

SPICe Briefing

Proposals to the Smith Commission on Further Powers in EU and International Affairs

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This briefing provides analysis of the Scottish Government, Scottish Labour Party, Scottish Conservative Party, Scottish Liberal Democrats and the Scottish Green Party proposals on the subject of European and international affairs submitted to the Smith Commission considering further powers for the Scottish Parliament.



The Scottish Parliament
Pàrlamaid na h-Alba

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EXECUTIVE SUMMARY

The Smith Commission considering further powers for the Scottish Parliament has received submissions from the Scottish Government, the Scottish Labour Party, the Scottish Conservatives, the Scottish Liberal Democrats and the Scottish Green Party.

Whilst the Scottish Liberal Democrats and the Scottish Green Party have considered the issues of the European Union and international affairs in their submissions to the Smith Commission, the Scottish Government has presented a range of proposals which seek to change how European Union and international affairs policy is coordinated in the United Kingdom.

The Scottish Government's proposals outline a number of measures which it proposes should be introduced to give the Scottish Government a more formal role both in engaging with the EU institutions and also in contributing to the determination of the UK's priorities, policies and positions on reserved matters that affect Scottish interests.

Under the current constitutional settlement foreign affairs and relations with the European Union are reserved to the UK Government and Parliament, although the Devolved Administrations do have an interest where foreign affairs overlap with devolved competences.

In the Scottish Government's submission to Smith, it proposed that Scotland should have guaranteed rights to engage directly with the EU institutions in areas of devolved competence; that a statutory mechanism should be put in place to enable Scotland to jointly develop, influence and represent UK policy positions on broader EU matters such as treaty change; and that the Scottish Government and Parliament should be given the ability to influence the policy priorities and contribute to the business planning of the departments, agencies, embassies, consulates and offices overseas that promote the UK's commercial and cultural interests. In addition, the Scottish Government has proposed that Scotland should have competence to negotiate, sign and ratify international agreements that relate to devolved matters and that Scotland should have a formal role in determining the UK's priorities and policies on international agreements relating to reserved matters that affect Scottish interests. Finally, the Scottish Government has proposed that the Concordats on Coordination of European Union Policy Issues and on International Relations between the UK Government and the Devolved Administrations should be put on a statutory footing.

The Scottish Government's proposals mirror aspects of practice already adopted in EU member states such as Belgium, Germany and Spain and, for international affairs, in Canada. However, many of the arrangements in place in other countries to support Sub State Governments in their engagement with both the European Union and international organisations do not easily cross over to the United Kingdom's system where devolution is limited to Scotland, Wales and Northern Ireland (which therefore each have two parliaments governing them), while England is governed solely from Westminster and the UK Government is required to represent the interests of the United Kingdom and England at the same time.

A further factor to consider is that any decision to give Scotland the powers proposed by the Scottish Government on European and International Relations might also raise questions about the representation of the administrations in Wales and Northern Ireland given that all three

Devolved Administrations are treated equally under the Memorandum of Understanding and the associated Concordats.

BACKGROUND

Following the Scottish Independence Referendum, the Prime Minister announced that Lord Smith of Kelvin had agreed to oversee the process to strengthen the powers of the Scottish Parliament.

This briefing provides analysis of the Scottish Government's proposals along with the proposals of the other major political parties which have been submitted to the Smith Commission on the subject of European and international affairs.

THE CURRENT SITUATION

Schedule V of the Scotland Act 1998 reserves all aspects of foreign affairs to the UK Government and Parliament including relations with the European Union. This means the United Kingdom Government is responsible for managing both international relations and relations with the European Union including leading on all policy and legislative negotiations. However, the Scotland Act does give the Scottish Government and Scottish Parliament responsibility for implementing international and European obligations where they relate to devolved matters.

