in each state. This leaves little room for regional flexibility in terms of treaty compliance.

Consequently, states have sought a more balanced treaty process through intergovernmental mechanisms. This has mainly taken place within the Council of Australian Governments. However, intergovernmental mechanisms are weak and reveal a lack of institutional incentives for Canberra to commit to a different treaty system, less potentially intrusive of states autonomy.

⁵ The Canada–United States softwood lumber dispute is one of the largest and most enduring trade disputes between both nations. The basis of the dispute is the claim that the Canadian lumber industry is unfairly subsidized by federal and provincial governments, as most timber in Canada is owned by the provincial governments.

Conclusion

What conclusions may we draw for Scotland in the Brexit context?

Federal, or highly devolved, models such as Germany or Belgium provide examples of directions Scotland could take in the treaty-making field, but this would require further devolution of powers, and more legislation would need to be adopted by the Westminster Parliament.

However, even although Scotland currently has neither formal treaty-making powers (in contrast to German Lander, or Belgian regions) nor informal ones (such as Canadian Provinces) that is not an end to the relevance of this discussion, because there is still the question of whether the UK may conclude treaties that intrude on devolved competences, and also the question of whether Scotland may exercise power in the way that treaties are implemented.

The US is an interesting example, because it illustrates that, even with a written constitution, new developments prompted by caselaw may challenge the federal/state balance considerably in this area.

Australia and Canada are also worth looking at because of their past history and relationship with British Law. They also reveal the relevance of caselaw in the absence of codified constitutional provisions on treaty-making, a situation very relevant to Scotland and the UK. On the one hand, treaty-making can unleash latent central government power. In Australia, the central government can easily overrule the states. Canberra can, and on several occasions has, enforced policy consensus on the states. For example, it unilaterally nullified a Tasmanian statute in 1991 to ensure compliance with a human rights treaty.

On the other hand, distribution of treaty-making power provides strong incentives for federal and provincial governments to find common ground regarding international obligations - otherwise, they may not be able to enter international agreements bearing significant benefits. Even in the absence of a formal veto, Canada's provinces have been able to wield practical power to good effect. The courts in Canada seem to have been more sympathetic to provincial power than in the Australian case. Furthermore, the fact that the provinces have, given the opportunity to provide input been willing to abide by treaty obligations, makes it unnecessary to impose more formal rules, such as a *de jure* veto proposed by British Columbia and Quebec. The Canadian example may merit a closer look to see if Scotland may learn from and seek to emulate some of its practices. In all cases, litigation has had an important role in the way treaty making power has developed, something also worth bearing in mind.

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