

DISMEMBERING CANADA? STEPHEN HARPER AND THE FOREIGN RELATIONS OF CANADIAN PROVINCES

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Stephen Harper's minority Conservative government has allegedly pursued a decentralized vision of Canadian federalism. This vision includes pledges to limit the federal spending power and the declaration of Québec as a "nation." Controversially, this commitment has also extended to the foreign relations of Canadian provinces. Québec recently negotiated a bilateral labour mobility agreement with France and was also granted formal standing in Canada's delegation at the United Nations Educational, Scientific and Cultural Organization (UNESCO). Ottawa has also promised to support an autonomous subfederal role in trade promotion and the negotiation of international economic agreements. This study will argue, however, that Canadian provinces have exercised partial and significant autonomy in terms of foreign offices, trade policy, cross-border functional relations, development assistance, and the environment, long before the arrival of Harper and the Conservatives. In fact, this policy capacity is due to long-term trends related to the intrusiveness of international trade agreements, federalism's response to these pressures, and the ongoing decentralization of federal-provincial relations in Canada.

Le gouvernement conservateur minoritaire de Stephen Harper aurait poursuivi une vision décentralisée du fédéralisme canadien. Cette vision comprend des promesses de limiter le pouvoir fédéral d'application des ressources et la déclaration que le Québec serait une « nation ». Cet engagement s'applique également, et de façon controversée, aux relations extérieures des provinces canadiennes. Récemment, le Québec a négocié un accord bilatéral avec la France sur la mobilité des travailleurs et a également été accordé une autorité officielle au sein de la délégation canadienne à l'Organisation des Nations Unies pour l'éducation, la science et la culture (UNESCO). Ottawa a aussi promis d'appuyer un rôle autonome pour les provinces dans la promotion du commerce et la négociation d'accords économiques internationaux. Cependant, l'auteur de cette étude soutiendra que les provinces canadiennes ont exercé une autonomie partielle et significative en matière d'affaires étrangères, de politique commerciale, de relations fonctionnelles transfrontalières, d'aide au développement et d'environnement bien avant l'arrivée de Stephen Harper et les Conservateurs. En fait, cette capacité en matière de politiques est attribuable aux tendances générales liées à l'intrusion des accords commerciaux internationaux, la réponse du fédéralisme à ces pressions et la décentralisation continue des relations fédérales-provinciales au Canada.

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I. INTRODUCTION

Stephen Harper has pursued an admittedly decentralist agenda since becoming Prime Minister in 2006. Specifically, Harper has pledged to limit Ottawa's use of the federal spending power and reduce new social programs in areas of provincial jurisdiction. As leader of a minority Conservative government, Harper also declared Québec a "nation" and promised to revisit existing fiscal transfers to the provinces. One of the most controversial issues, however, was Harper's decision to grant Québec a formalized role in Canada's delegation at the United Nations Educational, Scientific and Cultural Organization (UNESCO). Québec's proposed bilateral labour mobility agreement with France and Ottawa's support for international economic autonomy for all provinces also drew significant criticism. Some observers, such as Andrew Coyne, have suggested that granting provinces greater foreign autonomy contributes to the "dismembering of Canada" and "blurs our national identity." However, Paul Heinbecker, Canada's former ambassador to the United Nations, has suggested that this is simply "the same old bullshit."¹

This article will explore Harper's decentralist agenda in relation to the foreign activity of Canadian provinces. It will argue that the Prime Minister's use of the term "autonomy" requires clearer analytical parameters to allow for an extended evaluation of subfederal international engagement. In examining the historic role of Québec, trade promotion, foreign offices, trade policy, cross-border functional relations, development assistance, and the environment, it becomes clear that Canadian provinces have exercised both partial and significant autonomy in these policy areas long before the arrival of Harper and the Conservatives. There is a tendency to think that autonomy is simply granted to provinces by specific governments, but in this policy area it more accurately reflects the increasing intrusiveness of international trade agreements into areas of provincial jurisdiction, federalism's response to these pressures, and the ongoing decentralization of federal-provincial relations in Canada. There is also the fact that provincial governments are increasingly influencing both Canadian foreign policy and, in some cases, the evolution of international norms and standards.

II. DEFINING TERMS

A number of terms must be clarified to evaluate Harper's position regard-

1 Andrew Coyne, "Dismembering Canada" *Ottawa Citizen* (30 May 2006) A14.

ing provincial international activity. First, a distinction must be made between foreign policy and subfederal international relations. Foreign policy focuses on the specific international goals of officials and the values and mechanisms used to pursue these objectives.² In contrast, “foreign relations” is a much broader term, and refers to functional issues and other noncontroversial international activities.³ There are also important distinctions between trade and economic policy. Economic policy engages matters of economic growth and fiscal and monetary issues. Trade policy, however, focuses on the exchange of goods and services and the negotiation and implementation of international (and domestic) trade commitments. It also includes policies of protectionism and liberalization, which can be transparent (tariffs and quotas) or more difficult to identify (subsidies and nontariff barriers). Trade promotion, on the other hand, is the expansion of export markets for domestic goods, and in some cases the pursuit of investment.

There are also important distinctions between the term “autonomy,” and the related concepts of independence and sovereignty. Independence is the “ability to be free from the control of others” whereas sovereignty encompasses the “juridical recognition” of modern states to control territory and exercise authority over citizens.⁴ Autonomy, on the other hand, is the ability to achieve specific preferences. Although all political communities pursue these goals, none are able to consistently exercise complete autonomy due to internal and external demands and constraints. Autonomy is also a concept that admits of degree, varying among minimal, partial, and significant. This discussion will argue that Canadian provinces have exercised partial and significant autonomy in terms of foreign policy and a wide range of foreign relations for several decades.

Although there is considerable literature focusing on the foreign relations of subfederal governments, few directly reference the autonomy question, especially in a Canadian context. On a broad level, Ivo Duchacek, Hans Michelmann, and Panayotis Soldatos introduced the concepts of “paradiplomacy” and “perforated sovereignty” to evaluate the international activity of a wide range of federal states.⁵ In a recent update, Francisco Aldecoa and

2 Eugene R. Wittkopf, Charles W. Kegley Jr. & James M. Scott, *American Foreign Policy: Pattern and Process*, 6th ed. (Belmont CA: Thomson Wadsworth, 2003) at 14.

3 Earl H. Fry, “The United States of America” in Hans J. Michelmann, ed., *Foreign Relations in Federal Countries: A Global Dialogue on Federalism*, vol. 5 (Montreal and Kingston: McGill-Queen’s University Press, 2008).

4 Kim Richard Nossal, *The Patterns of World Politics* (Scarborough ON: Prentice-Hall Allyn and Bacon Canada, 1997) at 279.

5 The first consolidated efforts to deal with the international activity of subfederal units occurred in,

Michael Keating stressed the need to move paradiplomacy beyond domestic institutional variables to include sectoral issues, institution building, and civil society.⁶ In a similar fashion, Brian Hocking has focused on the interaction of state and nongovernmental actors in the formulation of international and domestic trade policy.⁷

A number of American scholars have also reviewed the foreign relations of American states. Earl Fry has examined subfederal trade and investment promotion, foreign offices, export financing, and Canada-United States (U.S.) cross-border regional associations.⁸ Michelle Sager has highlighted a similar range of topics in her study of federalism and international trade in the U.S.⁹ In his studies of American federalism, John Kincaid has published numerous articles focusing on the foreign affairs of American states.¹⁰ In contrast, Robert Stumberg has specifically highlighted provisions of international trade agreements with implications for the autonomy of American states.¹¹

In terms of the Canadian literature, Douglas Brown, Grace Skogstad, and Bruce Doern and Brian Tomlin have all reflected on the roles of provincial actors, questions of centralization and decentralization, and the institutional frameworks that exist in this policy area.¹² Stephen de Boer has explored

Ivo Duchacek, "The International Dimension of Subnational Self-Government" (1984) 14 *Publius: The J. of Federalism* 5. For a review of perforated sovereignty and paradiplomacy, see Ivo Duchacek, Daniel Latouche & Garth Stevenson, eds., *Perforated Sovereignities and International Relations: Trans-Sovereign Contacts of Subnational Governments* (New York: Greenwood Press, 1988); and Hans J. Michelmann & Panayotis Soldatos, eds., *Federalism and International Relations: The Role of Subnational Units* (Oxford: Clarendon Press, 1990).

6 Francisco Aldecoa & Michael Keating, eds., *Paradiplomacy in Action: The Foreign Relations of Subnational Governments* (London: Frank Cass, 1999).

7 Brian Hocking, *Localizing Foreign Policy: Non-Central Governments and Multilayered Diplomacy* (New York: St. Martin's Press, 1993); and Brian Hocking, ed., *Foreign Relations and Federal States* (London: Leicester University Press, 1993).

8 Earl H. Fry, "Federalism and the Evolving Cross-Border Role of Provincial, State, and Municipal Governments" (2005) 60 *International J.* 471; and Earl H. Fry, *The Expanding Role of State and Local Governments in US Foreign Affairs* (New York: Council of Foreign Relations Press, 1998).

9 Michelle Sager, *One Voice or Many?: Federalism and International Trade* (New York: LFB Scholarly Publishing, 2002).

10 John Kincaid, "Globalization and Federalism in the United States: Continuity in Adaptation" in Harvey Lazar, Hamish Telford, & Ronald L. Watts, eds., *The Impact of Global and Regional Integration on Federal Systems: A Comparative Analysis* (Montreal and Kingston: McGill-Queen's University Press, 2003) at 37. See also John M. Kline, "Continuing Controversies Over State and Local Foreign Policy Sanctions in the United States" (1999) 29 *Publius: The J. of Federalism* 111.

