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Enforcing Interstate Compacts in Federal Systems

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INTRODUCTION

The central goal of a federal system is for local government units to retain degrees of independence, specifically over matters of importance to that local unit. A logical corollary to that independence is the ability for local units to negotiate and contract with other local units on matters of importance. Therefore, it is not surprising that almost every federal system allows, either implicitly or explicitly, member states to form binding compacts with other states, the union government, or municipalities.[1] Some federal democracies even allow member states to compact with foreign governments. Furthermore, almost every federal constitution includes a provision outlining the settlement of interstate disputes. However, the specific legal authority allowing states to enter into compacts and the system governing the settlement of those disputes vary. This variance is mostly because interstate compacts walk a fine line between the division of powers delegated amongst state and federal actors; because of this, interstate compact disputes can be incredibly complicated.

Additionally, interstate compacts raise another, less obvious, area of difficulty; because one of the main purposes of interstate compacts is to maintain some degree of state independence and because the compacts often exist in the grey areas of shared powers, many states would prefer a compact that can be enforced without federal intervention. However, since federal governments

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[1] In Europe, such compacts are commonly called "Cooperation" or "Enhanced Cooperation." For clarity, the term "compact" will be used in this paper.

often hold authority over the states, states have few avenues for enforcement that do not involve the union government.

A former Center for Constitutional Democracy Fellow, Harrison Schafer, began this research by looking at types of interstate associations and compacts and their relative efficacy. This paper will expand on Schafer's research and specifically look at the source of authority for creating interstate compacts, the dispute resolution mechanisms for those compacts, how effectively systems settle disputes in practice, and examples of how states settled interstate compact disputes without the union government.

I. SOURCE OF LEGAL AUTHORITY FOR INTERSTATE COMPACTS

Across all federal systems, the authority for interstate compacts comes from one of three places: constitutional provisions, federal statutes, or multistate agreements.

A. Constitutional Authority

Some constitutions explicitly allow states to create interstate compacts; examples include the United States, Belgium, and Austria.

In the United States, interstate compacts carry the full force of statutory law.[2] States' ability to compact has proved crucial in providing effective local governance while still maintaining the division of powers between the states and the union government.[3] States' compacting authority comes from the U.S. Constitution, which provides that "[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power."[4] Even though the congressional consent component sounds restrictive, it has been loosely

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[2] John J. Mountjoy, *INTERSTATE COMPACTS State Solutions – By the states and for the states*, The Council of State Governments.
[3] *Understanding Interstate Compacts*, COUNCIL OF STATE GOVERNMENTS—NATIONAL CENTER FOR INTERSTATE COMPACTS, https://www.gsgp.org/media/1313/understanding_interstate_compacts-csgncic.pdf.
[4] U.S. CONST. art. I, § 10, cl. 3.

construed.[5] Congress can consent explicitly through a simple congressional resolution, impliedly through action or inaction, or after the compact is enacted.[6] Furthermore, the Compact Clause only applies to compacts that increase states' political power by encroaching on federal power.[7] Congressional consent is not required for joint state activity not affecting federal authority.[8]

The Austrian Constitution gives a vaguer allowance to the länders to enter into contracts with each other and the union government.[9] In effect, this allows länders to compact with each other, the federal government, and municipalities. However, in practice, Austria's federal system stands in the way of länders' opportunity to compact. Although länders' executive branches are robust and, therefore, capable of compacting with other länders, the Constitution leaves länder legislatures little room to enact policies.[10] More importantly, the judiciary is entirely held and controlled by the union government, so there is no way for länders to adjudicate their compacts independent from the union government.[11] The gap between the länders' constitutionally provided compacting power and the länders' lack of independent dispute resolution powers impacts länders' ability to compact; this is a recurring theme that this paper examines later.

