

## **Federalism and Compliance with International Agreements: Belgium and Canada Compared**

**Stéphane Paquin\***

École de politique appliquée, Université de Sherbrooke,  
2500 boulevard de l'Université Sherbrooke, Québec J1K 2R1, Canada  
stephane.paquin@usherbrooke.ca

Received: 22 June 2009; revised: 9 October 2009; accepted 9 November 2010

---

### **Summary**

This article aims to assess the effectiveness of two systems of governance with respect to the making of international treaties: the Canadian system, where the decision-making process is more centralized and where intergovernmental mechanisms are poorly institutionalized; and the Belgian system, where sub-state actors have the role of co-decision and where intergovernmental mechanisms are highly institutionalized. The central question to be discussed is: is the fact that one gives an important role to sub-state actors in the making of a country's treaty by means of institutionalized intergovernmental mechanisms something that negatively or positively affects the foreign policy of a state? And is this a positive- or a negative-sum game at the level of the conclusion and implementation of treaties? The article concludes that the Belgian system is more effective, largely because its sub-state actors have an important role at every step of the conclusion of a treaty.

### **Keywords**

paradiplomacy, federalism, international agreements, Canada, Belgium, treaty-making

### **Introduction**

The issue of sub-state actors in the making of treaties leads to the fundamental question in contemporary political science: who governs?<sup>1</sup> How are decisions concerning the making of treaties taken and implemented when the respective fields of endeavour of sub-state actors, such as the Canadian provinces or the Belgian regions and communities, are implicated? What role do sub-state actors play in the conclusion (negotiation, signature and ratification) and implementation (or application) of international treaties when those treaties affect their respective competences?

---

\*) I would like to thank Kim Richard Nossal from Queen's University, Chi Carmody from The University of Western Ontario and the anonymous reviewers for their comments.

<sup>1</sup>) R. Dahl, *Who Governs? Democracy and Power in the American City* (New Haven CT: Yale University Press, 1961).

Today, virtually all government activity affects the competence of at least one intergovernmental organization, and frequently many more.<sup>2</sup> In this way, in the context of international organizations and international conferences, themes are dealt with that relate to education, public health, cultural diversity, the environment, business subsidies, the treatment accorded to investors, the removal of non-tariff barriers, barriers to agriculture, services and so forth. Likewise, the enlargement of the scope of international issues means that all government departments have activities that are internationalized. This situation makes it harder for a country's ministry of foreign affairs to centralize the decision-making process.

In this context, sub-state actors have become more aware that their political power and their sovereignty — or, in other words, their ability to formulate and implement policy — are subject to negotiation in multilateral forums. This phenomenon is magnified in Europe by the process of European integration and in North America by the North American Free Trade Agreement (NAFTA). Thus, there has been a noticeable increase since the 1960s in the number of sub-state actors that are interested, and that participate actively in, international questions. In the United States, for instance, only four states had representative offices in other countries in 1970, versus 42 states with 233 representative offices in 30 countries in 2001.<sup>3</sup> In Germany, the *Länder* have established some 130 representative offices since 1970, of which 21 are located in the United States.<sup>4</sup> Quebec, a pioneer in the field, has some 30 representative offices around the world.<sup>5</sup> In Spain, the autonomous region of Catalonia operates some 50 representative offices abroad, and the Flemish government opened its one-hundredth representative office in September 2004, even though these offices mostly handle trade promotion issues.<sup>6</sup> This phenomenon is also evident in Japan and many other countries.<sup>7</sup>

<sup>2</sup> M. Karns and K. Mingst, *International Organizations: The Politics and Processes of Global Governance* (Boulder CO: Lynne Rienner, 2004); and M.-C. Smouts, 'Que reste-t-il de la politique étrangère', *Pouvoirs*, no. 88, 1999, pp. 11-29.

<sup>3</sup> E.H. Fry, *The Expanding Role of State and Local Governments in US Foreign Affairs* (New York: Council on Foreign Relations Press, 1998); E.H. Fry, 'Sub-State Strategies in an Era of Globalization and the Information Technology Revolution', in G. Lachapelle and S. Paquin (eds), *Mastering Globalization: New Sub-States' Governance and Strategies* (London: Routledge, 2005), pp. 116-123.

<sup>4</sup> R. Kaiser, 'Sub-State Governments in International Arenas: Paradiplomacy and Multi-Level Governance in Europe and North America', in G. Lachapelle and S. Paquin (eds), *Mastering Globalization: New Sub-States' Governance and Strategies* (London: Routledge, 2005), pp. 90-103.

<sup>5</sup> S. Paquin and L. Beaudoin (eds), *Histoire des relations internationales du Québec* (Montreal: VLB, 2006).

<sup>6</sup> S. Paquin, *Paradiplomatie identitaire en Catalogne* (Quebec: Laval University Press, 2003); S. Paquin, 'Les actions extérieures des entités subétatiques: quelle signification pour la politique comparée et la théorie des relations internationales?', *Revue internationale de politique comparée*, vol. 12, no. 2, 2005, pp. 129-142; S. Paquin, 'La paradiplomatie identitaire: Le Québec, la Flandre et la Catalogne en relations internationales', *Politique et Sociétés*, vol. 23, no. 3, 2005, pp. 203-237; S. Paquin, 'Paradiplomatie identitaire et la diplomatie en Belgique: Le cas de la Flandre', *Canadian Journal of Political Science*, vol. 33, no. 3, 2003, pp. 643-556; and S. Paquin, 'Globalization, European Integration and the Rise of Neo-Nationalism in Scotland', *Nationalism and Ethnic Politics*, vol. 8, no. 1, 2001, pp. 55-80.

<sup>7</sup> P. Jain, *Japan's Subnational Governments in International Affairs* (New York: Routledge, 2005); and

When considered from the perspective of theories of federalism and international affairs, the two conceptions also conflict: the centralizing school; and the school devoted to multi-level governance. From the perspective of the centralizing approach, one of the leading theoreticians of federalism, Professor Kenneth Wheare, has asserted that a monopoly of foreign affairs is a 'minimum power' of all central governments.<sup>8</sup> In his landmark study, Wheare highlighted the negative consequences of an unbundling of central control over foreign affairs, both for the national interest and for the functioning of the international system. In the same vein, Rufus Davis has maintained that questions concerning international relations are at the heart of federal regimes.<sup>9</sup> Centralization of foreign affairs power is a requirement of international law, according to Bertrand Badie and Marie-Claude Smouts, because a centralized political system is a necessary condition for states to be able to play the role that they are assigned in international law and practice.<sup>10</sup> In essence, without the existence of a central government that has plenary authority on its territory in relation to foreign affairs and the ability to participate in international relations and to enforce international obligations in the domestic order, inter-state relations can only be seriously compromised.<sup>11</sup> If power of co-decision regarding treaty-making is granted, this would risk paralysing a state's foreign affairs, because every player would have a veto, resulting in harm to the state's image in the international arena.<sup>12</sup> In Canada, many foreign affairs specialists have underlined the constitutional difficulties for the central government of negotiating and implementing international agreements when these involve provincial subjects of jurisdiction.<sup>13</sup>

Supporters of the concept of multi-level governance take a different view.<sup>14</sup> According to Brian Hocking, diplomacy or foreign policy cannot be considered a

---

N. Cornago, 'Exploring the Global Dimensions of Paradiplomacy: Functional and Normative Dynamics in the Global Spreading of Subnational Involvement in International Affairs', Workshop on Constituent Units in International Affairs, Hanover, Germany, October 2000 [unpublished].

<sup>8</sup> K.C. Wheare, *Federal Government* (Oxford: Oxford University Press, 1967).

<sup>9</sup> R. Davis, 'The Federal Principle Reconsidered', in A. Wildavsky (ed.), *American Federalism in Perspective* (Boston MA: Little Brown, 1967).

<sup>10</sup> B. Badie and M.-C. Smouts, *Le retournement du monde: Sociologie de la scène internationale* (Paris: PUF and Dalloz, 3rd edition, 1999).

<sup>11</sup> M. Shaw, *International Law* (Cambridge: Cambridge University Press, 6th edition, 2008).