11 Robert Stumberg & Matthew C. Porterfield, "Who Preempted the Massachusetts Burma Law? Federalism and Political Accountability Under Global Trade Rules" (2001) 31 *Publius: The Journal of Federalism* 173.

12 Douglas M. Brown & Earl H. Fry, eds., *States and Provinces in the International Economy* (Berkeley: Institute of Governmental Studies Press, University of California, 1993) [Brown & Fry]; Grace

the potential for a greater provincial role in North American integration.¹³ A number of economic studies have also reviewed provincial trade patterns, especially in terms of North American regional economies and the global exports of the provinces.¹⁴ The literature evaluating the international relations of Québec is extensive but somewhat eclectic in focus. There are contributions focusing on Québec's history of international activity and its linkages with France and la Francophonie.¹⁵ Other contributions have reviewed Québec's foreign activity in the context of provincial representation within Canadian federalism.¹⁶ There are also numerous studies examining Québec's international trade policy, especially in the context of the U.S.¹⁷ In contrast, little or no attention has been directed at the foreign trade relations of other provincial governments, with the possible exception of Ontario during the negotiation of the North American Free Trade Agreement (NAFTA).¹⁸ Analysis directly engaging the question of subfederal autonomy, however, is limited. On one hand, Ian Robinson has suggested that neoliberal agreements expose the vulnerability of provinces in terms of regional development programs, worker rights, environmental programs, and health regulations.¹⁹ This author reached a different conclusion in the context of the provinces and Canadian foreign trade policy.²⁰

Skogstad, "International Trade Policy and Canadian Federalism: A Constructive Tension?" in Herman Bakvis & Grace Skogstad, eds., *Canadian Federalism: Performance, Effectiveness, and Legitimacy* (Toronto: Oxford University Press, 2002) [*Canadian Federalism: Performance, Effectiveness, and Legitimacy*]; G. Bruce Doern & Brian W. Tomlin, *Faith and Fear: The Free Trade Story* (Toronto: Stoddart Publishing, 1991).

- 13 Stephen de Boer, "Canadian Provinces, US States and North American Integration: Bench Warmers or Key Players?" (November 2002) 8 Choices 1.
- 14 John F. Helliwell, *How Much Do National Borders Matter?* (Washington, D.C.: Brookings Institution Press, 1998); and Michael A. Anderson & Stephen L.S. Smith, "Canadian Provinces in World Trade: Engagement and Detachment" (1999) 32 Canadian J. of Economics 22.
- 15 Louis Bélanger, *Deux Analyses sur l'Évolution de la Politique Internationale du Québec: 1989-1992* (Québec City: Institut Québécois des Hautes Études Internationales, 1996).
- 16 Nelson Michaud, "Canada and Québec on the World Stage: Defining New Rules?" in Andrew F. Cooper & Dane Rowlands, eds., *Canada Among Nations 2006: Minorities and Priorities* (Montreal and Kingston: McGill-Queen's University Press, 2006); and Louis Bélanger, "The Domestic Politics of Québec's Quest for External Distinctiveness" (2002) 32 American Rev. of Canadian Studies 195 [Bélanger].
- 17 Louis Balthazar, Louis Bélanger, Gordon Mace, et al., *Trente ans de Politique Extérieure du Québec, 1960-1990* (Québec/Sillery: Septentrion and CQRI, 1993); Louis Balthazar & Alfred O. Hero Jr., *Le Québec dans l'Espace Américain* (Montreal: Editions Québec-Amérique, 1999).
- 18 Donald E. Abelson & Michael Lusztig, "The Consistency of Inconsistency: Tracing Ontario's Opposition to the North American Free Trade Agreement" (1996) 29 Canadian J. of Political Science 681.
- 19 Ian Robinson, "Neo-Liberal Trade Policy and Canadian Federalism Revisited," in François Rocher & Miriam Smith, eds., *New Trends in Canadian Federalism*, 2nd ed. (Peterborough: Broadview Press, 2003).
- 20 Christopher J. Kukucha, *The Provinces and Canadian Foreign Trade Policy* (Vancouver: UBC Press, 2008).

III. CONSTITUTIONAL CONSIDERATIONS

In order to evaluate long-term patterns of autonomy, it is important to review both international law and Supreme Court of Canada decisions related to subfederal foreign activity. First, there are international provisions that specify the responsibility of central governments to fulfil treaty commitments. Specifically, article 27 of the 1969 *Vienna Convention on the Law of Treaties*²¹ states that a party to the Convention must not use domestic law as justification for violating international treaty obligations. Prior to the Vienna Convention, these principles were recognized by domestic courts, especially in Switzerland and Belgium, and were subsequently codified in the national constitutions of both France and the Netherlands.²² The Vienna Convention also makes it clear that specific treaties do not have to be institutionally entrenched by legislation or executive order to be applicable. Canada ratified the Vienna Convention in October 1970. The treaty entered into force on 27 January 1980.

Central authority is also reinforced in several international trade agreements. As a signatory to the General Agreement on Tariffs and Trade (GATT) in 1947, Canada bound itself to the agreement's "federal state clause." Article XXIV(12), which was later incorporated into the World Trade Organization (WTO), states that "[e]ach contracting party shall take such *reasonable* measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territory."²³ Some member states have interpreted "reasonable measures" as a guarantee that central governments will use all constitutional means available to ensure provincial compliance. Canada and other federal countries, on the other hand, have argued that this clause does not supersede existing domestic practices within federal states in this policy area. The Canada-United States Free Trade Agreement (CUSFTA) also included a similar "federal-state clause." Article 103 stipulated that "[t]he parties to this agreement shall ensure that *all necessary measures* are taken in order to give effect to its provisions . . . by state, provincial and local governments."²⁴ Admittedly, CUSFTA did not dictate what

21 23 May 1969, U.N.T.S. 1155 at 331 (entered into force 27 January 1980) [*Vienna Convention*].

22 Gerhard Von Glahn, *Law Among Nations: An Introduction to Public International Law*, 2nd ed. (Boston: Allyn and Bacon, 1996) at 43.

23 Douglas M. Brown, "The Evolving Role of the Provinces in Canadian Trade Policy" in Douglas M. Brown & Murray G. Smith, eds., *Canadian Federalism: Meeting Global Economic Challenges?* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1991) at 90 (emphasis added).

24 Douglas M. Brown, "The Evolving Role of the Provinces in Canada-US Trade Relations," in

a party must do to meet these obligations but “it was widely agreed that this reference was stronger than the GATT’s ‘reasonableness’ standard.”²⁵ Article 105 of NAFTA also incorporates “all necessary measures” language.

Domestically, there are three sections of the *Constitution Act, 1867*²⁶ that are applicable to federal-provincial relations and international affairs. These include the treaty-making power, the trade and commerce power, and the peace, order and good government (POGG) clause. Unlike other federations, Canada did not give the federal government explicit control over foreign policy at the time of Confederation. In fact, the only reference to international relations in the *Constitution Act, 1867* is section 132, which grants the Dominion the authority to implement treaties negotiated by Great Britain. Over time, however, Ottawa gained increasing control of its foreign affairs, which in some cases had direct implications for Canadian provinces. In terms of the treaty-making power, *Reference re: Weekly Rest in Industrial Undertakings Act (Can.)*²⁷ established the precedent that Ottawa had the power to *negotiate* international treaties but it did not have the right to *implement* agreements in areas of provincial jurisdiction. Although there was initial concern the ruling would limit federal autonomy, the Supreme Court of Canada did not subsequently use the Labour Conventions case in favour of either level of government, preferring instead to maintain a balance between federal and provincial authority in this issue area.²⁸

Judicial review of the trade and commerce power followed a similar pattern. In 1867, Parliament was given exclusive control over the regulation of trade and commerce in section 91(2) of the *Constitution Act, 1867*. The difficulty with this arrangement, however, was that provinces were granted jurisdiction over property and civil rights, which includes the regulation of contracts through which international trade is conducted. Although the 1881 case, *Citizens Insurance Company v. Parsons*,²⁹ appeared to confirm Ottawa’s control over international trade, later questions were raised regarding the reg-

Douglas M. Brown & Earl H. Fry, eds., *States and Provinces in the International Economy* (Berkeley: Institute of Governmental Studies Press, University of California, 1993) at 115 (emphasis added).

25 Ian Robinson, “The NAFTA, The Side Deals, and Canadian Federalism: Constitutional Reform by Other Means” in Ronald L. Watts & Douglas M. Brown, eds., *Canada: The State of the Federation 1993* (Kingston: Institute of Intergovernmental Relations, Queen’s University, 1993) at 210.

26 (U.K.), 30 & 31 Vict. c. 3 reprinted in R.S.C. 1985, App. II, No. 5.

27 [1937] A.C. 326 [“Labour Conventions”].

28 Robert G. Richards, “The Canadian Constitution and International Economic Relations” in Douglas M. Brown & Murray G. Smith, eds., *Canadian Federalism: Meeting Global Economic Challenges?* (Kingston: Institute of Intergovernmental Relations, Queen’s University, 1991) at 58-59 [Richards].