The Belgium Constitution gives compacting power not to its states, but to local parliaments.[12] These compacts can be either with each other, the union government, or foreign entities.[13] Although enacted by local parliaments, the compacts are interpreted though federal

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[5] *See Cuyler v. Adams*, 449 U.S. 433 (1981).
[6] *Id.*
[7] *New Hampshire v. Maine*, 426 U.S. 363, 369 (1976) (*quoting Virginia v. Tennessee*, 148 U.S. 503, 519 (1893); *see United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 471 (1978).
[8] *Seattle Master Builders Ass'n v. Pac. Nw. Elec. Power and Conservation Planning Council*, 786 F.2d 1359, 1363 (9th Cir. 1986).
[9] BUNDES-VERFASSUNGSGESETZ [B-VG] [CONSTITUTION] BGBL No. 1/1930, as last amended by Bundesverfassungsgesetz [BVG] BGBL I No. 2/2008, art. 16, 50, 140(a) (Austria).
[10] ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, BETTER REGULATION IN EUROPE: AUSTRIA, THE INTERFACE BETWEEN SUBNATIONAL AND NATIONAL LEVELS OF GOVERNMENT 147 (2010), https://doi.org/10.1787/9789264094772-en.
[11] *The Austrian Judicial System: Institutions, Agencies, and Services. Austrian Federal Ministry of Justice. (2009).*
[12] 1994 CONST. (Belg.) art. 128.
[13] *Id.*

law.[14] However, these local parliaments maintain significant power because the Constitution does not contain a federal supremacy clause, and compact disputes are not adjudicated by a supreme court, but by an ad hoc "cooperation court" whose decisions are not appealable.[15] This paper discusses the mechanics of Belgium's "cooperation court" in the section addressing dispute resolution.

B. Authority by Federal Law

Several federal systems legislate interstate relations at the union level. These laws vary from country to country based on the desired level of cooperation, the country specific goals, and the types of governmental units included. Two notable examples are South Africa and India. South Africa has a union law governing all intergovernmental relations,[16] whereas India has compact legislation targeting key areas, such as water utilization and interstate migration.[17]

South Africa enacted statutory guidance for intergovernmental relations with its Intergovernmental Relations Framework Act of 2005 (IGR). This Act outlines cooperation between all levels of government.[18] The Act's purpose is "to provide within the principle of co-operative government set out in Chapter 3 of the Constitution a framework for the national government, provincial governments and local governments, and all organs of state within those governments, to facilitate co-ordination in the implementation of policy and legislation, including — (a) coherent government; (b) effective provision of services; (c) monitoring implementation of policy and legislation; and (d) realization of national priorities."[19] Chapter four of the IGR provides

[14] *Id.* at art. 133.
[15] Wilhelm Lehmann, *Attribution of Powers and Dispute Resolution in Selected Federal Systems* EUR. PARL. Working Paper (AFCO 103) (2002), https://www.europarl.europa.eu/RegData/etudes/etudes/join/2002/322199/IPOL-AFCO_ET(2002)322199_EN.pdf.
[16] Intergovernmental Relations Framework Act 13 of 2005 (S. Afr.).
[17] Interstate River Water Dispute Act 1956, (India).
[18] If this act conflicts with another act of parliament, the other act of parliament prevails. *Id.* at ch. 1, § 3.
[19] *Id.* at ch. 1, § 4.

for the settlement of intergovernmental disputes, both in general and arriving out of intergovernmental compacts. It is largely consistent with the requirements of Article 41(2)–(3) of the South African Constitution, and is one of the most robust interstate dispute resolution mechanisms among federal systems.[20]

Instead of a comprehensive act covering all intergovernmental compacts, India's compact legislation focuses on specific areas, such as water usage. Water, and natural resources in general, account for the lion's share of interstate disputes in India.[21] The Interstate River Water Dispute Act of 1956, which has been amended multiple times, governs disputes between states regarding water usage. This Act provides states a framework for creating interstate compacts involving water usage, dispute resolution mechanisms for disputes originating from their compacts, and dispute resolution mechanisms in the absence of a compact.