MEMORANDUM OF UNDERSTANDING AND THE CONCORDATS ON THE COORDINATION OF EUROPEAN UNION POLICY ISSUES AND INTERNATIONAL RELATIONS

Given that aspects of European and international policy relate to devolved matters, the United Kingdom Government works closely with the Devolved Administrations in Scotland, Wales and Northern Ireland. This relationship is managed by a Memorandum of Understanding. (UK Government 2013)

Attached to the Memorandum of Understanding are Supplementary Agreements, these include the Concordats on Coordination of European Union Policy Issues and on International Relations between the UK Government and the Devolved Administrations in Scotland, Wales and Northern Ireland.

The Concordat on Coordination of European Union Policy Issues specifically manages the United Kingdom Government's relationship with the Scottish Government in the provision of information, the formulation of UK policy, attendance and representation at Council of Ministers meetings, implementation of EU obligations and infraction proceedings.

Similarly, the Concordat on International Relations "sets out how the United Kingdom Government and Scottish Ministers will co-operate with respect to international relations".

PROPOSALS PRESENTED TO THE SMITH COMMISSION

Prior to the referendum the Scottish Conservatives, the Scottish Liberal Democrats and Scottish Labour Party all published proposals for the devolution of further powers to Scotland.

- Scottish Liberal Democrats: Federalism: the best future for Scotland
- Scottish Conservatives and Unionist Party: Commission on the Future Governance of Scotland
- Scottish Labour Party: Powers for a purpose – Strengthening Accountability and Empowering People

These proposals were subsequently submitted to the Smith Commission by each of the parties involved. The Scottish Government's submission to the Smith Commission "More Powers for the Scottish Parliament: Scottish Government Proposals" was published on 10 October 2014.

The UK Government published a Command Paper on 16 October 2014 which included a summary of the proposals from the parties supporting the Union. On foreign affairs, the Command Paper stated that:

"Foreign policy is reserved to the UK Government. The power therefore rests with the UK Government and Parliament. There is no overlap with devolved Scottish responsibilities, except that Scottish Government ministers and officials may travel internationally or meet international representatives, in respect of devolved affairs in accordance with the relevant concordat and Memorandum of Understanding." (UK Government 2014)

Whilst as a matter of law, international relations and relations with the European Union are the responsibility of the UK Government and Parliament, the Devolved Administrations will have an interest where international and European matters relate to devolved issues. The Scotland Act gives the Scottish Government and Scottish Parliament responsibility for observing and implementing International and European obligations where they relate to devolved matters.

The Liberal Democrats

In their publication, *Federalism: The Best Future for Scotland* published in October 2012, the Liberal Democrats proposed that the current arrangements in place for agreeing a common UK position ahead of EU negotiations should be revisited to establish and agree a more robust UK position on issues which are devolved, such as fisheries and agriculture, particularly at Council of Ministers level. In addition, it was proposed that "Scottish ministers should be fully involved, to make sure that an agreed UK position is established, sustained and represented at meetings." (UK Government 2014)

The Conservative Party

The Conservative Party proposed no changes to the current arrangements on relations with the European Union.

The Labour Party

The Labour Party proposed no changes to the current arrangements on relations with the European Union.

The Scottish Government

Chapter 7 of The Scottish Government's proposals for "More Powers for the Scottish Parliament" addresses Scotland's Place in the World. The Scottish Government proposes that:

"Scotland should be empowered to have a stronger and more clearly articulated voice on the international stage. This is essential to ensure the Scottish Parliament and Scottish Government can play a stronger role in decision-making on issues within their responsibilities or which affect their interests, and to enhance their ability to promote Scottish products and businesses internationally." (Scottish Government 2014a)

The Scottish Government suggests that "within the context of the UK, Scotland should have the competence to act internationally in devolved areas and also a formal role in determining the UK's priorities, policies and positions on reserved matters that affect Scottish interests".