29 (1881) 7 App. Cas. 96.

ulation of products that were consumed locally and traded internationally. As with Labour Conventions, however, the Supreme Court of Canada did not use trade and commerce to entrench federal or provincial power. Instead, "it reaffirmed that there was no federal power to regulate a single trade or business. And, it indicated that issues...must be determined on a careful case by case basis."³⁰

A third means of interpreting federal authority is the POGG clause. In comparison to trade and commerce or the treaty-making power, judicial interpretation of POGG is less clearly defined, especially in terms of economic issues. For Canadian provinces, the most relevant Supreme Court decision is *R. v. Crown Zellerbach*.³¹ In this case, a forest company was accused of dumping wood waste into the Pacific Ocean. Although existing federal legislation defined "sea" as an extension of provincial internal waters, the Supreme Court ruled that POGG allowed Ottawa to extend its control into provincial areas of jurisdiction when issues were deemed matters of "national concern." *Crown Zellerbach*, however, has also not served as an extensive precedent for federal control, especially due to the strong dissenting opinion of Justice La Forest who argued that marine pollution was not distinct enough to qualify as a matter of national concern.³² Subsequent cases, such as *Friends of the Oldman River Society v. Canada*³³ and *R. v. Hydro-Québec*,³⁴ have reinforced this federal-provincial balance. Therefore, these rulings, which in some cases date back to the nineteenth century, have reinforced a level of constitutional ambiguity that has led to Canadian provinces having a degree of international legitimacy not found in other federal states.³⁵

IV. QUÉBEC

Québec's pursuit of an autonomous international presence is well documented. From the outset, these initiatives were designed to highlight the province's cultural and linguistic differences and focused, for the most part,

30 Richards, *supra* note 28 at 62.

31 [1988] 1 S.C.R. 401 [*Crown Zellerbach*].

32 *Ibid.* at 457-58; see also Gerald Baier, "Judicial Review and Canadian Federalism" in *Canadian Federalism: Performance, Effectiveness, and Legitimacy* *supra* note 12 at 27.

33 [1992] 1 S.C.R. 3.

34 [1997] 3 S.C.R. 213.

35 Christopher J. Kukucha, "From Kyoto to the WTO: Evaluating the Constitutional Legitimacy of the Provinces in Canadian Foreign Trade and Environmental Policy" (2005) 38 Canadian J. of Political Science 129.

on other francophone countries.³⁶ Initially, Québec's efforts were limited to a series of foreign offices. In 1882, the province appointed an agent-general in Paris, and in 1911 Québec opened a "commercial" office in Britain, followed by a provincial posting in Brussels in 1915. Although these offices were subsequently closed, the provincial government had re-established its presence in Paris by the 1960s. In 1965, Québec also negotiated an educational exchange with France, its first formal international agreement. Provincial objectives were further clarified in the 1965 Gérin-Lajoie doctrine, which argued that Québec had the right to pursue international objectives consistent with its cultural identity or in constitutionally defined areas of jurisdiction. In February 1968, Gabon, with the encouragement of the French government, extended an invitation to Québec directly for an international education conference. The following year, Canada was represented by a joint-delegation at a franco-phone conference in Congo due to a cooperative agreement between Ottawa and Jean-Jacques Bertrand's provincial government. A similar framework was used to allow a federal-provincial delegation to attend a subsequent meeting in Niger.³⁷

In the 1970s, however, René Lévesque's Parti Québécois (PQ) separatist government used foreign policy as a means of generating support for a proposed referendum on Québec independence. Specifically, the PQ sought diplomatic immunity for its foreign representatives, made statements on human rights issues (such as South African apartheid), and considered an independent defence policy for a sovereign Québec, including its potential withdrawal from both the North Atlantic Treaty Organization (NATO) and the North American Aerospace Command (NORAD).³⁸ During the following decade, Québec's foreign ambitions began to fade, primarily due to the PQ's defeat in the 1980 separatist referendum and a loss of support from the French government. The arrival of Brian Mulroney as prime minister in September 1984, the resignation of Lévesque in October 1985, and the PQ's subsequent defeat in provincial elections the following month, also created a shift in federal-provincial relations. Instead of independence, Québec returned to the priorities of Gérin-Lajoie, which were reflected in an agreement between the new Liberal government of Robert Bourassa and the Mulroney government, which

36 Kim Richard Nossal, *The Politics of Canadian Foreign Policy* (Scarborough: Prentice-Hall Canada, 1985) at 199-200.

37 Kim Richard Nossal, *The Politics of Canadian Foreign Policy*, 3rd ed. (Scarborough: Prentice Hall Canada, 1997) at 326 [Nossal, *Politics*].

38 Stéphane Roussel & Charles-Alexandre Théorêt, "A 'Distinct Strategy'? The Use of Canadian Strategic Culture by the Sovereignist Movement in Québec, 1968-1996" (2004) 59 *International J.* 557.

granted both Québec and New Brunswick formal representation at the first la Francophonie summit in Paris.³⁹

The 1994 election of a PQ government in Québec ensured a return to the province's previous approach to international relations. Jacques Parizeau fought proposed la Francophonie reforms that had the potential to weaken Québec's status in the organization prior to the Marrakech Ministerial Conference in 1996. The province also expanded its standing in la Francophonie at the 1999 summit in Moncton, New Brunswick, to include all ministerial meetings.⁴⁰ Support for Québec separatism and the province's foreign policy agenda was further bolstered by the success of the Bloc Québécois (BQ) in the 1993 federal election. In fact, in an address to the United Nations in March 1994, Lucien Bouchard, the leader of the BQ, made it clear that separatism was once again at the forefront of Québec's political agenda. Bouchard continued to embrace sovereignty and international legitimacy for Québec after becoming premier in 1996. Under the current Liberal government of Jean Charest, however, Québec has returned to its historic Gérin-Lajoie agenda. In terms of international institutions, Québec has called for formal provincial participation in WTO negotiations, and in 2006 negotiated a formal role for itself in UNESCO. In October 2008, the province also negotiated a bilateral labour mobility agreement with France regarding the recognition of professional credentials from both countries.⁴¹

Although the UNESCO announcement and the bilateral labour deal are unprecedented developments, they need to be kept in context. Critics of the UNESCO decision, for example, note that Québec's role is limited to shaping Canada's overall UNESCO policies, and does not extend to the province an independent seat, vote, or presence in the organization. This raises the question of whether Québec's standing in UNESCO will diverge significantly from the province's already established participation in la Francophonie. Other observers have pointed out that Paul Martin made a similar UNESCO commitment to Québec in 2004, but then withdrew the offer. The labour-mobility agreement also hinges on the successful negotiation of future bilateral Mutual Recognition Agreements (MRAs) encompassing over one hundred professions and trades. All provinces have the right to enter into MRAs in relevant areas of jurisdiction. The successful negotiation of dozens of indepen-

39 Nossal, *Politics*, *supra* note 37 at 204-05.

40 Bélanger, *supra* note 16 at 202.

41 Alberta has also pursued a presence in the North American Energy Working Group of the Security and Prosperity Partnership (SPP) but to this point Ottawa has not approved a formalized role for the province in these discussions.

dent MRAs dealing with a myriad of different professions is also not a guaranteed outcome, as ongoing debates regarding the movement of professionals within the NAFTA and WTO frameworks would suggest.⁴²

Finally, Québec's legislative assembly was granted the right to ratify and review all federal treaties focusing on relevant areas of subfederal jurisdiction in the *Act to Amend the Act Respecting the Ministère des Relations Internationales*.⁴³ Some critics, such as Stéphane Paquin, suggest this created a potential problem within Canadian federalism regarding the ratification of future international agreements.⁴⁴ Others, such as Peter Hogg, point out that the ratification of treaties is the prerogative of the Crown and/or the federal executive, and there is no formal role for any elected legislatures in this process, unlike the United States Congress. Although parliamentary approval for significant agreements has occurred in the past, Hogg also points out that in recent years it has become increasingly less common to require formal ratification for international commitments.⁴⁵ Therefore, based on Hogg's analysis, the Québec legislature will be limited to passing legislation based on the right to "review" international treaties in areas of provincial jurisdiction. This is a significant development, but it falls short of creating a constitutional crisis on the question of ratification. As in other cases involving Québec, this autonomy predates the current Harper government.

V. TRADE PROMOTION & PROVINCIAL FOREIGN OFFICES

Most provinces engage in trade promotion at the international level. In some cases, these efforts are part of federal initiatives, such as Jean Chrétien's Team Canada program. Other provinces, however, organize independent trade missions. In the 1990s, Alberta targeted the Pacific Rim with the goal of diversifying its trade relations. Ontario also recently completed its first trade

42 "Labour Mobility: France and Québec Sign Historic Agreement" (17 October 2008), online: Gouvernement du Québec, Ministère des Relations Internationales <http://www.mri.gouv.qc.ca/en/_scripts/Actualites/ViewNew.asp?NewID=5898&lang=en>.

43 R.S.Q., c-M-25.1.1. as am. by Bill 52, *An Act to amend the Act respecting the Ministère des Relations Internationales and other legislative provisions*, 2nd Sess., 36th Leg., Québec, 2002 (assented to 8 June 2002).

44 Stéphane Paquin, "Quelle Place pour les Provinces Canadiennes dans les Organisations et les Négociations Internationales du Canada à la Lumière des Pratiques au Sein d'Autres Fédérations?" (2005) 48 *Canadian Public Administration* 477.