C. Mutual State Agreements

By far, the most common method for interstate compacts is mutual state agreements. Mutual state agreements can be signed formal contracts or informal promises between states. Some agreements are the result of federal dictate or incentives but, by definition, they do not derive their mandates from federal legislation or executive action.

Canada's Agreements on International Trade are the best examples of formal mutual state agreements.[22] These compacts are incredibly comprehensive agreements that establish procedure

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[20] Article 41(2)–(3) of the South African Constitution provides that "(2) [a]n Act of Parliament must (a.) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and (b.) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes. . . . (3) An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute." S. AFR. CONST., 1996, art. 41(2)–(3).

[21] *Asian Regional Documents*, International Water Law Project, https://www.internationalwaterlaw.org/documents/asia.html.

[22] *See* Agreement on Internal Trade: Consolidated Version, 2015 (Fourteenth Protocol of Amendment), *repealed by* Canadian Free Trade Agreement, 2017.

and trade policy objectives for all the Canadian provinces. They remove many cross-province barriers to trade and create uniformity in international trade policies.[23]

Informal agreements mostly serve as means for cooperation and policy formulation. The efficacy and strength of informal agreements primarily depend on the intent and clarity of their forming documents. For instance, Canada's Council of Education Ministers is a stronger informal agreement, as it operates under a clearly defined memorandum of understanding to create uniform practices.[24] Even with their memorandum of understanding however, it is not clear how disputes would be solved. Some weaker compacts lack so much authority they generally only function as policy think tanks or lobbying voices for certain state interests. Examples include associations of state chief executives such as the U.S.' National Governors Association, Spain's Conference of Presidents, or Australia's Council of Australian Governments. It should be noted that weaker forms of interstate agreements might be strategic if local governments want to advocate for certain policy positions and group actions without actually tying their hands to a binding compact.

II. DISPUTE RESOLUTION MECHANISMS

Regardless of a compact's source of authority, all interstate compact disputes are settled by one of three mechanisms: a dispute resolution compact provision, a federal statute governing intergovernmental dispute resolution, or a Constitutional provision governing interstate dispute resolution. Some countries, such as South Africa, use a mixture of all three.

A. Dispute Resolution Governed by a Compact Provision

[23] This free trade agreement has since been repealed as a result of the North American Free Trade Agreement renegotiation.

[24] *See About Us*, Council of Ministers of Education, Canada, https://www.cmec.ca/11/About_Us.html (noting that the CMEC is governed by an "Agreed Memorandum").

Canada's Agreements on International Trade exemplify robust dispute resolution mechanisms built into a specific compact.[25] Chapters Sixteen and Seventeen of the original agreement govern dispute resolution procedures. Specifically, Chapter Sixteen creates a committee composed of representatives of the signatory provinces, which "supervise the implementation of this agreement and assist in the resolution of disputes arising out of the interpretation and application of this agreement."[26] Chapter Seventeen provides the specific procedures for resolving disputes, including good-faith attempts to negotiate before appealing to the judiciary and avoiding parallel dispute resolution mechanisms. Chapter Seventeen outlines the processes for bringing a dispute and which mechanisms are triggered based on which article of the compact the dispute is brought under. Additionally, Chapter Seventeen sets out the appropriate types of punishment and remedies available if a party has violated the compact.[27]

B. Federal Statute Governing Intergovernmental Dispute Resolution

India's Interstate River Water Dispute Act is an example of a federal statute guiding all disputes over water usage, regardless of whether the dispute originates from the compact.[28] The Act calls for the creation of tribunals when a state initiates a formal complaint under the Act if the dispute cannot first be settled by negotiations. The tribunal is selected by the Chief Justice of the Indian Supreme Court and must be composed of high court judges. The Union government is allowed to appoint two "assessors to advise the tribunal."[29] Tribunal decisions are final and "have the same force as an order or decree of the Supreme Court."[30] The central government has the power to effectuate the decisions of the tribunal. Despite the impressive legal mechanism, many