In terms of specific proposals for European and international affairs, the Scottish Government suggests that:

- Scotland should have guaranteed rights to engage directly with EU institutions and EU decision-making processes in areas of devolved competence.
- A statutory mechanism should be put in place to enable Scotland to jointly develop, influence and represent UK policy positions on broader European matters (for example on EU reform or treaty change)
- The Scottish Government and Scottish Parliament should have a right to influence the priorities and be directly involved in the business planning of the departments, agencies, embassies, consulates and offices overseas that promote the UK's commercial and cultural interests, to ensure Scotland's distinctive interests are secured. UK agencies and overseas operations should be accountable to the Scottish Parliament for their pursuit of these interests
- Scotland should have competence to initiate, negotiate, sign and ratify international agreements that relate to devolved matters
- Scotland should have a formal role in determining the UK's priorities, policies and positions on international agreements relating to reserved matters that affect Scottish interests
- To establish a new partnership between the Scottish and UK Governments on international and European matters the two governments should develop a statutory Co-operation Agreement with strong bilateral inter-governmental and information-sharing arrangements, and swift dispute-resolution mechanisms. This would complement the Memorandum of Understanding that guides the way all parts of the UK should work together

Speaking at a European Policy Centre event in Brussels on 14 October 2014, the Cabinet Secretary for Culture and External affairs outlined what the Scottish Government hopes the Smith Commission will deliver in terms of European Union and international relations competence:

“We are making the case that additional powers should include specific competence for Scotland to act directly in the European Union, and internationally, to improve Scotland’s sustainable economic performance, maintain the integrity of Scottish Government policy in its areas of responsibility and make a distinctive contribution to global challenges.

Scotland’s relationship with the European Union is particularly important in this new debate. The EU exercises considerable influence over economic prosperity and social welfare – areas of policy that are either already the responsibility of the Scottish Parliament or expected to be transferred to Edinburgh through the Smith Commission process.

Our strong belief is that Scotland should have guaranteed rights to engage directly with EU institutions and EU decision-making processes in these areas.” (Scottish Government 2014b)

The Scottish Green Party

The Scottish Green Party also proposed that the Smith Commission should give consideration to the way in which Scotland can have a further enhanced international voice. In relation to European Union engagement the Scottish Greens wrote:

“we would argue that the UK Government should be open to exploring the extent to which Scotland’s voice in the world can be heard more fully than at present. A clear right to full participation in UK delegations where areas of devolved responsibilities are under

discussion would be one positive step, as would an enhanced ability to contribute to the development of UK policy stances. As one example the impact of the Transatlantic Trade and Investment Partnership could be dramatic, and it seems reasonable that Scotland's perspective on the negotiation of such international agreements should not only be heard in its own right, but be taken fully into account." (Scottish Green Party 2014)

ANALYSIS OF THE SCOTTISH GOVERNMENT'S PROPOSALS SUBMITTED TO THE SMITH COMMISSION

Of all the contributions to the Smith Commission, the Scottish Government has developed the most detailed and far reaching proposals for change in the area of Scotland's approach to the European Union and international relations within the context of the United Kingdom.

The next section of the briefing analyses the Scottish Government's proposals; looks at the possible implications for the United Kingdom including for the other Devolved Administrations; and provides some examples of how other Sub State Government's with legislative power have influence on EU and international issues within their country. The examples relate to Belgium, Germany, Spain and Canada (for international affairs), it is important to note that the constitutional arrangements in each of these countries are not directly comparable with the United Kingdom's system of asymmetric devolution which can be defined as where devolved legislatures have law-making powers for some parts of a country but the shared parliament is also solely responsible for government of part of the whole. In the case of the United Kingdom Professor Alan Trench states:

"In the UK, the anomaly arises because devolution is limited to Scotland, Wales and Northern Ireland (which therefore each have two parliaments governing them), while England is governed solely from Westminster. There is therefore a question of how to balance the democratic rights and representation of the various parts of the UK, when it is asymmetrically devolved." (Trench 2014)

GUARANTEED RIGHT TO ENGAGE DIRECTLY WITH EU INSTITUTIONS AND EU DECISION-MAKING PROCESSES

In the European Union context, the United Kingdom Government as the Member State represents Scotland in the European Council and in Council of Ministers meetings. In addition, contact with the European Commission is primarily made through the Member State Government. During the Scottish Parliament's consideration of the Scotland Act 2012, the Scottish Government proposed an amendment to the Scotland Bill which would have put Scottish Ministers attendance at European Union Council of Ministers meetings on a statutory footing. The Scottish Government also proposed that the statutory right would extend to enabling Scottish Government officials to attend European Commission and Council Working Groups where any non-reserved matter is to be discussed. The amendment was rejected by the UK Government.