45 Peter W. Hogg, *Constitutional Law of Canada*, vol. 1 (Toronto: Thomson Carswell, 1997) at 11:3–11:18.

mission to Asia in two decades. This mission consisted of provincial officials and business representatives in the technology, tourism, and education sectors. In addition to Asia, Ontario has targeted India and more traditional trading partners in Japan and Western Europe in sectors such as life sciences, information technology, automobiles, environmental technologies, and the aerospace industry.⁴⁶ In 2008, the province also sent a trade mission to the Middle East to attend the Cityscape Dubai Exhibition. New Brunswick has recently focused on trade promotion as part of its international strategy, targeting export markets in China, Germany, Japan, Mexico, Eastern Europe, and members of la Francophonie. In addition to trade missions, Ontario also organizes training for both exporting companies and members of the provincial bureaucracy.⁴⁷

Despite the significance of provincial trade missions, it is important to keep these efforts in perspective. During Ontario's 2005 Asia tour, Premier Dalton McGuinty attempted to lower expectations by stressing that the mission was not focused on "announceables" (actual contracts) but on educating the Chinese about the province's economic potential. The Alberta government has also acknowledged that numerous barriers exist in its attempts to diversify trade relations in Asia, despite a subsequent trade mission to China in 1997. These barriers include a lack of railway infrastructure to transport exports through British Columbia (B.C.), and capacity problems in coastal ports. Therefore, Alberta relies on other methods of advancing provincial trade interests, including the protection of oil and gas exports in international trade agreements, reductions in tariffs in the agricultural sector, and an ongoing commitment to foreign trade offices.⁴⁸

In fact, most provincial governments use foreign offices as a primary means of pursuing international trade and investment. As already noted, Québec was the first province to establish a series of foreign provincial offices in the early 1900s. During this period, Ontario was the only other province with an international office in London, established in 1918. For the most part, these offices were designed to supplement expanding federal representation

46 Sarah McGregor, "McGuinty's trip to China set on making business contacts, not announcements" *Embassy: Canada's Foreign Policy Newsweekly* (21 September 2005) 9, online: Embassymag.ca <http://www.embassymag.ca/reports/2005/092105_em.pdf>.

47 Brian Abeda, "New Brunswick looking beyond U.S. relationship: Maritime province eyes new markets in France and China" *Embassy: Canada's Foreign Policy Newsweekly* (21 September 2005) 12, online: Embassymag.ca <http://www.embassymag.ca/reports/2005/092105_em.pdf>.

48 Christina Leadlay, "Alberta-Asia trade will need infrastructure improvements" *Embassy: Canada's Foreign Policy Newsweekly* (21 September 2005) 13, online: Embassymag.ca <http://www.embassymag.ca/reports/2005/092105_em.pdf>.

abroad. In 1868, Canada's Dominion Agency for Emigration was opened in London, and several other immigration offices were established throughout Europe. By 1907, twelve trade commissions were located in such diverse locations as Yokohama, Sydney, Cape Town, and Mexico City. As Kim Nossal has noted, however, these federal and provincial officials were "not diplomats in anything but the most superficial sense. They were not accorded diplomatic status; nor, notably, were they representatives of a government with an independent international personality, capable of conducting an independent foreign policy."⁴⁹

Most provincial offices were closed by the 1930s, but provinces began to revisit the idea of foreign delegations following the Second World War. In 1945, Ontario reopened its London office and established a presence in Chicago (1953), New York (1956), and Los Angeles and Cleveland (1967). The province also opened offices in Europe and Asia, including Milan (1963), Stockholm (1968), Brussels, Vienna and Tokyo (1969), Frankfurt (1970), and Mexico City (1973). Québec, on the other hand, posted a delegation to New York in 1941 and added several offices in subsequent years, including Brussels (1972), Tokyo (1973), Mexico City (1980), and Buenos Aires (1998). For the most part, however, other provincial governments did not follow a similar pattern. Alberta limited its offices to London (1948), Los Angeles (1964), and Tokyo (1970). Remaining provinces had either no interest, or an idiosyncratic approach to overseas representation. New Brunswick opened a London office in 1970, and subsequently established a presence in Hamburg and Boston, all of which had ended by the 1990s.⁵⁰ Manitoba posted representatives in Minneapolis in 1975, and Saskatchewan opened and closed a series of offices in the late 1980s, including London, Zurich, Hong Kong, Minneapolis, and New York.⁵¹ Nova Scotia also recalled its delegation from London, but maintained a trade and investment presence in Boston until 2002.⁵² In addition, British Columbia had various contacts in the Pacific Northwest and California. Regardless, by the 1990s the majority of these offices, including those for Ontario and Québec, became targets for provincial budget cuts.

In 2001, Mike Harris and the Conservatives announced plans to open

49 Nossal, *Politics*, *supra* note 37 at 236.

50 Personal interview (2 June 2003). The federal, provincial, and industry officials interviewed for this study spoke on the condition of anonymity with the understanding there would be no direct quotations without permission. Future references will cite only the date of these meetings. Locations are excluded given the small number of officials working in this policy area (to best ensure confidentiality).

51 Personal interview (28 May 2003).

52 Personal interview (29 May 2003).

Ontario missions in New York, Shanghai, Tokyo, Munich, and London. The province also opened, and closed, offices in several American cities, including Boston and Atlanta. The McGuinty government continued this trend, establishing the London and Tokyo delegations first announced by Harris, and opening offices in Los Angeles, New York, Paris, Mexico City, Munich, New Delhi, Shanghai, and Beijing.⁵³ Alberta is another province with expanding foreign representation, with offices in Beijing, Hong Kong, Tokyo, Seoul, Taipei, Mexico City, and European postings in London and Munich. The U.S., however, is the key focus of Alberta's trade promotion efforts. At the institutional level, this is best reflected with the opening of its mission in Washington, D.C. in March 2005. The decision to establish an office in Washington, connected to the Canadian embassy, was explicitly designed to protect the province's energy and agricultural interests. During the Smithsonian's Folklife Festival in 2006, the premier and ten cabinet ministers visited Washington and participated in several conferences. Meetings were also held with Vice President Dick Cheney and other prominent members of Congress. For two weeks, a large truck from the oil sands was parked in front of the Smithsonian, as a friendly reminder to Americans of their dependence on Alberta oil and natural gas.

Not surprisingly, Québec has also maintained its international presence with twenty-five offices in seventeen countries. These include general delegations in Brussels, London, Mexico City, New York, Paris, and Tokyo. A less comprehensive range of services is available in Buenos Aires, Boston, Chicago, and Los Angeles. Government bureaus are located in Barcelona, Beijing, Damascus (Immigration Office), Hong Kong (Immigration Office), Miami, Munich, Shanghai, Vienna (Immigration Office), and Washington (Tourism Office). Finally, Québec has trade branches in Atlanta, Berlin, Rome, Santiago, Seoul, and Taipei, including additional business agents in Lima, Milan, and Hanoi.⁵⁴ Québec's presence in Washington, D.C. was officially established as a tourism office in 1978. Since its inception, the federal government has reluctantly accepted, but not approved, Québec's use of its office to develop working relationships with members of Congress and the executive branch to protect provincial interests. In recent years, Québec has also worked to develop ties with Washington universities, think tanks, and non-governmental organizations, in the pursuit of these objectives. In an attempt

53 Ontario, Ministry of Economic Development, *Ontario Opens Marketing Centre in Paris: McGuinty Government Promoting Ontario's Economy In France* (10 July 2008), online: Ministry of Economic Development <<http://www.ontariocanada.com/ontcan/page.do?page=6143&lang=en>>.

54 "Québec Offices Abroad," online: Québec, Ministère des Internationales <http://www.mri.gouv.qc.ca/en/ministere/bureaux_etranger/bureaux_etranger.asp>.

to discourage other provinces from establishing offices in the U.S. capital, and to monitor ongoing efforts by Québec and Alberta, Prime Minister Paul Martin established an "Advocacy Secretariat" in the Canadian embassy in Washington. The Harper government subsequently renamed this position the "Minister (Legislative/Sub-National/Public Affairs) and Head, Washington Advocacy Secretariat."⁵⁵

VI. TRADE POLICY

Unlike trade promotion, trade policy is related to the negotiation and implementation of international commitments. In this case, a slightly different relationship between Ottawa and the provinces has evolved, primarily over issues of consultation and participation. At the international level, foreign trade agreements now include areas of subfederal jurisdiction, such as services, agriculture, alcohol, government procurement, national health and safety standards, energy, and environment and labour issues. Provincial trade and subsidy practices were also targeted by the U.S. as early as the 1970s in a wide range of sectors, including pork, softwood lumber, automobile production, and Michelin tires. Saskatchewan's nationalization of American-owned potash firms and Québec's takeover of Asbestos Corporation were also under fire during this period. Domestically, as already noted, judicial rulings by the Privy Council and the Supreme Court of Canada enhanced the international legitimacy of Canadian provinces. Provincial governments were also becoming concerned with federal policy initiatives that challenged subfederal interests. The National Energy Program (NEP) is an example. As a result, several provinces, especially Québec, Ontario, and Alberta, began to demand a more inclusive role in the formulation of Canadian foreign trade policy.