[25] Canadian Free Trade Agreement, July 1, 2017.
[26] *Id*.
[27] Neither are included in this memo as they are long, complex, and based on the specific grievance.
[28] Canadian Free Trade Agreement, July 1, 2017
[29] Interstate River Water Dispute Act 1956, § 4 (India).
[30] *Id.* § 13.

scholars believe that India's process for settling water disputes is vague,[31] temporary, poorly enforced, and not sustainable.[32]

C. Constitutional Provisions Governing Interstate Dispute Resolution

Most constitutions have a blanket provision that defers all interstate disputes to either the supreme court or a constitutional court.[33] Some constitutions, such as Kenya's and Switzerland's, also mandate additional measures, like a requirement to engage in good faith negotiations, before states have the right to petition the supreme court.[34] Other constitutions, such as Russia's and Ethiopia's, have very detailed provisions for how to deal with interstate disputes. Russia's Constitution states:

> The President of the Russian Federation may use conciliatory procedures to resolve disputes between State government bodies of the Russian Federation and State government bodies of constituent entities of the Russian Federation, and disputes between State government bodies of constituent entities of the Russian Federation. In the event that no agreed decision is reached, he shall have the right to refer the dispute to the appropriate court.[35]

In another example, Ethiopia's Constitution creates a system whereby disputes arising between states are adjudicated by the House of Federation, Ethiopia's upper legislative house.[36] Instances of Ethiopia and Russia using their constitutionally mandated methods of interstate dispute

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[31] Ambar Kumar Ghosh & Sayanangshu Modak, *Interstate River Water Disputes: Chasing Ambiguities, Finding Sense,* OBSERVER RESEARCH FOUNDATION (2020), https://www.orfonline.org/expert-speak/interstate-river-water-disputes-chasing-ambiguities-finding-sense/

[32] Alan Richards & Nirvikar Singh, *Inter State Water Disputes in India: Institutions and Policies* (Univ. of Cal., Santa Cruz Dep. Envtl. Stud. & Dep. Econ, Working Paper No. 503, 2001).

[33] See BOSNIA HERZEGOVINA CONSTITUTION art. IV Chapter 3, BRAZIL CONSTITUTION art. 102, NIGERIA CONSTITUTION art. 232, PAKISTAN CONSTITUTION art. 184 §1, UNITED ARAB EMIRATES CONSTITUTION art. 99 Ch. 1.

[34] *See* CONST. art 189 (2010) (Kenya); BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 44 (Switz.).

[35] KONSTITUTSIIA ROSSIĬSKOĬ FEDERATSII [KONST. RF] [CONSTITUTION] art. 85 (Russ.).

[36] ETH. CONST. art. 83 (1995).

resolution are nearly impossible to find, despite how seemingly thorough and comprehensive the text of the constitution makes them appear.

Russia's and Ethiopia's constitutional provisions also allow for an examination into another theme arising out of interstate compact disputes; some constitutions, although detailed and specific about how to form compacts and/or resolve compact disputes, are not used in practice. While not incredibly common, there is sometimes an inconsistency between the written compact dispute mechanism and how the dispute is solved in practice. Although the exact reasons for this gap are unclear, possible explanations include power competition between levels of government, weak judiciaries, sham constitutions, weak union governments, or overly strong union governments.

D. Mixture of Dispute Resolution Methods

South Africa's Intergovernmental Relations Framework Act of 2005 (IGR) provides a complex dispute resolution process that involves mixture of compact provisions and federal statute dispute resolution mechanisms while still conforming with the South African Constitution's framework for interstate dispute resolution. Article 40(2) of the IGR requires any compact between state "organs" to include dispute settlement mechanisms in the agreement that "are appropriate to the nature of the agreement and the matters that are likely to become the subject of a dispute."[37] These prearranged dispute mechanisms become the default mechanism if the issue is contested later. For example, the South African Supreme Court refuses to hear a dispute if the parties do not first attempt to settle the matter in accordance with the prearranged dispute resolution mechanism.[38]

[37] *Id*. at art. 40(2).
[38] *Id*. at art. 40(3).