The proposal to give Scotland the guaranteed right to engage directly with EU institutions and EU decision-making processes in areas of devolved competence appears to be an extension of the Scottish Government's requested amendment on Council attendance during the passage of the Scotland Act 2012. The Scottish Government does not make clear whether a guaranteed right to engagement with the EU institutions would involve pursuit of a Scottish or an agreed UK position. This is important because it is difficult to see how part of the United Kingdom would - or could - be allowed to advance distinct foreign policy interests that fell outwith the agreed UK position in Brussels.

Giving Scottish Ministers the statutory right to engage directly with European Union institutions might also have a knock-on effect with Welsh and Northern Irish Ministers demanding similar rights. The Welsh First Minister Carwyn Jones has already addressed the issue of how representation at the Council of Ministers is handled. Speaking in March 2012 to the “Wales and the Changing Union Conference”, the Welsh First Minister said:

“—It is worth also mentioning Europe ... we hear a lot about the West Lothian Question ... but there's a related question about Europe which I'm calling the Bridgend Question. Early in my ministerial career I spent many a long day and night, as Agriculture Minister, at the Council of Ministers. Now, there are 4 Agriculture Ministers in the UK and yet, at the Council of Ministers, the English Agriculture Minister casts a vote on behalf of all of us – whether the other 3 of us agree or not. Again, this seems increasingly unsatisfactory and unsustainable as time goes by ... a revised way of dealing with EU business should also form part of our wider debate about the UK's future.” (Jones 2012)

However, giving evidence to the Welsh Assembly's Constitutional and Legislative Affairs Committee during its inquiry into “Wales' role in the EU decision making process”, when asked about the suggestion of a more formal mechanism for communicating, Carwyn Jones said that there was not a case for changing the mechanism. Nevertheless, he felt that if the Memorandum of Understanding does not work and that if the UK Government began to refuse attendance, then a statutory approach would be needed. (National Assembly for Wales Constitutional and Legislative Affairs Committee 2014)

Giving evidence as part of the same inquiry, David Liddington, the UK Minister for Europe explained that there was a distinction between attendance at the Council and taking the UK Chair, drawing attention to changes to the Memorandum of Understanding in October 2013, which provides a right of attendance, unless there is a compelling reason not to do so.

He added that:

“When it comes to going into the room, and taking the chair, there are both practical and constitutional issues involved. In practical terms, there is often only one chair, and there are always just a very limited number of seats in the room for the representing Minister and the supporting team. ... In constitutional terms, in most cases, the lead UK Minister concerned will, quite properly, want to be there and personally represent the UK position collectively, but we, as a matter of policy, have said that we will always look properly and sympathetically at requests by devolved Ministers to take the chair, where there is a genuinely good reason to do so. However, ultimately, that is a matter for the lead UK Minister to determine on the spot.” (National Assembly for Wales Constitutional and Legislative Affairs Committee 2014)

In Belgium and Germany (two EU member states with significant federal systems) there is a constitutional obligation allowing Sub-State Governments (SSG) to attend Councils. Whilst these Member States have established the right of SSGs to attend Councils, it should be pointed out that none of those systems are directly analogous to the constitutional set-up in the UK as both have federal structures whilst, as explained earlier, the UK has a system of asymmetrical devolution.

In Germany, The Bundestag and Bundesrat (as the Federal Parliamentary representation of the Lander) share the right to delegate representatives to the European Council, depending on whether the matter on the agenda lies in the area of federal or Länder competences. If EU negotiations concern a devolved Länder matter, it is the Lander themselves – working through the Bundesrat – which delegate an individual to represent Germany as a whole at Council meetings. This has tended to be in areas such as education, culture, media, and justice and home affairs.

Similarly, in Spain, the Autonomous Communities participate (where relevant) in the development of the Spanish negotiating position through the Conference for EU-Related Affairs. In addition, Ministers from the Autonomous Communities are permitted to represent Spain in the Council of Ministers formations where the communities have exclusive competence after all the Autonomous Communities have agreed a common Spanish position.