In response to these pressures, Ottawa attempted to institutionalize the interests of the provinces within the federal bureaucracy. During this period, External Affairs was reorganized to include a new Federal Provincial Coordination Division (FPCD). While the department was originally created to monitor the activities of Québec, it soon became responsible for keeping the provinces informed of all relevant Canadian international initiatives.⁵⁶ As External Affairs became more comfortable with provincial international activ-

55 Jane Taber, "The empty spot on the Prime Minister's wall" *The Globe and Mail* (23 December 2006) A5.

56 Elliot J. Feldman & Lily Gardner Feldman, "The Impact of Federalism on the Organization of Canadian Foreign Policy," in M.W. Westmacott & R.D. Olling, eds., *Perspectives on Canadian Federalism* (Scarborough: Prentice-Hall Canada, 1988) 268-72.

ity, however, the political need to monitor these initiatives diminished. As a result, the Privy Council Office (PCO) took control of most responsibilities. External Affairs continued to maintain a federal-provincial office, but in the words of one official, it was “little more than a man and a boy.”⁵⁷

During the Tokyo Round of the GATT, Ottawa adopted traditional practices of “executive federalism” to engage provinces on matters of trade policy.⁵⁸ At this point, the only formal mechanism for provincial input was the Canadian Trade and Tariffs Committee (CTTC), which was responsible for gathering briefs from business, unions, consumer groups, the provinces, and other interested parties. An ad hoc federal-provincial committee of deputy ministers was established in 1975, which was replaced by a Canadian Coordinator for Trade Negotiations (CCTN) in 1977. In the spring of 1985, the premiers of British Columbia, Alberta, Saskatchewan, and Manitoba all announced their support for “full provincial participation” in negotiations for the proposed CUSFTA. Although the provinces were unable to secure a formal role in the Trade Negotiations Office (TNO), headed by Simon Reisman, a commitment was made to continue consultation within the CCTN. Following the implementation of CUSFTA, the CCTN became the Committee for the Free Trade Agreement (CFTA) on which each province had one official representative. Ottawa also set up a series of consultative committees within various provincial departments to address sectoral concerns and ongoing trade irritants. Similar committees were also established for the stalled Uruguay Round negotiations. During negotiations for the NAFTA, the CFTA remained in place but Ottawa and the provinces also agreed to create the Committee for North American Free Trade Negotiations (CNAFTN).

Ultimately, the CNAFTN process evolved into the Federal-Provincial-Territorial Trade Committee (CTRADE) system. CTRADE currently involves a series of meetings between Ottawa and the provinces that occur four times annually. Initially, some provinces expressed concerns with the content and quality of information available through CTRADE. More recently, however, the federal government has attempted to improve access to information and the agenda-setting process. According to some officials, Ottawa has also prioritized provincial input due to the complexity of current negotiations, especially in areas such as services.⁵⁹ At the same time, however, there is ongoing pressure from specific provinces, such as Québec and Alberta, for a more for-

57 Personal interview (11 February 1994).

58 Donald V. Smiley, *The Federal Condition in Canada* (Toronto: McGraw-Hill Ryerson, 1987).

59 Personal interview (28 August 2001); Personal interview (9 October 2001).

malized role. Québec, for example, has previously supported a European Union (EU) model, in which member states are direct participants in EU negotiating teams. Alberta has also called for the institutionalization of federal-provincial relations outside of CTRADE. Of specific concern to Ottawa is a formal voting formula that could restrict Canada's options in international negotiations. Enthusiasm for a more formalized structure is also not shared by other provinces, which have concerns regarding the need for additional bureaucratic resources and expertise.⁶⁰

In addition to consultation, there is evidence that provinces have successfully protected subfederal sectoral interests and directly influenced Canadian foreign trade policy. For example, pressure from Québec contributed to Canada's contradictory approach to agriculture during both the WTO and NAFTA negotiations. Specifically, Ottawa promoted the liberalization of grains and red meats, due to the market advantage enjoyed by western provinces, but protected dairy and poultry, which are vital to the economy of Québec. Alberta, in response to the NEP, also ensured that energy provisions in NAFTA guaranteed its exports of oil to the U.S.

Article 2.2 of the WTO Agreement on Subsidies and Countervailing Measures (SCM) further supports this argument.⁶¹ Article 2.2 states that "the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy." Washington targeted this article in an attempt to limit competitive state subsidies. Canada opposed this position due to the threat it posed to regional and provincial subsidy programs. As one official pointed out, "the U.S. proposal would have made provincial programs countervailable [sic.] and all provinces, not simply Ontario and Québec opposed it."⁶² The other important factor was that "regional subsidies in the U.S. are primarily state driven programs, whereas in Canada the provinces rely almost exclusively on funding from the federal government."⁶³

Another specific interest for provincial governments is trade in services. In terms of NAFTA, pressure from Canadian provinces was directly reflected in annex I and annex II of the SCM. Annex I excluded all provincial health measures (as defined in article 1206 and existing prior to 1 January 1994) relating

60 *Canadian Federalism: Performance, Effectiveness, and Legitimacy*, *supra* note 12 at 171.

61 *Agreement on Subsidies and Countervailing Measures*, WTO, online: WTO <http://www.wto.org/english/docs_e/legal_e/24-scm.pdf> [SCM].

62 Personal interview (9 February 1994).

63 *Ibid.*

to national treatment, Most-Favoured Nation (MFN) status, and local presence requirements. As Mark Crawford has noted, this reservation immediately excluded most health services as the “basic nature of provincial schemes have not changed since 1994.”⁶⁴ Less clear, however, was whether emerging privately funded health-care services would be exempt. The Supreme Court of Canada’s decision to strike down Québec’s prohibition of private health insurance in *Chaoulli v. Québec (Attorney General)*,⁶⁵ rendered 9 June 2005, further reinforced the possibility that these services could be exposed to the NAFTA dispute settlement process. The annex II “Social Service Reservation” clause, on the other hand, excluded provincial social services “established or maintained for a public purpose.” As a result, Canadian officials have argued that annex II includes “private delivery” of “publicly-funded” services. Ultimately, B.C. pushed for a clear definition of social services in annex II, which resulted in “public education, public training, health, and child care” being included in provisions related to cross-border services and investment.⁶⁶

B.C. also argued for a broader exemption related to article 1.3 of the WTO’s General Agreement on Trade in Services (GATS). These provisions excluded services provided by regional and local governments “supplied neither on a commercial basis, nor in competition with one or more service suppliers.” As Crawford points out, B.C. was the only province to dispute what it believed was the too-narrow definition of the exemption. Other federal and provincial officials argued that the existing language of article 1.3 could be “interpreted broadly” and suggested the recognition of the “right to regulate” and “due respect for national policy objectives” in the GATS preamble protected subfederal interests.⁶⁷ Although article 1.3(c) states that all competition should be “economically rational as well as legally and practically possible,” Anthony VanDuzer has also argued that health and education services are likely “within the exclusion.”⁶⁸ Regardless, in the case of GATS the B.C. government had an impact on Canada’s negotiating position but did not alter the language of the WTO agreement.

In the current Doha Round, a wide range of services are again open to

64 Mark Crawford, “Truth or Consequences? The Law and Politics of the GATS Health Care Debate” (Paper presented at the conference “A Review of Canada’s International Policies,” Norman Patterson School of International Affairs, Ottawa, Ontario, 7 November 2003) 18 [Crawford].

65 2005 SCC 35, [2005] 1 S.C.R. 791.

66 Personal interview (2 August 2004).

67 Crawford, *supra* note 64 at 22-23.

68 J. Anthony VanDuzer, *Health, Education and Social Services in Canada: The Impact of the GATS* (Ottawa: Department of Foreign Affairs and International Trade, 2005) at 78, online: <<http://www.dfaif-maeci.gc.ca/tna-nac/documents/health-edu-ss-gats-en.pdf>>.

negotiation. In the decade following the GATS, however, most provincial officials have reviewed existing legislation and now make a distinction between “defensive” and “offensive” interests. Defensive considerations require ongoing support for government regulatory capacity, especially in the area of health and education. Offensive interests, on the other hand, are service-based issues potentially benefiting from a reduction of market barriers, such as GATS Mode IV, or business travel. For example, in Ontario there is obvious sensitivity to defensive concerns, but the province also supports greater Mode IV liberalization, especially in relation to professional services, such as architecture, engineering, management, and accounting.⁶⁹ At the same time, there is reluctance to expose tourguide services, given the interdependent nature of regulatory controls tied to municipal jurisdiction, and fishing, hunting, and other licence requirements. Regardless, it is important to remember that WTO rulings related to GATS are limited. In fact, only twelve of 332 complaints dating back to 1995 refer directly to reference to services, and only three of these targeted Canada: *Certain Measures Affecting the Automotive Industry*,⁷⁰ *Certain Measures Concerning Periodicals*,⁷¹ and *Measures Affecting Film Distribution Services*.⁷²

Finally, it is also clear that in some cases provincial interests are considered so important that separate international agreements are negotiated. The automobile industry in Ontario, for example, motivated Ottawa to negotiate the Canada-United States Auto Pact in 1965. A more recent example, is the 1986 Canada-United States Memorandum of Understanding (MOU) on softwood lumber. During negotiations, Ontario used the forestry sector to draw attention to broader concerns regarding CUSFTA. Québec also warned of the economic costs of a potential U.S. Department of Commerce countervailing duty. The newly elected premier of British Columbia Bill Vander Zalm openly challenged Ottawa’s position, and at one point B.C. officials entered into direct negotiations with U.S. representatives. Despite this pressure, the final MOU was only a partial victory for Canadian provinces. The agreement placed a 15 percent export tax on all lumber shipments to the United States. The provinces, however, were allowed to increase stumpage fees in exchange for a reduction in the 15 percent export charge. In B.C., the export tax was

69 Personal interview (30 May 2002).

70 (2000), WTO Doc. WT/DS139/AB/R, WT/DS142/AB/R (Appellate Body Report), online: WTO <<http://docsonline.wto.org>>.