<sup>12</sup> F. Scharpf, 'The Joint-Decision Trap: Lessons from German Federalism and European Integration', vol. 66, no. 3, *Public Administration*, 1988, pp. 239-278.

<sup>13</sup> J. Harrington, 'Redressing the Democratic Deficit in Treaty Law-Making: (Re-)Establishing a Role for Parliament', *McGill Law Journal*, vol. 50, no. 3, 2005, p. 465-509; D.M. Brown and E.H. Fry (eds), *States and Provinces in the International Economy* (Berkeley CA: Institute of Governmental Studies Press, 1993); G. Skogstad, 'International Trade Policy and Canadian Federalism: A Constructive Tension', in H. Bakvis and G. Skogstad (eds), *Canadian Federalism: Performance, Effectiveness and Legitimacy* (Toronto: Oxford University Press, 2001).

<sup>14</sup> I. Bache and M. Flinders (eds), *Multi-Level Governance* (Oxford: Oxford University Press, 2004); L. Hooghe (ed.), *Cohesion Policy and European Integration: Building Multi-Level Governance* (Oxford: Oxford University Press, 1996); L. Hooghe and G. Marks, 'Europe with the Regions: Channels of Regional Representation in the European Union', *Publius*, vol. 26, no. 1, 1996, p. 73; L. Hooghe and

monopoly of the central government.<sup>15</sup> Sub-state government will always have an important role, even if it is only for the purposes of implementing international agreements that are concluded by the central government. In addition, giving central governments in federal regimes a monopoly over foreign affairs, risks putting in danger the distribution of powers between different orders of government to the benefit of central authorities. According to Hocking, there are many examples of federal regimes that must operate with important constitutional limitations on their powers in foreign affairs.

According to Hocking, foreign policy should be thought of as a complex system where different actors within the federal regime structure work with each other. Those who favour a multi-level governance approach thus maintain that there are 'obligations of cooperation' that exist between central governments and sub-state actors. In order to put a coherent foreign policy into practice, it is important to consult, and indeed accord, an important role for sub-state actors by means of intergovernmental mechanisms, so that they can participate actively in the country's treaty-making process. In this view, regional integration, the growth of multilateralism and globalization have thus rendered centralist theses obsolete.

The requirements of cooperation between the different orders of government are more and more important, and it is for this reason that one notices a considerable increase in executive federalism or intergovernmental relations<sup>16</sup> in respect of the conclusion of international treaties in federal regimes, such as in Belgium.<sup>17</sup> In this respect, Canada also exhibits this tendency, even if temptation to govern from the centre remains dominant.<sup>18</sup> According to Richard Simeon, intergovernmental relations are the weakest link of Canadian federalism;<sup>19</sup> and according to a number of experts (Smiley, Watts, Simeon, Gagnon, Rocher and Brown), the culture of intergovernmentalism in Canada is largely informal — intergovernmental arrangements are rarely constraining and work instead by 'soft' consensus.

---

G. Marks, 'Unravelling the Central State, But How? Types of Multi-Level Governance', *American Political Science Review*, vol. 97, no. 2, 2003, p. 233; and C. Jeffery, 'Sub-National Mobilization and European Integration: Does it Make Any Difference?', *Journal of Common Market Studies*, vol. 38, no. 1, 2000, p. 1.

<sup>15</sup> B. Hocking, *Localizing Foreign Policy: Non-Central Governments and Multilayered Diplomacy* (London: St Martin's Press, 1993).

<sup>16</sup> Intergovernmental relations in federal states refer to the relations within a country among central and/or between non-central government executives. In Canada, for example, intergovernmental relations can involve federal and provincial representatives: or provincial representatives alone (prime ministers, sectoral ministers, and senior officials or civil servants). Intergovernmental relations provide forums for the exchange of information, for bargaining, for negotiation and consensus building.

<sup>17</sup> J.P. Meekison (ed.), *Relations intergouvernementales dans les pays fédérés: Une série d'essais sur la pratique de la gouvernance fédérale* (Ottawa ON: Forum des Fédérations), pp. 105-123.

<sup>18</sup> D.J. Savoie, 'Power at the Apex: Executive Dominance', in J. Bickerton and A.-G. Gagnon (eds), *Canadian Politics* (New York: Broadview Press, 4th edition, 2004), pp. 145-163.

<sup>19</sup> R. Simeon, 'Conclusion', in J.P. Meekison (ed.), *Relations intergouvernementales dans les pays fédérés: Une série d'essais sur la pratique de la gouvernance fédérale* (Ottawa ON: Forum des Fédérations).

The question for research is hence as follows: if sub-state actors are given an important role in the treaty-making process by means of institutionalized inter-governmental mechanisms, will this have negative or positive effects? And is this a positive- or a negative-sum game at the levels of the conclusion and implementation of treaties?

This article's more specific purpose is to assess the effectiveness of the two systems of governance with respect to foreign policy. The article will allow us to evaluate the performance of the two different systems: the Canadian system, where the decision-making process is more centralized and where intergovernmental mechanisms are poorly institutionalized; and the Belgian system, where sub-state actors have the role of co-decision and where intergovernmental mechanisms are highly institutionalized. In comparing the effectiveness of these two systems, it is possible to assess the validity of those who advocate a centralist position versus those who advocate a multi-level governance view.

The methodology employed here is comparative. The two cases under examination are very similar, except with respect to the object of research. At the level of political systems, the two cases share considerable similarities, given that they involve decentralized federal regimes, two multicultural and pluri-ethnic countries, and two industrialized democracies that have a liberal conception of relations between the state and citizens. But the cases of Canada and Belgium remain cases that are fundamentally distinct where it matters — that is to say, at the level of their systems of governance in matters of treaty-making. It is indeed in the Belgian federation that the sub-state actors have the most important role to play within the foreign policy processes of the nation-state.

This article is divided into three parts: the first part deals with the Canadian case; the second with the Belgian case; and the third part, which is divided into two sections, will then offer a comparative analysis. The article's hypothesis is that the Belgian system is more effective than the Canadian, because sub-state actors in Belgium have a more important role to play. Because sub-state actors in Belgium participate in the decision-making process, they are more likely to respect Belgium's international obligations.

### **Federalism and International Relations in Canada**

The role of the Canadian provinces in Canada's foreign policy has again become an important electoral issue in Canada since 2003.<sup>20</sup> Following Quebec's provincial election in April 2003, which brought the Liberal Party of Quebec — led by

---

<sup>20</sup> In Canada, this question was also a very important issue in the 1960s after the formulation of the Gérin-Lajoie Doctrine by the government of Quebec, followed by the reply of Canada's Secretary of State, Paul Martin Senior, in 1968 outlining the central government's position; see Government of Canada, *Federalism and International Relations* (Ottawa ON: Queen's Printer, 1968).

Jean Charest — to power, the Quebec government began to claim that Quebec (and Canada's other provinces) should play a more central role in international organizations and in international negotiations.

The issue is particularly important in Canada, because in 2002 Quebec's National Assembly unanimously adopted a law that requires the National Assembly's approval of all international agreements concluded by Canada that involve Quebec's matters of competence. With such a law, Quebec's National Assembly became the first British-style legislature to be closely associated with the process of concluding international agreements by the central government.<sup>21</sup>

In June 2004, for example, the National Assembly approved two international agreements that Canada's central government in Ottawa had concluded: with Chile, despite the fact that it had already been in force for seven years; and with Costa Rica, which had been in force since 2001. While the Liberal government voted to approve these treaties, the *Parti Québécois* voted against.<sup>22</sup> In 2005, meanwhile, the Quebec National Assembly became the first parliament in the world — even before the Parliament of Canada — to approve the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression.

Many commentators on Canadian current events have not understood what is at stake when the Quebec government demands a place in Canada's international organizations and negotiations when its fields of competence are in play. Many have linked this reaction to Quebec nationalism, suggesting that this question is linked more to whim than reason.