Belgian representation in the Council of Ministers generally falls in to one of the following categories:

- The federal government representing Belgium where the subject is an exclusive federal competence for example in the General Affairs Council
- Where joint competence over a policy exists, the federal government generally takes the lead with assistance from a regional representative
- Where the competence of the policy is exclusive to the regions and/or the communities, they are required to jointly agree the Belgian position and represent it in the Council. The exception to this rule is when it relates to fisheries, for which only Flanders has the competence so the Flemish Government always represents Belgium in the Council on fisheries issues. (Kingdom of Belgium Government)

The important point to note in examining the way in which the Sub State Governments in Belgium, Germany and Spain are able to represent their Member State in the Council is that they are always responsible for representing one unified Member State position. As alluded to earlier, if the Scottish Government were to be given similar rights to engage directly with the EU institutions on devolved issues, it is likely it would be required to represent the agreed United Kingdom position rather than a distinct Scottish position. In addition, it is possible the other Devolved Administrations would request similar rights from the UK Government.

Given the requirement to develop and present a consistent Member State position at the Council of Ministers, it is arguable that for Sub State Governments the real 'meat' of participation in EU matters is in the domestic coordination processes between the centre and the regions to agree a common position, rather than what actually goes on at Council where whoever is representing the Member State they are required to represent the agreed position.

A STATUTORY MECHANISM SHOULD BE PUT IN PLACE TO ENABLE SCOTLAND TO JOINTLY DEVELOP, INFLUENCE AND REPRESENT UK POLICY POSITIONS ON BROADER EUROPEAN MATTERS

The second Scottish Government proposal was that a statutory mechanism should be put in place to enable Scotland to jointly develop, influence and represent UK policy positions on broader European matters such as Treaty change. The proposal may be related to the decision of David Cameron to veto the Fiscal Compact Treaty¹ in December 2011 without apparently consulting the Devolved Administrations (STV News 2011). In addition it may relate to the decision not to include the Devolved Administrations in meetings of the UK Government's EU Coordination Meetings currently known as the Rogers-Scholar meetings. These meetings allow Whitehall departments to discuss EU policy matters internally. Previously, the Devolved Administrations had an open invitation to attend these meetings but this invitation was rescinded in 2008. (Scottish Parliament European and External Relations Committee 2014a)

¹ The Treaty on Stability, Coordination and Governance was signed on 2 March 2012 by the leaders of all then euro area members and 8 other EU member states, and entered into force on 1 January 2013. It introduced measures on government budget deficits to try to prevent a repeat of the economic downturn that began in 2008.

A proposal to put a statutory mechanism in place to enable Scotland to jointly develop, influence and represent UK policy positions on broader European matters would once again also have implications for the Welsh and Northern Irish Governments who may request similar rights.

The United Kingdom Government might argue that a mechanism is already in place for enabling Scotland to jointly influence and represent UK policy positions on broader European matters. The Joint Ministerial Committee (Europe) which meets regularly to discuss and agree a UK position on EU matters has served that function. As its operation is governed by the Memorandum of Understanding it is not underpinned by a statutory mechanism.

An important consideration in relation to this proposal is that it relates to European matters which are ostensibly reserved to the UK Government and Parliament. Whilst Sub State Governments in Belgium, Germany and Spain have rights to influence and in many cases decide the Member State position where the issue at hand relates to devolved competences, there is less formal precedent for contributing to and representing the national position on federal issues except where they overlap with devolved issues.

INFLUENCING THE PRIORITIES AND BE DIRECTLY INVOLVED IN THE BUSINESS PLANNING OF THE DEPARTMENTS, AGENCIES, EMBASSIES, CONSULATES AND OFFICES OVERSEAS

The next Scottish Government proposal, that both the Government and Parliament in Scotland should have the right to influence the priorities and be directly involved in the business planning of the departments, agencies, embassies, consulates and offices overseas that promote the UK's commercial and cultural interests, to ensure Scotland's distinctive interests are secured appears to be a new proposal from the Scottish Government. As part of the United Kingdom, Scotland's interests are represented around the world by the United Kingdom's international network.