71 (1997), WTO Doc. WT/DS31/AB/R (Appellate Body Report), online: WTO <<http://docsonline.wto.org>>.

72 (1998), WTO Doc. WT/DS117/1 (Appellate Body Report), online: <<http://docsonline.wto.org>>; Personal interview (31 August 2005).

eventually eliminated and in Québec it was reduced in various stages before stabilizing at 3.1 percent. The only difficulty was that stumpage increases raised timber costs to all markets, not just those in the U.S. Not surprisingly, it was pressure from the provinces and industry that contributed to Canada's decision to terminate the MOU after its five-year term expired in 1991.⁷³

In contrast, the 2006 Canada-U.S. Softwood Lumber Agreement (SLA) was viewed by some observers as a settlement imposed on the provinces by federal negotiators. In April 2005, Ottawa forwarded a U.S. proposal to Canadian producers that included export taxes, ongoing quotas, and a commitment to return some, but not all, of the approximately \$5 billion in duties already collected by Washington. Within hours, Ontario rejected the proposal with B.C. and Québec expressing similar reservations. For British Columbia the proposal was especially difficult to accept given that approximately half of the duties paid to the United States came from provincial producers. Despite this pressure, a "terms sheet" outlining the parameters of a final agreement was signed by both Canada and the United States on 27 April 2006. Opposition from B.C. was immediate, but divisions within industry appeared as Canfor, Weyerhaeuser, and Abitibi-Consolidated publicly endorsed the tentative settlement. After initial concerns, Ontario and Québec also decided to support the Softwood Lumber Agreement, which was formally signed on 1 July 2006.

Although B.C. initially refused to endorse the SLA, the agreement did not directly challenge the province's long-term autonomy in this sector. In the following months, for example, B.C. negotiated several changes to the SLA, including acceptance of the province's market-based pricing system and a review of the commercial viability of the agreement's "running rules." Termination of the agreement was also changed to be permitted after eighteen months following implementation, with six months notice, and a "standstill clause" was included, prohibiting any U.S. trade remedy cases for a one-year period.⁷⁴

In addition, the B.C. government had also previously published its Forestry Revitalization Plan (FRP) in March 2003. The FRP included significant provincial reforms including a 20 percent tenure reallocation of logging rights from major licencees. This was designed to allow greater access for First Nations, new entrepreneurs, and remanufacturers. The FRP also introduced

73 T.M. Apsey & J.C. Thomas, *The Lessons of the Softwood Lumber Dispute: Politics, Protectionism and the Panel Process*, at 12-19, online: <<http://www.acah.org/aspey.htm>>.

74 Wendy Leung, "B.C. OK's amended softwood agreement" *The Vancouver Sun* (17 August 2006) A1.

new guidelines for processing timber. Historically, “appurtenancy” dictated where harvesters could process lumber, thereby ensuring the survival of communities that relied on the forestry sector for employment. The FRP, however, maintained export restrictions ensuring that timber cut in B.C. remained in the province for processing. The FRP also introduced a new market-driven system for calculating stumpage fees. Despite these changes, the FRP did not significantly alter provincial practices, especially in terms of market access. Government-industry alliances were protected with extensive compensation for companies losing licenses, which could then rebid for access. Log export controls also ensured that the majority of raw logs were not shipped to external markets. In sum, significant regulatory capacity remained, and many of these practices directly influenced Canada’s negotiating position and the final legal text of the 2006 SLA.⁷⁵

VII. CROSS-BORDER FUNCTIONAL RELATIONS

Provinces engage in a wide range of cross-border activities, including issues related to the environment, transportation corridors, water management, security, road maintenance, and firefighting. This interaction takes place in a number of formal and informal settings. At the executive level, the oldest ties exist in Atlantic Canada. The Conference of New England Governors and Eastern Canadian Premiers (NEGECP) was formalized following an initial meeting focusing on energy issues in 1973. A wide range of issues are addressed in the NEGECP, including energy, tourism, trade irritants, transportation, and economic development. New Brunswick, however, has recently become an active participant in the Eastern Regional Conference of the Council of State Governments. The province has also signed additional agreements with Maine related to highway and bridge maintenance, and management of the St. Croix Waterway.⁷⁶ For the most part, other provinces in Atlantic Canada have not pursued additional regional linkages due to the absence of a land border with the United States. Competing economic interests, including lobsters, blueberries, and potatoes, also limit the incentive for stronger subfederal cooperation.⁷⁷

In evaluating cross-border functional relationships in central Canada it is important to make a distinction between Ontario and Québec. Both provinc-

75 British Columbia, Ministry of Forests, *BC Heartlands Economic Strategy - Forests: The Forestry Revitalization Plan* (Victoria: Ministry of Forests, 2003) at 10-20.

76 Personal interview (2 June 2003).

77 Personal interview (28 May 2003); Personal interview (29 May 2003).

es are associate members of the Council of Great Lakes Governors (CGLG), but Québec's ties to Atlantic Canada, and the importance of hydroelectricity, are such that its cross-border relations are more extensive. In fact, Ontario's subnational activity is limited to a narrow range of water management issues within the CGLG, specific trade disputes, assorted functional agreements, and direct ties with U.S. state representatives. Dalton McGuinty's Liberal government has prioritized closer subfederal linkages with U.S. states. For the most part, this has occurred at the executive and official level, including a bilateral meeting with the governor of Georgia in 2005. The assistant deputy minister and other officials in the Ministry of Economic Development and Trade (MEDT) have also developed contacts in several American states, especially New York and Pennsylvania. For the most part, however, Ontario's cross-border relations are driven by issue-specific concerns.⁷⁸

Québec, on the other hand, has a number of well-developed subfederal relations, which are the result of the provincial energy interests and its participation in the NEGECP. Therefore, the province has a historic commitment to cross-border linkages that does not exist in Ontario. In fact, much of the motivation to participate in the NEGECP was to secure a stable market for Québec's energy exports. Although energy remains a crucial issue for Québec, this forum also expanded its focus following September 11, 2001. For example, at the 2002 NEGECP meetings in Québec City, trade, security, and environmental issues were on the agenda. At the same time, there are Québec officials who view the Conference of Governors and Premiers as a forum driven by American interests. Although Québec is currently a member of the conference's subcommittee on trade and globalization, provincial officials cite minimal interest from U.S. representatives unless it focuses on cross-border infrastructure projects.⁷⁹ Therefore, Québec has pursued other institutionalized linkages in the region, including annual bilateral "summits" with New York, which date back to 1983.

The provinces of Manitoba and Saskatchewan also have cross-border linkages with American states. Saskatchewan is an associate member of the Midwestern Legislative Conference (MLC), a regional forum linked to the Council of State Governments Midwest. For the most part, the MLC focuses on functional issues such as economic development, the environment, education, health and human services, and natural resources and energy. However,

78 Personal interview (31 August 2005).

79 Personal interview (4 June 2003).

the MLC also has a Mid-West Canada Relations Committee, created in 1991.⁸⁰ Although Manitoba recently joined the MLC, the province has historically emphasized cross-border linkages within the Western Governors Association (WGA). Manitoba is not a formal member of the WGA but Premier Garry Doer has emphasized this forum for trade promotion and functional agreements such as the Memorandum of Understanding on Drought and Wildland Fires signed in September 2003. In addition, Manitoba has negotiated bilateral MOUs with several American states and municipalities. The province, for example, recently completed a series of agreements with Minnesota related to economic development, trade, tourism, water issues, and education. In addition, Manitoba signed an MOU with Texas on trade and economic development, and engaged in preliminary discussions with California on clean energy strategies. Manitoba also signed an MOU on bioscience technology with the city of Atlanta.⁸¹

Among the western provinces, Alberta has the most prolific agenda related to cross-border functional issues. In fact, the province is associated with the WGA, the Council of State Governments West (CSG-West), the Pacific Northwest Economic Region (PNWER), the Rocky Mountain Trade Corridor, the Montana-Alberta Bilateral Advisory Council (MABAC), and the CanAm Border Trade Alliance. In terms of the WGA, Alberta has also entered into agreements on cross-border technical issues, such as the protocol "Governing the Siting and Permitting of Interstate Electric Transmission Lines in the Western United States," signed in June 2002.⁸² An addendum to the initial protocol was also negotiated by Alberta in April 2004. Another example of Alberta's cross-border regional agenda is its involvement in PNWER. Although Alberta's primary interest in PNWER is the development of export markets, it has also used the forum to address other issues such as CANAMEX, a proposed trade corridor through Alaska, the Yukon, B.C., Alberta, Montana, Idaho, Utah, and Nevada to the Mexican border. Following September 11, PNWER also focused on issues aimed at preventing the disruption or slowdown of cross-border shipping and business travel.⁸³

B.C.'s interest in cross-border functional issues has also increased in recent years. The province is now associated with the WGA, CSG-West, PNWER,

80 Personal interview (31 May 2004).

81 Personal interview (2 June 2004).

82 Available online: <http://www.fs.fed.us/specialuses/documents/interagency_wga_elec_trans_Protocol.pdf>.

83 Alberta, International and Intergovernmental Affairs, *US Pacific Northwest-Alberta Relations* (Edmonton: Government of Alberta, 2004); and Alberta, International and Intergovernmental Affairs, *Montana-Alberta Relations* (Edmonton: Government of Alberta, 2004).