Article 41 states that government organs must formally declare disputes over breaches of compacts according to compact provisions, but first, government organs must make good faith negotiations with the other organ either directly or through an intermediary.[39] In other words, the failure to make a good-faith attempt at negotiating effectively precludes litigating parties from the next stage of the resolution process. Until parties make a good-faith effort to settle the dispute, they are legally prevented from the next stage of the resolution process.

Article 42 provides for actually dealing with the dispute and directs the parties to convene to settle the disputes according to whatever mechanism governs, i.e., a clause in the compact, applicable legislation, or the constitution. If parties fail to convene, the appropriate federal minister may instruct the disputing parties to convene and possibly designate a facilitator to guide the process in the event that one party subsequently refuses to convene. What determines the appropriate federal minister remains unclear, but, in case studies, it is usually a department head in the union government with authority over the subject matter disputed.

Article 45 states that no party may bring its complaints to a court until it has satisfied all the negotiation requirements of Articles 41 and 42. Additionally, parties may not introduce negotiation discussions as evidence in any judicial proceeding.

III. Efficacy of Dispute Resolution

As has been alluded to in this paper, a large gap exists in many federal countries between the theoretical power to compact and settle disputes and the practical ability to compact and settle disputes. Although dispute resolution provisions are written into the framework of almost every federal constitution, dispute resolution in practice varies significantly. The dominant constitutional procedure for interstate compact disputes is adjudication before the supreme court. Despite it being

[39] *Id*. at art. 41.

the most commonly listed method for solving interstate compact disputes, actual examples of interstate compact disputes being settled by a supreme court are rare, especially if the supreme court is seen as an organ of the union government. One likely explanation is that the nature of interstate disputes does not lend itself to adjudication by the union government. States do not want to forfeit power or claims, and union governments do not want to appear weak if they are unable to enforce their decisions. Using a supreme court or other federal tribunal to resolve interstate compact disputes only appears practical in nations with a strong union government, which is unfortunate if one of the goals of the interstate compact was to address an issue free from federal interference.

With these issues in mind, this section will explore two questions: in general, what are the most effective forms of dispute resolutions in general? Further, how can states enforce compacts without relying on the union government?

A. Effective Dispute Resolution in General

The United States offers an interesting case study for both the efficacy and inefficacy of settling interstate compact disputes through a supreme court. This is because one can track the efficacy of settling the same disputes over time compared to the growth of the federal government. As the federal government became more powerful, the Supreme Court became better able to solve interstate compact disputes. An example of this evolution is the Supreme Court's treatment of New Jersey and New York's water, land, and trade disputes. New Jersey and New York have squabbled over who controls the Hudson River since the 17th century.[40] New York exploited a loophole in the original colonial charter to claim not only that it owned every island on the Hudson River and all ports on both sides, but also that the River flowed along Staten Island instead of out to sea, and

[40] Michael Aaron Rockland, *The Baffling Battles Around Jersey's Borders*, N.J. MONTHLY (Dec. 11, 2020), https://njmonthly.com.

therefore, the island was part of New York.[41] New Jersey attempted to reconcile with New York over the dispute, but using its wealth and power, New York ignored New Jersey and refused to negotiate.[42] When New Jersey took the issue to the Supreme Court in the 1830s, New York did not show up because it claimed the Supreme Court had no authority to settle disputes between the states.[43] The federal government realized that New York would simply ignore any order given by the Supreme Court even if the court did hear the issue. To protect the legitimacy of the Court, the federal government intervened and brokered a compact in which New Jersey ceded claims to Staten Island, and New York agreed to split the Hudson River.[44] A century later, the two states squabbled over ownership of two islands, Ellis and Liberty, in the Hudson River.[45] This time, however, the Supreme Court heard the case and ruled for New Jersey based on the terms of the original compact.[46] In almost 150 years, the Court evolved from being unable to compel states to show up to court to being able to compel states to surrender territory with a mere edict.