Thus, for example, a *Globe and Mail* editorial asserted that: 'Even the most decentralized federations reserve one power for the central government: the power to represent the country abroad. In foreign affairs, a nation must speak with one voice'.<sup>23</sup> To give a role to the provinces with respect to international affairs 'is a recipe for diplomatic disaster'.<sup>24</sup> *The Ottawa Citizen* added: 'The idea is ridiculous. Operating on the international stage — at the United Nations, signing treaties, declaring and ending wars — is one of the core functions of a national government'.<sup>25</sup> The same sentiments were expressed by the *National Post*:

For a nation to be well represented abroad, it must speak with one voice. If Quebec gets its wish to have standing at international negotiations relevant to areas of provincial jurisdiction — UNESCO, which deals with education and cultural affairs, is one of its preferred examples — Canada's official position will become incomprehensible on any issue on which the central government and the province are not in full agreement.<sup>26</sup>

<sup>21</sup> Bill 52, *An Act to amend the Act respecting the Ministère des Relations Internationales and other Legislative Provisions*, 2nd Session, 36th Legislature, Quebec, 2002 (entered into force on 8 June 2002).

<sup>22</sup> É. Desrosier, 'Les temps changent', *Le Devoir*, 5 June 2004, p. C3.

<sup>23</sup> 'Why Canada Speaks for Quebec Abroad', Editorial, *The Globe and Mail*, 5 October 2005, p. A22.

<sup>24</sup> 'Why Canada Speaks for Quebec Abroad'.

<sup>25</sup> 'One Country, One Voice', Editorial, *The Ottawa Citizen*, 5 October 2005.

<sup>26</sup> 'Let Canada Speak with One Voice', Editorial, *The National Post*, 2 September 2005.

This kind of reaction was not restricted to Anglophone Canada. In Canada, the editorial page's editor of the daily *La Presse*, André Pratte, wrote on 17 November 2004 that 'The Quebecois have no reason to complain about the manner in which the government of Canada is defending their interests in the world'. He maintained, moreover, that 'international relations belong to central jurisdiction'.<sup>27</sup>

Both editorialists and elected officials from the central government continued to maintain that the central government in Canada possesses an exclusive monopoly with respect to international relations, meaning that federalism has no real impact on the conduct of international relations by the central government.<sup>28</sup> In fact, no constitutional acknowledgement of an exclusive federal power in international relations exists in Canada. Federalism and provincial rights have had important effects on the conduct of international relations. Canada even has a number of characteristics of systems of multi-level governance.

The Constitution Act of 1867 does not deal much with the question of international relations. In fact, there is no attribution by the Constitution of the exclusive power of foreign affairs. This state of affairs is not unusual, since in 1867 Canada did not become a sovereign government, but a dominion at the heart of the British Empire. Responsibility for foreign affairs thus rested not with the Canadian government, but rather with London. The only article of the Constitution Act of 1867 that dealt with international law was Article 132 concerning imperial treaties. This article specified that:

The Parliament and the Government of Canada shall have all of the powers necessary to fulfil Canada's obligations, or those of its provinces, as part of the British Empire, towards foreign countries, arising from treaties concluded between the empire and those foreign countries.

In sum, the federal government could not conclude treaties but had the capacity to implement 'empire treaties' even within the provinces' fields of power.

It was only with the Statute of Westminster of 1931 that Canada acquired sovereignty in matters of foreign affairs. The question was then raised rapidly in the context of Canadian federalism: does the federal government have the power to force the provinces to implement treaties, even when those treaties deal with subjects that fall within the exclusive jurisdiction of the provinces according to the Constitution? It was the Ontario government, in the case of the Labour Conventions, that challenged the ability of the Canadian government to legislate in provincial fields of jurisdiction in order to implement international engagements.<sup>29</sup> Following his election in 1930, Prime Minister of Canada R.B. Bennett ratified three International Labour Organization (ILO) Conventions:

<sup>27</sup> A. Pratte, 'La place du Québec', *La Presse*, 17 November 2004 (this author's translation).

<sup>28</sup> For an excellent review of the arguments on both sides, see Hugo Cyr, *Canadian Federalism and Treaty Powers: Organic Constitutionalism at Work* (Brussels: PIE-Peter Lang, 2009).

<sup>29</sup> A. Patry, *Le Québec dans le monde* (Montreal: Leméac, 1980), p. 155.

one applicable to hours of work; one on the weekly period of rest; and one on the establishment of a minimum wage. In implementing these Conventions for the provinces, the government of Canada interfered in the field of labour, which involves provincial jurisdiction.

The Judicial Committee of the Privy Council in London — at that time Canada's final court of appeal — gave its judgment in 1937. The judgment is of fundamental importance regarding the powers of the government of Canada and the rights of provinces with respect to international relations. The judges observed that federalism is the foundation of Canada and that by virtue of the principle of parliamentary sovereignty, the provinces are not obliged to undertake legislative measures in order to implement a treaty that is concluded by the executive branch of the federal government.

Since then, the conclusion of treaties has followed two fundamental steps: 1) the conclusion of the treaty, that is, its negotiation, signature and ratification; and 2) its implementation. The first step belongs exclusively to the federal government. The second step — that is, the adoption of the legislative measures necessary in order to apply a treaty as a matter of domestic law — belongs to the federal and provincial governments. It is therefore necessary to incorporate treaties as a matter of domestic law by legislative action at the appropriate level. In Canada, a treaty does not apply apart from applicable law. Judges judge the law, not treaties.

For example, the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards was concluded by Canada's federal government (step 1), but was implemented (step 2) by the two levels of government: federal and provincial. The Hague Convention on Civil Aspects of the Abduction of Children was concluded by the federal government (step 1), but implemented exclusively by the provinces (step 2).

This constitutional situation poses a sizeable problem for Canada: provincial collaboration is inevitable when the provincial fields of power are affected by a treaty or international convention. This problem is even more obvious when it is a question of Canada's involvement in the work of international organizations that affect provincial areas of competence, such as UNESCO, the World Health Organization (WHO) or even the ILO. To avoid being denounced, the federal government has historically adopted three strategies: 1) refusal to participate or to engage; 2) use of the federal state clause; and 3) the creation of formal consultative mechanisms with the provinces' mechanisms of multi-level governance.

### **Canada's Refusal to Participate or Engage as a Means to Respect Provincial Jurisdictions and the Federal State Clause**

Refusal to participate or to engage means that the government of Canada abstains from participating in a final vote when a treaty affects provincial spheres of com-



petence, or it will simply refuse to participate in the work of an international organization in order to respect provincial jurisdictions. Since 1938, for instance, a semi-official but very detailed procedure has been put in place to define Canada's participation in the ILO, since work is a matter of provincial jurisdiction. When a draft convention was under consideration, the Canadian delegation had to vote in favour of taking the matter into consideration but had to abstain from the final vote if the draft convention applied to a matter of provincial jurisdiction, unless the 'provinces had provided proof of sufficient support in order for reasonable hope that it would be effectively adopted in Canada'.<sup>30</sup> In a contrary case, Canada's federal government had to find ways to limit the extent of the convention to matters falling under federal jurisdiction. For example, the Canadian delegation at the San Francisco Convention of 1945 objected to the UN Charter making reference to full employment among the aims of the United Nations, because labour is a matter of provincial jurisdiction.<sup>31</sup>

In other instances, the Canadian government has refused to participate in the work of certain international organizations. It declined on several occasions the invitations to participate in the Hague Conference on Private International Law. It was not among the founders in 1955 and did not become a member until 1968.

Federalism and provincial rights with respect to foreign affairs in Canada have a direct quantitative impact, in the sense that the federal government has ratified fewer international treaties than countries with a unitary structure. Prior to 1961, Canada had ratified only eighteen of the 111 conventions adopted by the ILO.<sup>32</sup> With respect to conventions concerning human rights, Canada had ratified only six of eighteen by 1969, whereas the average among countries of a unitary structure was ten.<sup>33</sup>

The federal state clause implies that Canada has no requirement to ascertain the application of an international treaty coming from an international organization if it affects the jurisdiction of a province. This compromises Canada's image, but equally Canada's ability to influence international relations. The other solution is to have recourse to federal state clauses. When an international negotiation affects a field of provincial jurisdiction, Canada will support the process but secure the addition of a federal clause in the final text. The federal state clause (sometimes referred to as the 'Canada Clause') subjects the treaty's implementation to Canada's constitutional requirements and confirms that Canada's federal

---

<sup>30</sup> 'Some Proposals Concerning Canada and the International Labour Organization', a memorandum of the Permanent Delegate of Canada to the League of Nations, 30 November 1938, cited by R. Dehousse, *Fédéralisme et relations internationales* (Brussels: Bruylant, 1991), p. 191.