and the International Mobility and Trade Corridor (IMTC). Not surprisingly, B.C.'s influence is often linked directly to the mandate and membership of these organizations. In the WGA, B.C. has articulated provincial concerns related to the Canada-U.S. softwood lumber dispute. In addition, B.C. has also signed bilateral agreements with other WGA members, most notably Idaho and Montana, on environmental protection and conservation. Unlike the WGA, B.C. has official standing within the CSG-West. B.C. became an "associate" member in 2000 but its influence remains limited in this forum. B.C.'s membership in PNWER is also driven by matters of international trade. A dispute between Oregon, B.C., and Alberta regarding horticultural producers and provincial phytosanitary restrictions, for example, was addressed within PNWER.⁸⁴ Whistler, B.C. also hosted the first PNWER meeting outside of the U.S. in July 2001. Finally, issues of cross-border access for B.C. are primarily addressed in the IMTC or as part of the Peace Arch Crossing Entry (PACE) and CANPASS programs.⁸⁵

VIII. INTERNATIONAL DEVELOPMENT ASSISTANCE

In recent years, Québec has placed considerable emphasis on international development initiatives. Specifically, the province has developed an International Solidarity Program that targets social issues in francophone developing countries in Africa, the Caribbean, and Latin America. In most cases the province's Ministère des Relations Internationales (MRI) works with provincial private sector organizations and nongovernmental groups that are members of the Association Québécoise des Organismes de Coopération Internationale (AQOCI). One solidarity initiative is Québec Without Borders, which was created in 1995 to sponsor the participation of Québec citizens, between the ages of 18 and 39, in international development projects. The province's Public Awareness Program on Development and International Solidarity Issues also promotes dialogue and citizen engagement on a wide range of international issues. The Québec International Development Program (PQDI), however, works more specifically with international cooperation agencies, such as la Francophonie and UNESCO, and focuses on issues of education, food safety, health, the environment, and human rights. For the most part, fund-

84 Personal interview (19 December 2002).

85 Theodore H. Cohn, "Transportation and Competitiveness in North America: The Cascadian and San Diego-Tijuana Border Regions," in Heather N. Nicol & Ian Townsend-Gault, eds., *Holding the Line: Borders in a Global World* (Vancouver: UBC Press, 2005) at 205-08.

ing for these projects comes from the Canadian International Development Agency (CIDA) or international organizations, although 1 percent of Lotto Québec's net profits are targeted for these programs.⁸⁶ A specific example of Québec's interest in development was the November 2007 tripartite agreement among the governments of Canada, Québec, and Haiti. This agreement, which focused on the reform of Haiti's public service, pledged \$5 million in federal funding, with an additional \$1.5 million from the Québec government in the form of "salaries of the government department and agency employees" engaged in related governance initiatives.⁸⁷

Alberta is another province with an established program of international development. Initially, these efforts focused on potential provincial economic opportunities. Although these considerations remain relevant, it is also clear that Alberta's current development activities are not solely driven by economic objectives. Alberta's decision to establish an International Governance Office (IGO), for example, was related to the province's commitment to engage in international development opportunities. The province's extension of its twinning agreement with Mpumalanga, South Africa, also demonstrates a commitment to governance initiatives. The fact that recent exchanges have focused on social issues, gender equality, civic participation, and the delivery of services for poor and disenfranchised citizens in Malawi, China, South Africa, and Vietnam further reinforces this point. At the same time, it is important not to overstate Alberta's international development efforts. First, it is clear that Alberta does not use multilateral institutions to achieve specific objectives in this policy area. The province has no long-term agenda related to international culture or development and, unlike Québec, is not seeking formal status in institutions such as UNESCO. In the area of development assistance, it is also clear that any involvement by Alberta is due to the successful pursuit of funding by CIDA and the private sector. The exception to this would be Alberta's International Financial Institutions (IFI) branch, but these initiatives focus on economic development and not governance or development issues. Therefore, IGO initiatives in Alberta tend to be ad hoc and opportunity driven. They also continue to focus on study tours and exchanges

86 Québec Ministère des Relations Internationales, "MRI's role in international solidarity" (30 September 2008) online: Québec Ministère des Relations Internationales <http://www.mri.gouv.qc.ca/en/solidarite_internationale/index.asp>.

87 Québec Ministère des Relations Internationales, "Support for governance in the Republic of Haiti - Signing of Tripartite agreement Between the governments of Canada, Québec and Haiti" (30 September 2008) online: Québec Ministère des Relations Internationales <http://www.mri.gouv.qc.ca/en/informer/salle_de_presse/communiques/textes/2007/2007_11_07.asp>.

of government officials and other professionals.⁸⁸

IX. THE ENVIRONMENT

In an environmental context, the international impact of the provinces is most evident with the NAFTA Side Deal on the Environment and the Kyoto Protocol. For example, annex 41 of the North American Agreement on Environmental Cooperation (NAAEC) outlines compliance provisions for Canadian provinces. There are no similar sections dedicated to U.S. or Mexican states. As a result, Ottawa implemented the Canadian Intergovernmental Agreement (CIA), which came into force in 1995 when Alberta became the first province to ratify the framework. To date, only Québec and Manitoba have joined Alberta in ratifying the NAAEC CIA. Despite this fact, a number of provinces, including nonsignatories to the CIA, have been targeted under articles 14 and 15 of the NAAEC's citizen submission complaint process. At this point, however, these cases have not posed significant problems for Canadian provinces. In *BC Logging*, for example, the final factual record refused to rule on several complaints dealing with publicly-owned land.⁸⁹ The *BC Mining* case also excluded the Tulsequah Chief and Mount Washington mining projects due to pending legal actions.⁹⁰ In other decisions, panels explicitly noted an unwillingness to contradict existing domestic judicial precedent. Finally, and perhaps most importantly, are questions related to the lack of an effective enforcement mechanism for NAAEC citizen submissions. Although these cases contribute to improved transparency and access, they are not binding on Canadian provinces, signatories or nonsignatories, in any tangible way.⁹¹

Provincial autonomy is also evident with the Kyoto Protocol, which the Chrétien government signed in 1997 and ratified in 2002. From the very start of negotiations, the Province of Alberta opposed the agreement and pro-

88 Alberta, Intergovernmental and International Relations, Governance Advisory and Exchange Program (2003-08).

89 Secretariat, Commission for Environmental Cooperation, *Factual Record: BC Logging Submission (SEM-00-004)* (27 June 2003), online: CEC CCA CCE <http://www.cec.org/files/pdf/sem/00-4-FFR_en.pdf>.

90 *BC Mining* (16 November 2001) Council Resolution 01-11 (Commission for Environmental Cooperation), in Secretariat, Commission for Environmental Cooperation, Appendix I, *Factual Record: BC Mining Submission (SEM 98-004)* (27 June 2003), online: CEC CCA CCE <http://www.cec.org/files/pdf/sem/98-4-FFR_en.pdf>.

91 Jeremy Wilson, "The Commission for Environmental Cooperation and North American Migratory Bird Conservation: The Potential of the NAAEC Citizen Submission Procedure" (2003) 6 J. of International Wildlife Law and Policy 205.

moted a “made in Alberta” solution. Alberta’s opposition was further reinforced when the U.S. announced its intention to not sign Kyoto in 2001. The current Alberta government under Premier Ed Stelmach has extended this “industry-friendly” path by promoting intensity-based caps on emissions. In March 2007, in anticipation of new federal measures, the provincial government announced standards for slowing the growth of greenhouse gas emissions. Under the regulations, large-scale industries would be asked to lower the amount of energy used per unit of output. The effect would be to reduce the rate of emissions growth, rather than the actual amount of greenhouse gases being emitted. The provincial policy was taken both to establish its jurisdictional credentials in case of constitutional challenges down the road, and also to send a strong signal to the federal government of the province’s main priorities.

In the end, the “call to arms” was unnecessary, as the province’s approach was closely mirrored in the federal plan released at the end of April 2007. In putting forward intensity-based reductions, Ottawa imposed no ceiling on greenhouse gas emissions and protected Alberta’s lucrative oil sands producers from having to undertake actual reductions in greenhouse gas emissions in the foreseeable future. The provincial and federal plans were so close that there was little room for either the province or the private sector to raise objections. The federal policy was even more favourable to provincial commercial interests, as it excluded oil sands from the new regime of regulations that were brought into place. It also left open a three-year window in which new investments were to be protected from meeting standards.⁹²

Similar issues were also raised during the recent federal election campaign when Prime Minister Harper unexpectedly promised to restrict the export of raw bitumen to jurisdictions with weak environmental standards. In his comments, Harper also took an extremely hard line with Alberta and suggested that Ottawa had “two or three constitutional levers” to pull in any fight with Alberta over control of the oilsands.⁹³ Although Harper’s comments appear to violate his pledge to grant provinces greater international autonomy, they need to be taken in the context of the election campaign and Ottawa’s broader climate change agenda. First, the U.S. is Canada’s only customer for unprocessed bitumen and federal officials made it clear that proposed measures would not

92 Christopher J. Kukucha & Tom Keating, “Of ‘Bad Boys’ and ‘Spoiled Brats’: Alberta in Canadian Foreign Policy” in Jean Daudelin & Daniel Schwanen, eds., *Canada Among Nations 2007: What Room for Manoeuvre?* (Montreal & Kingston: McGill-Queens University Press, 2007) at 108-27.