Another example of the Supreme Court's power to settle interstate disputes is the case of New York v. United States, in which the Supreme Court adjudicated a dispute stemming from an interstate compact regarding the disposal of nuclear waste.[47] In this case, the Supreme Court sided with New York and held that certain provisions of the compact were invalid.[48] While the legal rational of the holding is not relevant to this paper, the case highlights a supreme court's power

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[41] John P. Snyder, *The Story of New Jersey's Civil Boundaries 1606-1968* 13-16 (New Jersey Geological Survey 2004) (1969).
[42] *Id*.
[43] *Id*.
[44] *Boundary Line Between New-York and New-Jersey*, N.Y. TIMES (Feb. 4, 1864), https://www.nytimes.com/1864/02/04/archives/boundary-line-between-newyork-and-newjersey.html?auth=login-google1tap&login=google1tap.
[45] Linda Green House, *The Ellis Island Verdict: The Ruling; High Court Gives New Jersey Most of Ellis Island*, N.Y. TIMES (May 27, 1998), https://www.nytimes.com/1998/05/27/nyregion/ellis-island-verdict-ruling-high-court-gives-new-jersey-most-ellis-island.html.
[46] *Id*.
[47] *New York v. United States*, 505 U.S. 144, 147 (1992).
[48] *Id*.

not only to adjudicate interstate conflicts but also conflicts between the states and federal government.

Even in systems that settle disputes outside of a supreme court but still within a federal tribunal, efficacy is questionable because states do not want to surrender any claims, and federal governments do not want to appear weak if they cannot enforce the verdicts. A clear example of this is the mixed results of India's water dispute resolution system. Instead of taking the matter to its supreme court, India takes compact disputes to a specially called federal tribunal. These tribunals run into the same problems as weak supreme courts because they cannot enforce their decisions against the parties. Moreover, many of India's interstate water disputes exist in a state of limbo, despite the existence of a technically binding resolution on the books.[49]

India's interstate water dispute system raises a separate question: what constitutes an "effective" dispute resolution? While it might be true that India is ineffective in terms of enforcing settlements, perhaps one could define efficacy as preventing conflict. While many interstate dispute resolution mechanisms might not fully effectuate their goals, they might serve as an important pressure release valve that allows states to address their unsolvable grievances and makes stakeholders feel heard. If efficacy is defined as the avoidance of conflict or maintaining the legitimacy of the larger federal system, many interstate dispute resolution mechanisms that fail to effectuate their orders might nonetheless be effective in the larger picture.

This pressure release function of dispute resolution is not limited to federal compacts. Examples can also be seen in international and customary courts. Most people feel strongly about the normative aspects of right and wrong and trust institutions to maintain those standards. In international law, most people believe international courts adjudicate on matters of human rights

[49] Ghosh, *supra* note 31.

and are comforted by the belief that there is a system to protect human rights when domestic courts fail. Likewise, individuals with more traditional beliefs who feel belittled or unheard by modern governments rely on customary courts to enforce traditional values, even if those decisions do not carry the full weight of law. The efficacy of those courts is secondary to their value as a pressure relief valve. Likewise, many of the mechanisms used to settle interstate compact disputes legitimize the larger system. Average citizens and politicians know that using too much of a river's water upstream to stop the waterflow into their state is wrong, even if they do not know why these actions are legally prohibited. Regardless of which method is used to solve interstate compact disputes or how effective these methods are, it is vital that they serve to legitimize the larger system instead of undermining it.