<sup>31</sup> J. Eayrs, 'Canadian Federalism and the United Nations', *Canadian Journal of Political Science*, vol. 16, 1950, p. 175.

<sup>32</sup> Dehousse, *Fédéralisme et relations internationales*, p. 181.

<sup>33</sup> Dehousse, *Fédéralisme et relations internationales*.

government undertakes to observe the treaty only within the limits of its constitutional competences.<sup>34</sup>

Canada has frequent recourse to such clauses because they permit it to avoid the question of jurisdiction with the provinces. Countries with unitary structures will contest such clauses, since they signify that Canada is bound only to the extent of its powers, which is not the case with a country such as France. In addition, there is no obligation of results for Canada. The question is therefore posed: is the Canadian government seeking to involve the provinces meaningfully in the process?

### **The Creation of Formal Mechanisms of Consultation with the Provinces: Towards Multi-Level Governance**

Federal state clauses evolved and, most notably in commercial agreements, began to impose obligations so that federal states could seek to make their provinces adopt international agreements. This transformation of federal clauses and the formulation of the Gérin-Lajoie doctrine in Quebec in 1965, whereby Quebec affirmed the right to represent itself when its fields of competence are involved, forced Canada's federal government to consult the provinces when international treaties affect their fields of power, since, if not, they risk being denounced.<sup>35</sup> Because the federal government is conscious of its limits, many consultative mechanisms between the federal government and the provinces have been put forward.<sup>36</sup>

The first federal-provincial understanding, in 1974, dealt with the Hague Conference on Private International Law. With respect to treaties adopted at the Hague Conference, Canada's federal Minister of Justice created a consultative group that was composed of civil servants of provincial ministries of justice representing four regions of Canada. This consultative group is replaced every four years and is tasked with giving advice to the Minister of Justice on questions of private international law. Following the recommendations of this group, the provincial ministers are consulted in order to specify Canada's negotiating position and to determine questions of implementation. Moreover, provincial representatives can form part of the Canadian delegation to sessions of the Hague Confer-

---

<sup>34</sup> A. Patry, *La compétence internationale des provinces canadiennes* (Montreal: André R. Dorais, 2003), p. 6.

<sup>35</sup> S. Paquin (ed.), *Les relations internationales du Québec depuis la doctrine Gérin-Lajoie (1965-2005)* (Ste-Foy: Laval University Press, 2006).

<sup>36</sup> J. Zeigel, 'Treaty-Making and Implementation Powers in Canada: The Continuing Dilemma', in B. Cheng and E.D. Brown (eds), *Contemporary Problems of International Law: Essays in Honour of Georg Schwarzenberger on his Eightieth Birthday* (Agincourt: Carswell, 1988); and D. Turp, *Pour une intensification des relations du Québec avec les institutions internationales* (Quebec QC: Ministry of International Relations, 1 November 2002).

ence. Afterwards, the Uniform Law Conference of Canada prepares model laws that the provinces may adopt if they wish.<sup>37</sup>

Other consultative mechanisms have come into being, such as the federal-provincial conference of ministers responsible for human rights issues. The conference meets biannually and gathers a standing committee that includes representatives of the federal government, the provinces and territories. The committee is tasked with the job of proceeding to consultations and providing liaison between the different orders of government. The specific functions of the committee:

[...] include serving as a consultation mechanism on the ratification of international human rights conventions; encouraging information exchange among governments in Canada with respect to the interpretation and implementation of international human rights instruments and related matters; facilitating the preparation of reports on conventions that have been ratified, as well as other reports on human rights requested by the United Nations or other organizations; encouraging information exchanges and research on human rights matters of common interest to all jurisdictions; providing views with respect to the development of Canada's positions on international human rights issues; and organizing and providing follow-up to ministerial conferences on human rights.<sup>38</sup>

Decisions on the ratification and implementation of conventions concerning human rights are taken in the framework of these conferences.

In the field of education, in 1977 the Canadian foreign ministry — the Department of External Affairs — concluded an understanding with the Canadian Council of Ministers of Education (CCME) that for all international matters involving questions related to education, the CCME would recommend the composition of the Canadian delegation and would designate the head of mission to negotiate on behalf of the provinces. This understanding, agreed to by all of the provinces, including Quebec, has regulated Canada's international relations in the field of education since 1977.<sup>39</sup>

In the economic field, the federal government also instituted different consultative mechanisms with the provinces. At the beginning of the Tokyo Round of the General Agreement on Tariffs and Trade (GATT) in 1973, the government of Canada developed consultative mechanisms on federal initiatives related to international trade.<sup>40</sup> These mechanisms were needed because the Tokyo Round negotiations began to touch upon matters that were clearly within provincial jurisdiction. Because subsequent rounds also involved provincial jurisdiction, the mechanisms remained in place.<sup>41</sup> These consultations increased in importance,

<sup>37</sup> A.C. Belluscio, '*La conclusion et la mise en œuvre de traités dans les États unitaires et fédérés*' [unpublished].

<sup>38</sup> See the Heritage Canada site online at <[www.pch.gc.ca/progs/pdp-hrp/docs/core\\_e.cfm](http://www.pch.gc.ca/progs/pdp-hrp/docs/core_e.cfm)>.

<sup>39</sup> Y. Dussault, '*Les négociations interaméricaines en matière d'éducation: le rôle des acteurs fédérés canadiens*' (2004) [unpublished].

<sup>40</sup> I. Bernier, '*La Constitution canadienne et la réglementation des relations économiques internationales au sortir du « Tokyo Round »*', *Cahiers de Droit*, vol. 20, 1979, p. 673.

<sup>41</sup> H.S. Fairley, 'Jurisdictional Limits on National Purpose: Ottawa, the Provinces and Free Trade with

since international negotiations increasingly deal with domestic policy concerning subsidies to business or provincial or local regulations that have the effect of creating distortions or obstructing international trade.

These practices of intergovernmental negotiations continue in a number of forums, including e-trade. The standing committee brings together federal, provincial and territorial civil servants every three months in order to exchange information and to identify a Canadian position on a range of questions related to commercial policy, including negotiations.<sup>42</sup>

The federal government must thus consult the provinces to obtain technical opinions and to develop the arguments for negotiation. Nevertheless, these mechanisms do not signify that the federal government recognizes a role for the provinces with respect to international relations. Canada's Minister of Foreign Affairs frequently recalls that the steps taken to conclude a treaty arise from the federal government's discretionary power and that Canada should speak with a single voice on the international scene.

### **Federalism and International Relations in Belgium**

According to the first article of its Constitution, Belgium has been 'a federal state composed of communities and regions' since 1993. Belgian federalism has consequences for the conduct of international relations. The constitutional revision of 1993, which sought to end debate about the division of powers between the central government, the other orders of government, and the communities and regions, permits the regions and communities to become real international actors, with the power of representation and right to sign treaties with sovereign states.

The Belgian sovereign, who previously had exclusive power over international relations, continues to do so at present, 'without prejudice to the power of communities and regions to regulate international cooperation, including the conclusion of treaties, concerning subjects arising from their powers under the Constitution or by virtue of it'.<sup>43</sup> The powers of the communities in international relations include 'cooperation among communities, as well as international cooperation, including the conclusion of treaties for subjects foreseen in paras. 1 and 2 [cultural matters, education (with exceptions)].'<sup>44</sup>

---

the United States', in M. Gold and D. Leyton-Brown (eds), *Trade-Offs on Free Trade: The Canada-US Free Trade Agreement* (Toronto ON: Carswell, 1988).

<sup>42</sup> S. de Boer, 'Canadian Provinces, US States and North American Integration: Bench Warmers or Key Players?', *Choices*, vol. 8, no. 4, (Montreal: Institute for Research on Public Policy, 2002), p. 4.