93 Jason Fekete, “Harper targets oilsands exports” *Calgary Herald* (27 September 2008), online: *Calgary Herald* <<http://www2.canada.com/calgaryherald/news/story.html?id=b842d188-0f7d-4457-ace6-e0df8c140120>>.

disrupt levels of daily exports. Environmental groups also pointed out that Canada's comparatively low emission targets were unlikely to be higher than the anticipated forthcoming U.S. standards. The timing of the announcement — during the 2008 campaign — may have been critical, as one of the few vulnerable Conservative seats in Alberta was in Edmonton-Strathcona, where incumbent Rahim Jaffer faced strong opposition from the New Democratic Party candidate, environmental lawyer and activist Linda Duncan (who went on to win the riding by less than 450 votes). In this context, it is not surprising that Harper would propose an apparently pro-environmental policy to appeal to voters whose support for a climate change agenda was higher than other areas of the province.⁹⁴

B.C., Ontario, Manitoba, and Québec have also pursued autonomous positions on international environmental policy. All four provinces, along with Arizona, California, Montana, New Mexico, Oregon, Utah, and Washington State, are members of the Western Climate Initiative (WCI), which was formed in February 2007 to address regional solutions to climate change in North America. Saskatchewan and six states in both the U.S. and Mexico have observer status in the WCI. The origin of the WCI can be traced back to the West Coast Governors' Global Warming Initiative in 2004, when Washington State, Oregon, and California, agreed to cooperate on issues related to global warming. The WCI, however, has focused on subfederal legislation targeting greenhouse gas emissions and the development of a cross-border climate registry and regional cap-and-trade system. All of these programs exceed the environmental programs and initiatives of federal governments in the U.S. and Canada. Unlike Alberta, however, the WCI cap-and-trade system will set overall limits on total emissions and then lower these caps over time to reduce overall levels of pollutants.⁹⁵

X. DISMEMBERING CANADA? EVALUATING THE HARPER AGENDA

Any suggestion that Harper's Conservatives represent a new era of international autonomy for Canadian provinces is disingenuous. In fact, evidence suggests that subfederal governments in Canada have enjoyed partial or substantial levels of autonomy for extended periods. The first contributing fac-

94 Dave Cooper, "Harper to limit bitumen exports" *Edmonton Journal* (27 September 2008) A1.

95 B.C. Climate Action Secretariat, "Western Climate Initiative," online: B.C. Climate Action Secretariat <<http://www.climateactionsecretariat.gov.bc.ca/clas/mediaroom/fact/initiative.html>>.

tor is the legitimacy granted to provinces under international law, including the Vienna Convention and federal-state clauses in the GATT, WTO, and NAFTA. Privy Council and Supreme Court of Canada decisions related to the POGG, treaty-making, and trade and commerce powers have also created a level of ambiguity regarding provincial international activity that does not exist in other federal states. Québec's international engagement, dating back to the early twentieth century, is another example of partial and substantial provincial autonomy. Historically, Québec was the first province to open foreign offices, establish linkages with international organizations (such as la Francophonie), and articulate a clear foreign policy agenda under the Gérin-Lajoie doctrine. Under PQ governments, the province also adopted increasingly aggressive international positions, including the possibility of diplomatic status for Québec officials abroad and the potential removal of an independent Québec from existing western security alliances. Although Québec's recent international initiatives have received considerable attention in the media, they do not represent a significant departure from previous activity. The province's formalized role in UNESCO does not grant Québec a seat or vote in the organization and the bilateral labour mobility agreement with France requires the uncertain completion of numerous MRAs. As noted earlier, Québec's legislative initiatives are also limited in their overall impact.

Trade missions and the establishment of other provincial offices also demonstrate a significant level of long-term provincial autonomy. During the past several decades, most provinces have participated in federal or provincial foreign trade missions to Asia, Europe, and the Middle East. In addition, almost all provinces have maintained international offices in the pursuit of investment and expanded export markets. Québec and Alberta also have established an unprecedented presence in Washington, D.C., but in both cases these offices were opened prior to the arrival of the current Conservative government. Perhaps the clearest indication of partial and significant provincial autonomy is in the area of trade policy. In fact, there are several examples of provinces influencing not only Canadian foreign policy but also the development of international norms and standards. Canada's contradictory positions on agriculture, for example, reflect protectionist pressures from dairy and poultry farmers in Québec, and demands from western red meat and grain producers for greater liberalization. NAFTA's energy provisions were a direct result of pressure from Alberta in the aftermath of the NEP, while provincial interests tied to softwood lumber and the automotive sector were evident in the Auto Pact and previous lumber agreements in 1986, 1996, and 2006. Similar provincial interests were protected in article 2.2 of the SCM and NAFTA's annex

I and II provisions dealing with services. Federal and provincial consultation on matters of trade policy has also become an established part of executive federalism dating back to the 1970s.

Levels of partial to significant autonomy are also evident when reviewing subfederal cross-border functional relations. In Atlantic Canada and Québec, these ties date back several decades in established forums such as the NEGECP. In Ontario, linkages are not as entrenched, but the province is an active participant in the CGLG and has a presence related to cross-border disputes and other functional issues. On the prairies, Manitoba and Saskatchewan have signed a number of bilateral MOUs and have standing in forums such as the WGA and MLC. Alberta, on the other hand, is actively involved in the WGA, CSG-West, PNWER, and MABAC. B.C. has a similar range of relations with the WGA, CSG-West, and PNWER, as well as the IMTC. In contrast, a relatively new area of provincial international activity is development assistance. In Québec, there are established programs such as Québec Without Borders and the Québec International Development Program. The province has also participated in a joint federal-provincial initiative in Haiti. In addition, Alberta has established an International Governance Office and participated in study tours and professional exchanges with South Africa, China, Malawi, and Vietnam. The majority of these initiatives, however, are directly tied to funding provided by CIDA and other NGO's.

Finally, Canadian provinces have demonstrated long-term autonomy in relation to international environmental issues. One of the first examples was the standing granted to Canadian provinces in the NAAEC, which was not extended to Mexican and U.S. states. Provinces then had the opportunity to ratify these provisions, which the majority of provincial governments chose not to do. Although the citizen complaint process of the NAAEC has targeted Canadian provinces, including those governments not bound by the agreement, factual records to date have not directly challenged existing domestic judicial precedent or subfederal policy capacity. Similar patterns are evident in the Kyoto Protocol, where Ottawa was significantly influenced by Alberta's intensity-based framework. Although Harper's pledge to restrict exports of raw bitumen appeared to directly challenge Alberta's control over the oilsands, it was misleading due to election considerations in Edmonton-Strathcona and the fact that the U.S., which is the province's only customer for raw bitumen, will have environmental standards similar to those in Canada. Finally, the involvement of several provinces in the WCI demonstrates that subfederal commitments to a climate registry and regional cap-and-trade systems exceed those of the federal government.

Based on this discussion, it is clear that Harper was not a primary catalyst for greater provincial international autonomy. Instead, this decentralization, which has occurred over several decades, is due to a number of factors. The first is the increasing intrusiveness of foreign-trade agreements into areas of domestic policy space. As these commitments include areas of provincial jurisdiction such as alcohol, procurement, services, and natural resources, as well as health, labour, and environmental standards, provinces have begun developing expertise and bureaucratic resources in these issue areas. The institutions of Canadian federalism have been able to respond to these subfederal pressures by incorporating provincial governments into existing frameworks of intergovernmental relations, especially those related to federal-provincial consultation. Greater provincial autonomy is also consistent with the ongoing decentralization of Canadian federalism in general. As Donald Savoie has suggested, "it became much more fashionable to talk about autonomy" for Canadian provinces in the 1980s, when Joe Clark first introduced his "community of communities" argument. This argument was adopted by Brian Mulroney, especially in justifying the cancellation of the NEP and the doomed Meech Lake Accord. Subsequent Liberal governments under Chrétien and Martin have also embraced devolution of powers, primarily to appease Québec.⁹⁶ It is interesting to note that before Coyne complained about the "dismembering of Canada," Michael Bliss critiqued Martin's willingness to give Québec greater international autonomy as legitimizing an "independent country within the hollow shell of something called Canada."⁹⁷ Finally, there is the fact that new prime ministers rarely lead significant change in this policy area. Most subfederal international issues in Canada are handled at the desk officer or middle management levels of Foreign Affairs and International Trade and/or other line departments, which typically guarantees considerable continuity on these files.

A cynic might wonder why Harper would claim credit for the apparent expansion of provincial international autonomy. One of the oldest rules of politics is to "grab the low hanging fruit" and it is easy for elected officials to seek thanks for developments that precede them. There are also obvious political benefits to be gained by appealing to Québec voters, who may not support independence in this current political climate, but certainly endorse greater provincial autonomy. In that regard, it is also interesting to note that few provinces desire significant autonomy in subfederal foreign affairs due to lim-

96 Les Perreux, "Four degrees of centralization: The recent history of provincial autonomy in Canada can be divided into four distinct eras" *The Globe and Mail* (30 July 2008) A7.

97 Michael Bliss, "A country going to pieces" *National Post* (22 October 2004) A18.

ited budgets and bureaucratic resources. In fact, it can be argued that Alberta is the only other province seeking similar levels of control in this policy area. Once again, this provides political benefits for the Prime Minister as he seeks to secure political support in his home province.