However, in terms of actually achieving the desired settlement, the more effective systems for dispute settlement are those that involve negotiation between state actors and/or mediation by a neutral third party. This is a key feature of South Africa's Intergovernmental Relations Framework Act. This negotiation and mediation approach was instrumental in solving The Cape Town Dispute.[50] In 2006, The Cape Town Municipal Government drastically altered the wards of the city in what was criticized as a move to gerrymander impoverished neighborhoods along racial lines. Shortly after, the Provincial Government of Western Cape tried to restructure Cape Town to create more powerful wards that directly represented all the citizens of the city, not just the 51% majority. The leaders of the wards would then govern the city as an executive committee, replacing Cape Town's mayoral system. The move was potentially legal under *The Structures Act*, a federal law which gave the provincial government the power to restructure municipal governments.

[50] Omolabake Akintan & Annette Christmas, *Intergovernmental Dispute Resolution in Focus: The Cape Storm*, LOCAL GOVERNMENT PROJECT OF THE COMMUNITY LAW CENTRE OF THE UNIVERSITY OF THE WESTERN CAPE (2008), https://dullahomarinstitute.org.za/multilevel-govt/publications/cape-storm-dispute-paper-igr-framework-act-january-16th.pdf.

However, the whole dispute was largely seen as politically motivated instead of equity motivated because Cape Town was the only major city in South Africa not controlled by the African National Congress.

The Provincial Executive Council formally filed a dispute in October of 2006, triggering the good faith negotiation requirements of the IGR Act. The Federal Minister for Provincial and Local Government stepped in as an intermediary to resolve the dispute citing the IGR Act as his authority to do so. Despite being contentious, the negotiations between the two parties were successful under the IGR framework and resulted in Cape Town remaining a mayoral executive system while adding several new wards. Although this is not an interstate dispute, it was the first (and only comprehensive analysis that I could find) of the IGR Act and provided the government of South Africa a framework for settling disputes under the Act moving forward.

B. Solving Disputes Without the Union Government

One major catalyst for this research topic is the desire for states to be able to settle compact disputes without resorting to the union government. While such dispute resolution measures are rare, they are not unheard of. The three best examples are Belgium, Canada, and South Africa. Interestingly, these countries demonstrate two themes in keeping the union government out of interstate compact disputes. The first theme is that mutual state agreements lend themselves to being the type of interstate compact most free of union government interference. This is logical as it is the type of agreement formed without union input. Furthermore, states can construct their own dispute resolution mechanisms within the compact such as specific performances that must be made in the event of a breach, requirements for mediation, or the creation of an interstate tribunal to resolve the dispute separate from the federal judiciary. The second and less logical theme is that a strong federal government, or at least a strong supreme court, might be beneficial in settling

disputes without actually having a role in settling the dispute. This is because, in these systems, states are innately aware that the matter could be settled by an unfriendly third party, i.e., the union government. This background threat might incentivize states to either write robust dispute resolution mechanisms into the compacts or incentivize them to engage in good faith negotiations or arbitrations in the event of a dispute to keep the union government out of the process.

Although the source of authority for interstate compacts in Belgium comes from the constitution, interstate disputes are adjudicated by the Special Law of 8 August 1980. This is not a blanket compact provision such as the Compact Clause of the U.S. Constitution; instead, it deals with compacts relating to autonomous powers. Belgium is not a strong central federal democracy, and because of this fact, many important powers are wielded by local governments. The law requires interstate compacts for areas such as the management of waterways and ports, public transport and telecommunication networks, and several matters related to international relations. For all other autonomous powers, it simply permits compacts. According to this law and the Special Law of 29 January 1989, the parties involved must set up an ad hoc co-operation court to adjudicate any dispute arising out of the compact. The decision of that court cannot be appealed.