The Scottish Government's International Engagement Strategy which was published in October 2012 states that the Scottish Government:

“will also maximise the resources available to us. We represent Scotland through a lens of independence of thought but we will continue to make full use of the UK resources at our disposal. In particular, we will work with the Foreign and Commonwealth Office network and UK Trade and Investment around the world to maximise business, cultural and educational opportunities for Scotland. We will also engage directly with the British Council, so that we can effectively showcase Scotland's cultural and educational excellence abroad.” (Scottish Government 2012)

This shows that the Scottish Government already works closely with the UK Government and the UK's network of embassies and consulates. However, the Scottish Government proposal suggests that it feels that the work of the UK Government's network could be better tailored to take account of Scottish interests and that the Scottish Parliament should be able to hold the international network accountable for its Scottish related activities.

Other countries, such as Canada and Belgium have informal ways of working to allow the constituent parts of the state to contribute to the way in which a country is represented overseas but there do not appear to be any examples of formal mechanisms for this.

COMPETENCE TO “INITIATE, NEGOTIATE, SIGN AND RATIFY INTERNATIONAL AGREEMENTS”

The Scottish Government’s proposal that Scotland should be given competence to “initiate, negotiate, sign and ratify international agreements that relate to devolved matters” is also a new proposal. It is a mirror of the approach in the Belgium where both the Walloon and Flemish regions have this power². For example, Flanders has the power to sign treaties with:

“sovereign states, international organisations with international legal personality and federated states with competences that, in keeping with internal law, they may exercise at the international level.

Also, the parties must each have the intention to acquire mutual rights and/or to take on obligations - it must not merely be a declaration of intent.” (Flanders Department of Foreign Affairs)

According to the Flanders Department of Foreign Affairs, Flanders is a partner in more than 600 treaties and other agreements.

Under Article 32 of the German Basic Law – Lander are allowed to sign treaties with nation states as long as the federal government consents. The Lander are also quite active in softer cross-border activities and informal organisations such as the Four Motors of Europe³.

In Canada the provinces are quite active in terms of signing international agreements where the policy relates to provincial competence. Amongst Sub State Governments, Quebec is a leader in this area :

“Quebec is extremely active when it comes to signing international agreements, making visits abroad, etc. For example, Quebec governments have signed several hundred international agreements since 1964 with both states and regional governments from every continent. These agreements cover virtually all the fields in which the Quebec government is involved domestically: agriculture, economic development, culture, social services, transportation, and so on.” (Generalitat de Catalunya 2010)

A FORMAL ROLE IN DETERMINING “UK PRIORITIES, POLICIES AND POSITIONS ON INTERNATIONAL AGREEMENTS”

The Scottish Government has also proposed that Scotland is given a formal role in determining “UK priorities, policies and positions on international agreements relating to reserved matters that affect Scottish interests”. The reason for this proposal may relate to Scottish Government concerns over the on-going negotiation of the Transatlantic Trade and Investment Partnership (TTIP) agreement between the European Union and the United States. In particular, the Scottish Government has expressed concern about the potential impact of a TTIP agreement on the Scottish National Health Service. The Cabinet Secretary for Health and Wellbeing wrote to the UK Government’s Secretary of State for Health requesting “cast-iron assurances that, whatever the approach to the provision of health services in the rest of the UK, TTIP will not affect the Scottish Government’s ability to determine how NHS services are provided” (Scottish Parliament European and External Relations Committee 2014b).

² Every level of government in Belgium - including the Flemish Region and the Flemish Community - is allowed to pursue its own policy abroad with regard to its domestic competences, including the conclusion of treaties (*ius tractandi*). This principle is described as “in foro interno, in foro externo”.

³ The Four Motors for Europe are four major European Regions : Baden-Württemberg (Germany), Catalunya (Spain), Lombardy (Italy) and Rhône-Alpes (France).