<sup>43</sup> É. Philippart, 'Gouvernance à niveau multiple et relations extérieures: le développement de la 'para-diplomatie' au sein de l'Union européenne et la nouvelle donne belge', *Etudes internationales*, vol. XXIX, no. 3, 1998, p. 632.

<sup>44</sup> See Art. 127 of the Constitution of the Kingdom of Belgium, cited in A. Alen and R. Ergec, *La Belgique fédérale après la quatrième réforme de l'État de 1993* (Brussels: Ministry of Foreign Affairs of Belgium, 2nd edition, 1998), p. 57.

Since the revision of the Constitution in 1993, the organization of Belgium's international relations has been fundamentally adapted to the federal state's structure. The autonomy of Belgian sub-state actors with regard to external policy is unique in the world. Its exceptional nature arises from the recognized constitutional principle of *in foro interno in foro externo*. On top of that, there is an *absence of hierarchy* between different levels of administration.

In essence, in conformity with Article 167 of the Belgian Constitution, international cooperation remains in the hands of the federal government, the communities and the regions, each of which operates within the limits of its respective powers, including with respect to the conclusion of treaties. In sum, the Constitution recognizes that Belgium's sub-state actors (including communities and regions, which in the case of Flanders have merged together — in the south, international relations are now under the central control of Wallonie-Bruxelles International) are sovereign within their fields of competence and this arrangement applies to international relations. This provision rests upon the idea of equally applying the principle of exclusivity of powers of federal states that is observed in the internal order to the field of international relations. For this reason, Belgian sub-state actors possess a true international legal personality and, in practice, this means that foreign countries and international organizations can, if they want, negotiate and conclude real treaties with Belgium's sub-state actors. Treaties signed by sub-state actors and foreign states are considered real binding treaties in Belgium.

Since the revision of the Constitution in 1993, there have been three categories of treaty in Belgium: 1) treaties that exclusively involve the powers of the federal government and that are concluded and ratified by this same federal government; 2) treaties related exclusively to community or regional powers and that are concluded and ratified by communities and regions; and finally 3) mixed treaties.

When a treaty project is brought to the attention of the federal government, it must inform the other levels of government. The regions and communities can then ask to be a party to the treaty if it affects their fields of jurisdiction. It is only after negotiation between the various parties that there is a decision about the category of the proposed treaty.

When an agreement involves federal powers and either community or regional powers at the same time, the treaty is concluded according to a special procedure convened among the different orders of government. It must also be approved by all of the parliaments involved.<sup>45</sup> Mixed treaties require twenty different steps to complete the whole procedure.

Thus, in Belgium, sub-national actors enjoy greater autonomy concerning foreign policy than all other regions in the world. Quebec, which is often cited as a leader in regional autonomy, is relatively behind when compared with Belgium's

---

<sup>45</sup> Alen and Ergec, *La Belgique fédérale après la quatrième réforme de l'État de 1993*.

regions and communities. The new system of multi-level governance allows Belgian regions to become true international actors, which includes the power to sign actual treaties with sovereign states, if they agree to negotiate a treaty with them (which is not always the case).

Belgium's communities and regions also possess the right of representation — that is, the right to open offices abroad if the host state accepts.<sup>46</sup> They have the option of designating their own representatives abroad, whether as part of, or separately from, the diplomatic and consular posts of the central Belgian state.<sup>47</sup> These sub-national ambassadors are still on the Belgian diplomatic list. Flanders has 100 'quasi-embassies' around the world. Most of these offices, around 90, are economic representations with civil servants from Flanders that have the rank of trade commissioners. Only ten of the offices are political representations where the civil servants have the rank of 'adviser'. Within Europe, the Flemish have generally preferred to maintain representatives outside Belgian embassies, whereas elsewhere in the world they have generally sought to co-locate within the central government's missions. The status and exercise of these representatives' functions are fixed by virtue of a Cooperation Agreement that was concluded in 1995 between federal authorities and the federative states. The Belgian ambassador has no superior hierarchical authority over the representatives of sub-state actors, but still remains head of the delegation of the Belgian federation in the host country.<sup>48</sup> As one Flemish civil servant has observed, with respect to Flemish exclusive matters, 'there is nothing more useless than a Belgian ambassador'.<sup>49</sup> One other civil servant did not agree. After working closely with federal civil servants, he concludes that they generally have the expertise concerning international agreements and are essential players in helping regional governments with very complex international issues. Regional governments simply do not have the resources and thus rely on the federal government.<sup>50</sup>

With the Lambermont Accords of 29 June 2001, which are accords of a constitutional character, even power over foreign trade has been regionalized. Flanders is probably the most globalized region in the world: it exports 89 per cent of its GDP. No country is as decentralized as Belgium when it comes to international relations.

---

<sup>46</sup> These representations abroad can take different forms. They can be political, economic (foreign trade and investment), cultural, or focus on tourism, education or immigration. See David Crieckemans, 'Are the Boundaries between Paradiplomacy and Diplomacy Watering Down? Preliminary Findings and Hypotheses from a Comparative Study of Some Regions with Legislative Power and Small States', paper presented at the World International Studies Committee (WISC), July 2008, p. 33.

<sup>47</sup> Interview with a civil servant of the Flemish Department of Foreign Affairs, May 2009, Brussels.

<sup>48</sup> Alen and Ergec, *La Belgique fédérale après la quatrième réforme de l'État de 1993*, p. 57.

<sup>49</sup> The statement is based on an interview with a Flemish civil servant during summer 2006.

<sup>50</sup> The statement is based on an interview with a Flemish civil servant during summer 2009.

## Decision-Making in Belgium's System of Multi-Level Governance

In order to avoid conflicts and ensure coherence in Belgian foreign policy, an Inter-ministerial Committee on Foreign Policy (ICFP) has been created. The Committee brings together representatives of different authorities at the highest political and administrative levels and was conceived as an institution of permanent dialogue to avoid conflicts.<sup>51</sup> The Committee shelters fifteen sectoral inter-ministerial conferences, and decisions are taken on a case-by-case basis. The ICFP is an organism for the exchange of information and dialogue where decisions are taken by consensus. If consensus is not achieved, Belgium abstains from taking a position, although this is a positive abstention that signifies that Belgium will not block the decision-making process. This method of proceeding puts considerable pressure on those involved to arrive at a joint position. The ICFP Secretariat is maintained by the Foreign Service in Charge of Relations with Communities and Regions, which looks after both the organization and management of working groups and committees that are active in the context of the ICFP.<sup>52</sup>

On 30 June 1994, a Framework Agreement was promulgated concerning the participation of Belgium and its sub-state actors in international organizations. The Framework Agreement imposes a requirement of systematic and horizontal dialogue, which is a precondition of each ministerial meeting of an international organization.

Representatives of Belgium's prime minister, other federal ministries, and community and regional representatives responsible at a technical level or responsible for external relations are invited to all dialogue meetings. Under the terms of Article 7 of the Cooperation Agreement, a working group on the Kingdom of Belgium's representation to international organizations ensures follow-up and general coordination. The working group is required to meet at regular intervals within the framework of the ICFP. Because of the absence of hierarchy among central, community and regional authorities, the proper functioning of the system depends entirely upon the good faith of the different authorities. Federal diplomats involved with the process assert that the system of cooperation is a kind of appeal system, with a Dialogue Committee at its head.

However, the situation is different at the level of working groups within the ICFP. Cabinet and administrative delegates sit on working groups. Multiple working groups have been created in parallel under the ICFP, and a number of formal and informal mechanisms have been created under cooperation agreements at this level. In practice, the common external policy of the Belgian federation is

---

<sup>51</sup> C.-E. Lagasse, 'Le système des relations internationales dans la Belgique fédérale', *Courrier Hebdomadaire* 1549-1550, 1997, p. 10.

<sup>52</sup> B. Kerremans, 'Determining a European Policy in a Multi-Level Setting: The Case of Specialized Coordination in Belgium', *Regional and Federal Studies*, vol. 10, no. 1, 2001, pp. 42-44.

maintained above all by working groups.<sup>53</sup> Most decisions are taken by the working groups and are submitted to the executive and then to the legislative branch for approval. It is via this complex system that mixed treaties are concluded, as are the positions taken by Belgium in intergovernmental organizations.