In Canada and South Africa, states avoid federal interference by placing dispute resolution mechanisms in the compact. Canada does this voluntarily while South Africa is obligated to under the Intergovernmental Relations Framework Act of 2005. In Canada's case, many important compacts specifically address in their charter measures for solving disputes, which types of disputes trigger which resolution mechanisms, and the appropriate steps for settling a dispute. Take, for example, the most recent free trade agreement which recently replaced the free trade agreement discussed earlier in this paper.[51] Chapter ten of the agreement is devoted entirely to and

[51] Canadian Free Trade Agreement, July 1, 2017.

titled “Dispute Resolution.” The chapter begins by outlining blanket promises all parties agree to, such as the promise not engage in parallel dispute resolution proceedings, the promise to be cooperative, and the promise to engage in consultations before lodging formal complaints. It then divides Chapter ten into three parts; disputes between member provinces, disputes between individuals and member provinces, and “Removal of Access to Dispute Resolution for Non-Compliance.”

The exact mechanisms for dispute resolution are incredibly complex and could fill a paper of their own, but of note to this paper and the question of compacts free from union government interference is the following provision: if disputes cannot be settled by negotiation, they will be decided by a three-member panel with one member chosen by each of the parties and one member chosen by the secretariat of the agreement. Panelists are chosen from a pre-established list of panelists pursuant to Article 1005.2. The panel hears arguments and gives a report which rules on matters of fact and restitution. Disputants then have the right to request review by an appellate panel on the grounds that the original panel “erred in law, failed to observe a principle of natural justice, or acted beyond or refused to exercise its jurisdiction.”[52] Unless appealed pursuant to violations in constitutional law, an appellate panel report is final and is not subject to judicial review.[53] Furthermore, failure to pay a monetary penalty ordered under the agreement precludes a party from filing any complaint under the agreement. In other words, failure to comply with a panel decision precludes a member from future compact benefits. Additionally, if parties do not comply with a panel ruling, an opposing party can “commence the process of enforcing the order in the same manner as an order against the Crown in the non-complying Party’s superior courts.”[54]

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[52] *Id.* at art. 1026.
[53] *Id.* at art. 1034.
[54] *Id.* at art. 1031(3)(a).

In summary, Canada's provinces created an incredibly complex and working trade compact largely independent of the union government that has its own quasi judiciary to settle disputes, its own punishment/incentive system that exists entirely within the compact, and its own detailed mechanisms to internally respond to specific preidentified areas of potential dispute.

CONCLUSION

In writing this paper, it became clear to me that the most effective way to understand how federal countries solve interstate compact disputes is a taxonomy detailing each country's specific methods. Unfortunately, the information to compile such a complete taxonomy could not be acquired. This is either because the information could not be obtained through conventional research, or because some countries have never solved interstate disputes through formal mechanisms, so such records do not exist.

Because of this lack of information, the next best option was to identify several patterns and extrapolate usable conclusions from those patterns. Despite their lack of full breadth, the patterns and conclusions that emerged were nonetheless illuminating.

Three patterns emerged. First, interstate compacts come from one of three sources of authority: constitutional provisions, federal statutes, or multistate agreements. Second, regardless of the source of authority for the type of compact, all interstate compact disputes are settled by one of three mechanisms: by a specific provision in the compact, by a federal statute governing intergovernmental cooperation/dispute resolution, or by constitutional provisions governing interstate dispute resolution. Finally, there exists a wide gap in efficacy among compact dispute mechanisms.

Most importantly though, the following conclusions were extrapolated from the patterns that emerged. First, solving compact disputes through a supreme court or federal tribunal is

difficult in systems with weak federal governments because states do not want to surrender power or claims, and union governments do not want to appear weak if they cannot enforce their decisions. Second, dispute resolution mechanisms that cannot enforce their desired outcomes can nevertheless be effective if they prevent conflict by allowing parties to address grievances and serve as a pressure release valve. Third, mutual state agreements are the type of compact best suited to resolution without union government interference because they are often made outside of union government involvement. Lastly, compacts that include strong, pre-agreed to dispute resolution mechanisms written into the text of the compact with internal enforcement and punishment systems help to ensure compliance without having to resort to the union government for enforcement.