In Germany, Bundesrat (as the Federal parliamentary representation of the Lander) consent is required for the ratification of international (including EU) Treaties where they relate to Lander competences. According to the roles and functions of the Bundesrat:

“in accordance with Article 59, Sub-section 2 of the Basic Law, international treaties that regulate the Federation's relations with other nations or relate to matters of federal legislation require the "consent or participation of the appropriate legislative bodies in the form of a federal law".

In terms of the Bundesrat's rights, this means that a treaty law (a so-called "ratification law") requires Bundesrat consent when the adoption of a domestic law with similar content would, according to the Basic Law, likewise require the consent of the Bundesrat. If the Bundesrat denies approval of such an international agreement, the agreement cannot come into force. For example, the evolution of the European Communities into the European Union, through the Treaty of Maastricht, required the Bundesrat's approval...

... If the Basic Law does not require Bundesrat consent for national implementation of the content of an international treaty, the treaty law must still be forwarded to the Bundesrat, but here the Bundesrat only has a right of objection (in the second "reading"). In such cases, the Bundestag can override the Bundesrat's objections, thus opening the way for treaty ratification.” (Bundesrat)

Canada allows for extensive consultation with the provinces if a treaty/agreement is likely to have an impact on provincial competences. The Canadian Constitution has been interpreted in such a way that the federal government cannot impose the terms of international agreements on the provinces when they involve provincial jurisdiction⁴.

However, in October 2005, the then Quebec Minister for International Relations, Monique Gagnon-Tremblay, published a document calling for more powers for Quebec on the international stage. The requests included access to all information and a role in defining the Canadian position prior to international negotiations and recognition of a right of Quebec to consent before Canada signs a treaty where the subject relates to Quebec's jurisdiction (Generalitat de Catalunya 2010). The requests were rejected by the Canadian Prime Minister Stephen Harper.

A STATUTORY “CO-OPERATION AGREEMENT”

The final European and international affairs related proposal from the Scottish Government is that a statutory “Co-operation Agreement with strong bilateral inter-governmental and information-sharing arrangements, and swift dispute-resolution mechanisms” should be introduced. This proposal would in effect put the Concordats on European Union policy issues and International Relations on a statutory footing.

Adopting this approach might help address some of the Scottish Government's other earlier proposals such as putting a statutory mechanism in place to enable Scotland to jointly develop, influence and represent UK policy positions on broader European matters.

Any approach to put United Kingdom inter-governmental relations with regards to European and international affairs on a statutory footing will not necessarily address how the interests of the Devolved Administrations are considered when developing United Kingdom policy positions on European Union and international affairs.

⁴ See the 1937 Labour Conventions which ruled that if a treaty dealt with a subject that was normally devolved to the provincial level, then legislation enacting it could only be introduced by the provincial legislatures.

CONCLUSIONS

Whilst the Scottish Liberal Democrats and the Scottish Green Party have considered the issues of the European Union and international affairs in their submissions to the Smith Commission, the Scottish Government has presented a range of proposals which seek to change how European Union and international affairs policy is coordinated in the United Kingdom. These mirror aspects of practice already adopted in EU member states such as Belgium, Germany and Spain and, for international affairs, in Canada. However, many of the arrangements in place in other countries to support Sub State Governments in their engagement with both the European Union and international organisations do not easily cross over to the United Kingdom's system where devolution is limited to Scotland, Wales and Northern Ireland (which therefore each have two parliaments governing them), while England is governed solely from Westminster and the UK Government is responsible for representing the interests of the United Kingdom and England at the same time.

A further factor to consider is that any decision to give Scotland the powers proposed by the Scottish Government on European and International Relations might also raise questions about the representation of the administrations in Wales and Northern Ireland given that all three Devolved Administrations are treated equally under the Memorandum of Understanding and the associated Concordats.