The ICFP does not meet on a regular basis. Since its creation, the average number of meetings has been two per year, but between May 2006 and 2008, no meetings were held. In order to work, this system also relies on informal meetings between Cabinet-level personnel and civil servants of both levels of governments. Networks are thus very important.

Relations between people in the cabinets of the different tiers of government who happen to be in the same political party — for example, Christian-Democrats in the Cabinet of the federal Foreign Affairs Minister and in the Cabinet of the Flemish Minister-President) are also important to ensure proper circulation of information. They know each other, and information between different levels of government thus flows more freely.<sup>54</sup>

Belgian sub-state actors also have the right to formulate policy directly in the multilateral sphere — that is, within intergovernmental organizations.<sup>55</sup> For the last few years, the sub-state actors have been represented within the Belgian delegation to international organizations such as the European Union and the World Trade Organization (WTO). It is important to emphasize that they do not occupy a separate seat in these organizations, but the seat of Belgium. In the case of certain organizations that deal with matters that are exclusively communitarian or regional, Belgium is represented only by ministers of the sub-state actors. At UNESCO, this means that for most of the time there is no representative from the Belgian federal level, since the organization's mandate is largely outside of federal Belgian jurisdiction. If, however, UNESCO wanted to accept a new member, such as Palestine (or Quebec...), this is a political decision that is in the central government's field of jurisdiction. It would then be a representative of Belgium that would occupy the Belgian seat. With respect to *la francophonie*, the French community of Belgium is a member state of UNESCO (*État membre*) and is not placed alongside the Kingdom of Belgium. By comparison, Quebec has the status of a participating government (*gouvernement participant*) and goes by the designation of 'Canada Quebec' in the organization.

Since hierarchic principles do not apply, the diplomatic representatives of sub-state actors can play a more important role than an ambassador named by the central government. When there is a question of content, such as in the case of a provisional agreement, it is the Flemish and Walloon representatives who will

---

<sup>53</sup> B. Kerremans, 'Determining a European Policy in a Multi-Level Setting', p. 44.

<sup>54</sup> This information was confirmed by a Flemish civil servant during summer 2006.

<sup>55</sup> F. Massart-Piérard, '*Politique des relations extérieures et identité politique: la stratégie des entités fédérées de Belgique*', *Études internationales*, vol. XXX, no. 4, 1999, p. 714.



have a say. At the moment, there appear to be few conflicts between the two communities in this regard.

In sum, different levels of government in Belgium have concluded a series of cooperation agreements with respect to the representation of Belgium in international and supranational organizations. The most important agreement involves Belgium's participation in the EU Council of Ministers, where ministers of the federative states can represent Belgium and conclude agreements in its name.<sup>56</sup>

Belgium's position in the EU Council of Ministers is discussed in a special coordinating section within the Belgian Ministry of Foreign Affairs between all the orders of government. In some instances, account has to be taken of the existence of levels of power and non-hierarchical juridical order. As Eric Philippart states: 'In many cases, Belgium can no longer participate in the work of the EU Council without the adoption of common provisional positions by the different levels of power concerned'.<sup>57</sup> According to one Flemish civil servant in 2009, 'It has happened that Belgium didn't have a position during a negotiation'. But the Flemish government never blocked the conclusion of a treaty because, in the words of a Flemish civil servant, 'that would be like using a nuclear bomb. You can only use it once. If it were to happen it would severely damage Belgium's reputation in international negotiations'.<sup>58</sup>

A rotation system has been initiated among the Belgian communities and regions so that Belgium is only represented in each ministerial council by a single minister. At the time of the 2001 Belgian presidency of the EU, a 'first' in EU history occurred, since the ministers of the federative states officially presided over the EU. Thus, on the basis of intra-Belgian accords, the Flemish Ministers of Education, Youth and Tourism presided over the EU Council of Ministers, while the Flemish Minister of Culture organized an informal ministerial council on culture.

### **An Assessment of Belgium's Experience**

Belgium's recent experience is quite extraordinary. Even though the country is facing deep constitutional and political problems, the treaty-making process works fairly well. More than sixteen years after the St Michel Agreements of 1992, there is little evidence of deep conflicts between Flemish, Walloon and central government representatives in relation to the treaty-making process. Rather, there have been only minor disagreements.

<sup>56</sup> F. Massart-Piérard, 'Les entités fédérées de Belgique: Acteurs décisionnels au sein de l'Union européenne', *Politique et Sociétés*, vol. 18, no. 1, 1999, p. 25.

<sup>57</sup> É. Philippart, 'Gouvernance à niveau multiple et relations extérieures: le développement de la «paradiplomatie» au sein de l'Union européenne et la nouvelle donne belge', *Études internationales*, vol. XXIX, no. 3, 1999, p. 639.

<sup>58</sup> The statement is based on an interview with a Flemish civil servant during summer 2009.

In Belgium, the sub-state actors enjoy more autonomy in paradiplomacy than all other sub-state governments, even more than Quebec. The new Belgian system of international relations allows regions to become true international actors, including having the power to sign treaties with sovereign states. As a result of the Lambermont Accords of 29 June 2001, even international trade has been regionalized. Belgium's sub-national governments are the most vigorous sub-state actors on the international stage.

Did it ever happen in the past that one sub-state government blocked an international treaty? On this issue there have been some minor disagreements between senior civil servants of both communities. According to a senior Flemish civil servant:

[...] the Flemish government never blocked the ratification of an international agreement that affects its jurisdictions. There is no precedent of a mixed treaty suspended by the Flemish government. The Flemish government has always followed the federal government's recommendations.<sup>59</sup>

But according to a top Walloon civil servant, that situation occurred twice (out of more than 450 treaties).<sup>60</sup> According to a different Walloon civil servant, Flanders opposed the Framework Convention on the Protection of National Minorities, which was put forward by the Council of Europe in October 1993.<sup>61</sup> The Framework Convention would, in Flanders' view, endanger Belgium's Flemish-language regime by granting additional rights to French-speaking citizens in the areas surrounding Brussels. The Flemish community therefore sought to introduce a reservation by which Belgium would not be held to have any national minorities. Thus, because of Flemish pressure, Belgium had to abstain from signing the Convention. According to Françoise Massart-Piérard, in this case, where matters vital to its interests were involved, the Flemish community blocked Belgium's accession to this international agreement.<sup>62</sup> This was also the case for the UNESCO Convention on Cultural Diversity.<sup>63</sup>

If, however, the system works smoothly in general, there have been more problems in the case of mixed treaties. According to a top Flemish civil servant, since 1994 the central government has signed or even ratified a treaty without the compulsory input of the regions or communities on 44 occasions out of more than 300 mixed treaties. These treaties were declared mixed after the signature or sometimes ratification by the central government. On human rights treaties, the federal government has launched negotiations in the past without consulting the

---

<sup>59</sup>) The statements of civil servants in Belgium are based on interviews conducted during 2006 and summer 2009.

<sup>60</sup>) Interview with a Walloon civil servant during summer 2009.

<sup>61</sup>) Interview with a Walloon civil servant during summer 2009.

<sup>62</sup>) Massart-Piérard, '*Politique des relations extérieures et identité politique*', p. 710.

<sup>63</sup>) Based on an interview with a Walloon civil servant during summer 2009.

sub-national governments.<sup>64</sup> But these cases tend to be decreasing and have not been politically explosive or related to the political crisis that Belgium has been experiencing since the 1960s.