SOURCES

Bundesrat – Participation in Foreign Affairs [Online] available at:

<http://www.bundesrat.de/static/Web/EN/funktionen-en/aufgaben-en/inhalt/9-Auswaertiges-en.html>

Flanders Department of Foreign Affairs – Flanders International Treaty Competence [Online] available at: <http://www.vlaanderen.be/int/en/flanders-international-treaty-competence>

Generalitat de Catalunya (2010) Foreign policy of constituents units at the beginning of the 21st century [Online] available at: http://www.gencat.cat/drep/iea/pdfs/IEA_70.pdf

Jones, Carwyn (2012) Speech - Wales and the Future of the United Kingdom, 2 April 2012 [Online] available at: <http://www.clickonwales.org/2012/04/wales-and-the-future-of-the-united-kingdom/>

Kingdom of Belgium Government - Representation of the Belgian federated entities [Online] available at:

http://diplomatie.belgium.be/en/policy/european_union/belgium_and_the_eu/representation_belgian_federated_entities/

National Assembly for Wales Constitutional and Legislative Affairs Committee (2014) Wales' role in the EU decision-making process, March 2014 [Online] available at:

<http://www.assembly.wales/Laid%20Documents/CR-LD9674%20-%20Constitutional%20and%20Legislative%20Affairs%20Committee%20-%20Wales%E2%80%99role%20in%20the%20EU%20decision-making%20process%20Ma-06032014-254313/cr-ld9674-e-English.pdf>

Scotland Act 1998 [Online] available at: <http://www.legislation.gov.uk/ukpga/1998/46/contents>

Scottish Conservatives and Unionist Party (2014): Commission on the Future Governance of Scotland, 2 June 2014 [Online] available at:

http://www.scottishconservatives.com/wordpress/wp-content/uploads/2014/06/Strathclyde_Commission_14.pdf

Scottish Government (2014a): More Powers for the Scottish Parliament: Scottish Government Proposals 10 October 2014 [Online] available at:

<http://www.scotland.gov.uk/Publications/2014/10/2806/0>

Scottish Government (2014b) Press Release: Scotland's role in Europe 14 October 2014

[Online] available at: <http://news.scotland.gov.uk/News/Scotland-s-role-in-Europe-1156.aspx>

Scottish Government (2012) International Engagement Strategy October 2012 [Online] available at: <http://www.scotland.gov.uk/Resource/0040/00405438.pdf>

Scottish Green Party (2014) Submission to Smith Commission on Devolution 10 October 2014

[Online] Available at: <http://www.scottishgreens.org.uk/wp-content/uploads/downloads/2014/10/SGP-submission-to-Smith-Commission.pdf>

Scottish Labour Party (2014): Powers for a purpose – Strengthening Accountability and Empowering People, March 2014 [Online] available at:

http://b.3cdn.net/scotlab/c07a7cdb97a522f4c5_h1m6vwh8l.pdf

Scottish Liberal Democrats (2012): Federalism: the best future for Scotland, October 2012 [Online] available at:

https://d3n8a8pro7vhmx.cloudfront.net/no2nuisancecalls/pages/228/attachments/original/1412933917/Federalism_-_the_best_future_for_Scotland.pdf?1412933917

Scottish Parliament European and External Relations Committee (2014a) Official Report, 20 March 2014 [Online] available at:

<http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=9100&mode=pdf>

Scottish Parliament European and External Relations Committee (2014b) Letter from the Cabinet Secretary for Finance, Employment and Sustainable Growth to the Convenor of the European and External Relations Committee 5 August 2014 [Online] available at:

http://www.scottish.parliament.uk/S4_EuropeanandExternalRelationsCommittee/General%20Documents/20140805_Cab_Sec_to_Convener_on_TTIP.pdf

STV News (2011) First Ministers call for more input on EU decision-making, 21 December 2011 [Online] available at: <http://news.stv.tv/politics/289749-first-ministers-call-for-more-input-on-eu-decision-making/>

Trench, Alan (2014) Devolution Matters Blog: The West Lothian Question 23 September 2014 [Online] available at: <http://devolutionmatters.wordpress.com/the-west-lothian-question/>

United Kingdom Government (2014): The parties' published proposals on further devolution for Scotland 13 October 2014 [Online] available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/363236/Command_paper.pdf

United Kingdom Government (2013) Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers and the Northern Ireland Executive Committee October 2013 [Online] available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf

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