One civil servant suggests that the problem lies in the complex bureaucratic structure of the Belgian states, where information easily gets lost and also because the mechanisms to negotiate a mixed treaty are not applied sufficiently.<sup>65</sup> The problem is thus one of coordination and communication but also lack of resources at the sub-national level. One other problem lies in the fact that the division of power is not always clear-cut. According to a Flemish civil servant, it happened in one case that the Constitutional Court had to clarify which order of government had the constitutional attribution for the media.<sup>66</sup>

According to a civil servant of the Flemish government, the average time needed between signature and ratification is around three years for a mixed treaty and eighteen months for a Flemish treaty signed without the federal government.<sup>67</sup> More than 30 bilateral treaties have been signed by the Flemish government. In the case of Wallonia, according to a top civil servant, the time required for a mixed treaty is no more than one-and-a-half years.<sup>68</sup>

Despite these experiences, the fact remains that in practice there are fewer conflicts between federal and sub-state governments concerning foreign affairs in Belgium than there are in Canada. There are arguments and conflicting viewpoints, but in general the system works fine according to all of the civil servants and specialists interviewed (more than 25 at all levels and from both communities). One possible explanation for this arises from the fact that the sub-state actors participate in the decision-making process and therefore are more likely to make the necessary legal changes. In addition, in cases of inaction by the sub-national states to ratify an international agreement, the central government can substitute for the sub-national governments. This possibility, which has never been used, puts significant pressure on sub-national governments.

At the same time, the new system of international relations in Belgium, which can be regarded as a response to previous problems, could in the future prove to be a new source of tension in a country that has difficulty in forming coalition governments. As Eric Philippart observes: 'The system has become harder to manage because it presupposes a number of vertical and horizontal actions. It is thus more diffuse, lacking in leadership and centre of gravity'.<sup>69</sup> Will the Belgian foreign policy system survive the next constitutional crisis that is currently unfolding? In Belgium, if the current crisis leads to more decentralization, that would

---

<sup>64</sup> The statement is based on an interview with a Flemish civil servant during summer 2009.

<sup>65</sup> Interview with a Flemish civil servant during summer 2009.

<sup>66</sup> Interview with a Flemish civil servant during summer 2009.

<sup>67</sup> The statement is based on an interview with a Flemish civil servant during summer 2009.

<sup>68</sup> The statement is based on an interview with a Walloon civil servant during summer 2009.

<sup>69</sup> Massart-Piérard, *Politique des relations extérieures et identité politique*, p. 640.

actually mean that sub-state actors end up with more competencies in international relations, since the *in foro interno in foro externo* principle is constitutionalized.

### Assessing Canada

In Canada, contrary to conventional wisdom, the Canadian federal government has been required to share parts of its foreign affairs powers with the provinces because its constitutional powers are limited. Federalism and the negotiation of international agreements have necessitated ever-closer federal-provincial cooperation since the 1960s.

Where international treaties are concerned, there is no central database in Canada to find the information necessary to determine whether or not the provinces have taken compulsory legislative interventions to implement the treaties concluded by the central government. It is thus very difficult to produce an overall comparison with Belgium, where this information *is* available. Even the report of the UN's Universal Periodic Review is particularly vague on these issues.<sup>70</sup> Several federal officials have reported that the general rule is that the central government ratifies a treaty only after the provinces have adopted the decrees or passed legislation for implementation of the treaty.<sup>71</sup> For several provincial officials, this statement is a myth. A consultant to the *Ministère des relations internationales du Québec* claimed that 'When we look in more detail at the various legislative stages in Canada, we are able to see that the process is relatively long and the legislative steps at the provincial level are often not always completed before Canada ratifies'.<sup>72</sup>

Since it is difficult to obtain information from the provinces on these issues and because the government of Quebec is the only one that requires a vote of the National Assembly for approval of important treaties, some cases between the governments of Canada and Quebec were analysed, also because, according to some federal employees, Quebec has one of the best records of implementation among the Canadian provinces.

When we look at the Canada-Costa Rica Free-Trade Agreement (CCRFT), for example, the signature from Canada's central government came on 23 April 2001 and the Agreement Implementation Act was tabled in the House of Commons on 20 September 2001. On 18 December 2001 the CCRFT received Royal Assent. However, the treaty was only approved by Quebec's National Assembly

---

<sup>70</sup> UN Universal Periodic Review Working Group, *Rapport du Canada*, December 2008.

<sup>71</sup> The statements are based on a series of interviews with civil servants from the central government during summer 2008.

<sup>72</sup> The statements of consultants and civil servants in Canada and Quebec are based on interviews conducted during summer 2008 and 2009.

on 2 June 2004 — that is, *after* the treaty was ratified and *after* the treaty came into effect on 1 November 2002!<sup>73</sup>

The same situation occurred concerning the Canada-Chile Free Trade Agreement (CCFTA). Canada's central government signed the agreement on 5 December 1996 and the Agreement Implementation Act was tabled in the House of Commons on 5 July 1997, yet the treaty was approved by Quebec's National Assembly on 2 June 2004, seven years after the treaty went into effect on 5 July 1997.<sup>74</sup>

In the case of the 1993 Hague Convention on the Protection of Children and Cooperation in Respect of Inter-Country Adoption,<sup>75</sup> the treaty was adopted at The Hague on 23 May 1993, was ratified by Canada on 19 December 1996 and went into effect in April 1997. Meanwhile, the treaty was adopted by the Quebec National Assembly on 20 April 2004 and implemented by Quebec on 1 February 2006, more than thirteen years after adoption and nine years after Canada's ratification of the treaty!

In the case of the UN Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol to the Convention, which was adopted on 11 December 1997, Canada's signature came on 28 April 1998 and its ratification on 17 December 2002. However, Kyoto has been neither approved nor implemented by the National Assembly of Quebec, even though the treaty has been in effect in Canada since 16 February 2005.

The Framework Convention on Tobacco Control (FCTC) of the WHO was adopted on 21 May 2003. Canada's signature came on 15 July 2003 and ratification on 26 November 2004. Adoption by Quebec's National Assembly came on 15 December 2004 and implementation of the law on 23 June 2005, two years after Canada's ratification.<sup>76</sup>

Existing mechanisms are also the cause of numerous conflicts. For instance, it is difficult to assess in advance how Canada's obligations under existing and projected free-trade agreements will evolve. This poses problems of scale for all levels of government, but is exacerbated at the provincial level for many reasons. According to Stephen de Boer, a former Ontario senior civil servant, it is already the case that federal government representatives have negotiated very significant undertakings that have important and irreversible effects on provincial fields of

<sup>73</sup> See online at <http://www.dfait-maeci.gc.ca/trade-agreements-accords-commerciaux/agr-acc/costarica/index.aspx?lang=en>; and Daniel Turp, 'Approbation des engagements internationaux : Assemblée nationale du Québec' [unpublished document], 12 September 2007, 13 pages.

<sup>74</sup> See online at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/chile-chili/index.aspx>; and Turp, 'Approbation des engagements internationaux'.

<sup>75</sup> See online at <http://www.cic.gc.ca/english/immigrate/adoption/hague.asp>; and Turp, 'Approbation des engagements internationaux'.

<sup>76</sup> See online at [http://www.hc-sc.gc.ca/ahc-asc/activit/strateg/int\\_tobac-tabac\\_fctc-cclat-eng.php](http://www.hc-sc.gc.ca/ahc-asc/activit/strateg/int_tobac-tabac_fctc-cclat-eng.php); and Turp, 'Approbation des engagements internationaux'.

competence without consultation.<sup>77</sup> This is the case in relation to NAFTA Chapter 11, which involves the protection of foreign investors and their investments. According to de Boer, the failure of federal negotiators to give meaning to provincial laws on expropriation caused a number of foreseeable legal problems. The presence of a provincial negotiator at the table could have drawn federal negotiators' attention to this issue. The same happens with respect to the international negotiations that are ongoing in international organizations. One can look to the example of the negotiations of the Multilateral Agreement on Investment (MAI), which — if it had been ratified and implemented — would have placed in jeopardy a considerable part of Quebec's model of development.

Another problem linked to Canada's international obligations arises because the provinces are not at the negotiating table before and during treaty negotiations. As a result, provinces do not always have a good idea of their obligations. Until recently — and it is still the case for many provinces,<sup>78</sup> particularly the smaller ones<sup>79</sup> — the provinces only from a distance followed the negotiations concerning international agreements that affected their interests. The result of this approach was foreseeable: there was a great risk that the provinces would introduce legislation that would be incompatible with Canada's international obligations. According to one civil servant, there are many precedents.<sup>80</sup>

Furthermore, according to one civil servant from Quebec, it is not clear that the political decisions taken in the course of important bilateral and multilateral meetings on the means of liberalizing exchanges or the environments, of which the federal government is a participant, take account of the difficulties of implementation at the provincial level.

The question is whether politicians and senior civil servants, in the process of policy formulation, consider the sometimes considerable difficulties of implementation at the provincial level? Since provincial officials are often poorly informed about the extent of international obligations that have been negotiated or are under negotiation by the federal government, enquiries inevitably follow from foreign governments that point out the inconsistency of provincial governments' policies with Canada's international obligations. According to one civil servant from Quebec, the reason why Canada has such a bad record in relation to the Kyoto agreements has to do with coordination problems between the provinces and the central government. He said: 'During the negotiation, the government of Canada changed its position many times without consulting the

---

<sup>77</sup> De Boer, 'Canadian Provinces, US States and North American Integration', p. 7. At the time this text was drafted, de Boer was Senior Policy Adviser and Team Leader, Trade and International Policy Branch, at the Ministry of Enterprise, Opportunity and Innovation, Government of Ontario. Today he is a federal civil servant.

<sup>78</sup> Interviews with civil servants from Ontario and British Columbia.

<sup>79</sup> Interview with a civil servant from Prince Edward Island in June 2006.

<sup>80</sup> The statement is based on an interview with a Quebec civil servant during summer 2008.

provinces. The result is that the provinces are not interested in paying the high price for Ottawa'.<sup>81</sup>

Another problem that has arisen in the past from the lack of coordination is over provincial subsidies to local businesses that violate Canada's international obligations. According to one civil servant from Quebec, the problem became that of who should pay compensation in the case of a successful claim.<sup>82</sup> Should compensation be paid by the provincial government, which had not participated in the negotiation process, or should it be the federal government, which had not made known to the province what Canada's international obligations were?

In Canada there is no general legal norm that regulates the Canadian state's responsibility with respect to international law if a province does not fulfil obligations flowing from a treaty related to its sphere of competence. The federal government has had recourse to indemnification agreements concluded with a province when Canada was held to be responsible towards a foreign state for a province's failure to fulfil an international obligation incurred by the federal government. This method, however, is not always relevant, since the failure to fulfil international obligations does not always involve a financial loss. Nevertheless, Christiane Verdon emphasizes that as a general rule:

[...] the juridical status of a federal-provincial agreement by which the provinces agree to implement a treaty by putting in place implementing legislation is not well-defined. Does it involve an agreement that creates rights and obligations whereby the penalty for failure to fulfil would be recognized by a court or does it more likely involve a political agreement that is not obligatory in law?<sup>83</sup>

This situation risks creating multiple problems in the future. In cases of conflict, the federal government and concerned provincial governments would therefore be required to work together to defend Canada's position. This would include provincial participation in WTO dispute settlement hearings. Intergovernmental cooperation in Canada in this respect is not formalized, even though there are many precedents. It is odd that the provinces do not have a more formalized role, because when a foreign government challenges a provincial government's policy or law, it is the province that will have the best arguments and legal opinions to defend its position. The province in question should have the right to defend its position directly, but within the Canadian delegation.

<sup>81</sup> This affirmation by a civil servant in 2008 from Quebec is confirmed by Heman Bakvis, Gerald Baier and Douglas Brown, *Contested Federalism: Certainty and Ambiguity in the Canadian Federation* (Oxford: Oxford University Press, 2009), p. 214.

<sup>82</sup> The statement is based on an interview with a Quebec civil servant during summer 2009.

<sup>83</sup> A. de Mestral and C. Verdon, '*La conclusion et la mise en œuvre des traités dans les États unitaires et fédérés*', *Contemporary Law/Droit contemporain* (Cowansville QC: Editions Yvon Blais, 1992), pp. 442-463.

## **Conclusion**

Canada and Belgium can be compared in many ways, even though they are different in terms of population, ethnic composition and many other things. Both countries are decentralized federations, multinational democracies and open economies. Both countries have been facing constitutional problems related to deep diversity and nationalism. But what makes these cases interesting is that they remain fundamentally different where it is important for this research — that is to say, at the level of their system of governance in matters of treaty-making.

In the case of Belgium, sub-state actors have a co-decision role and intergovernmental mechanisms are completely institutionalized. The Canadian system is fundamentally different, the decision-making process is highly centralized and intergovernmental mechanisms are generally poorly institutionalized. Analysis of different federal-provincial mechanisms reveals that the Canadian provinces have an asymmetrical role in intergovernmental mechanisms. They sometimes have a joint-decision power, as in the field of education, but sometimes very little power, as in the fields of environment and health. There are very few institutions in Canada where decisions are taken jointly and where the federal government is obliged to take into account the views of provinces, contrary to the case of Belgium.

After comparing the two cases, the conclusion is that the Belgian system is more effective, largely because Belgium's sub-state actors have an important role at every step of the conclusion of a treaty. Because sub-state actors in Belgium participate in the decision-making process, they are more likely to respect Belgium's international obligations. It is true even if the system is relatively complex and harder to manage than in Canada, because it presupposes various vertical and horizontal mobilizations. The secret of Belgium's success is its highly institutionalized intergovernmental mechanisms.

In Canada, it is rare that Canadian federal government representatives do not consult their provincial counterparts on international matters when the powers of the provinces are affected. Problems arise, contrary to the situation in Belgium, because intergovernmental mechanisms do not cover the totality of negotiations and the majority of these mechanisms are poorly institutionalized. The absence of clear, consistent and predictable rules is the source of many intergovernmental conflicts and political interventions.

Because Canada does not have intergovernmental mechanisms of coordination, contrary to Belgium, many problems remain unsolved. Many Canadian provinces do not have the resources or sufficiently clear interest in international negotiations to implement agreements concluded by Ottawa. The problem of resources has been accentuated by the crisis in public finance, fiscal imbalance and many budgetary cutbacks in the 1990s. A foreseeable consequence of this is that a number of concerns that affect certain provinces are not transmitted to the federal level and vice versa.



One of the problems with Canada arises from the fact that the Council of the Federation is relatively new and does not have a role in coordinating the provinces' international policies. The Council of the Federation in Canada is not an institution where provincial policy concerning universal international organizations is decided as well as provincial positions concerning bilateral and multilateral trade negotiations when their fields of competence are affected. The existence of such a mechanism explains why Belgium has been much more successful.

Another problem in Canada, contrary to Belgium, is the lack of guarantees on the part of the central government for sub-state actors' participation in the central government's delegations on Canadian bilateral and multilateral policy that affects provincial fields of competence. In Canada, the reciprocal requirement of information is not the rule, while it is central in Belgium.

In Belgium, the central government can substitute for the sub-national governments in ratifying an international agreement, but only in cases of inaction by the sub-state actors. As seen, this possibility, which has never been used in the past, puts significant pressure on sub-national governments. The central government in Canada does not have such a tool. Canada's problem arises from the fact that the central government does not ratify a treaty *after* the provinces have adopted the decrees or passed legislation for the implementation of the treaty. Canada can thus easily be denounced. As shown in this article, the treaty-making process in Canada is relatively long, much longer than in Belgium, and legislative steps at the provincial level are often not completed before Canada ratifies.

Contrary to Belgium, where this situation has not generated real problems, the central government in Canada does not recognize the right of provinces to conclude binding international agreements within their fields of competence, with certain limitations. For example, Quebec or Ontario cannot conclude an international treaty over issues of education without the intervention of the central government. That situation has created multiple conflicts in the past, even though this practice is commonplace in Canada — Quebec has concluded some 550 international agreements — and abroad. These conflicts tend to spill over all the other issues.

In conclusion, many Canadians like to present Canada as a model of federation that has something to teach the world, especially Belgium. In this case, however, it is Canada that could learn from other experiences...

**Stéphane Paquin** is Professor at the School of Applied Politics at the Université de Sherbrooke in Quebec, Canada. His areas of research are federalism and decision-making processes in the foreign policy of Canada and Belgium, paradiplomacy and the international relations of sub-state actors, and international political economy.

