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Research Paper

Implementation mechanisms of international environmental instruments into domestic law: a comparative analysis of the implementation of international agreements in the legal systems of the European Union (EU) and Canada with a particular focus on climate change.

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Introduction

The EU is considered to have effectively implemented the Kyoto Protocol through an internal “burden-sharing” agreement between the Member States, which establishes a common but differentiated approach to the achievement of greenhouse gases reduction targets. Before deciding to officially withdraw, Canada had failed to adequately conform to the Kyoto Protocol requirements. Why was the EU able to implement coordinated policies to achieve Kyoto Protocol targets while Canada has been so unsuccessful to the point where it officially withdrew from its international obligations at the end of 2011?

While not the only one, the shared competence on environment issues between federal and provincial governments represents an important explanatory factor of Canada’s failure to implement a coordinated set of policies throughout the country. Despite Canada’s withdrawal from the Kyoto Protocol, this issue will resurface as soon as a new legally-binding multilateral agreement on climate change will be reached.

In this research paper, I present and analyse the genesis of the internal EU “burden-sharing” agreement and the institutional setting that made it possible and enforceable. I then examine the factors determining the Canadian federal-provincial conundrum, looking in particular at Canada’s treaty-making power and domestic implementation of treaties.¹ Finally, I explore the possible solutions for Canada to adopt a harmonized federal-provincial approach guaranteeing compliance with the requirements of a future legally-binding multilateral agreement on climate change.

¹ See Rabe, B., 2007, “Beyond Kyoto: Climate Change Policy in Multilevel Governance Systems”, *Governance*, vol. 20, n. 3, p. 427-8 and p. 432-4.

To that effect, I explore the feasibility of translating Canada's international commitments into an internal agreement similar to the one in place in the EU in order to insure internal coordinated action and achievement of agreed reduction targets. I examine whether a Canadian-style burden-sharing agreement where provinces enter into an agreement between themselves and between them and the federal government can be envisaged and potentially enforceable. This arrangement would consider the different energy-generation infrastructure, economic development and energy consumption patterns of each province.

But how can this agreement be achieved when a formal institutional mechanism is lacking? In this respect, I propose that the Council of the Federation, a fairly recent institution aiming to facilitate interprovincial dialogue, should acquire a specific role in facilitating the provincial implementation of international treaties negotiated by Canada.

In fact, the Council should be institutionalized and its role enhanced and upgraded from a mere dialogue forum and advisory board to a fully-fledged decision-making body with enforcing capacity where possible. Ideally, this reinforced body should then be in a position to guarantee a smoother and more coherent multilevel governance process within the Canadian federation. The paper examines the enabling factors as well as the political and legal challenges to this proposed solution.

1. The United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol

The UNFCCC represents the key multilateral environmental agreement through which national governments address climate change.² The ultimate objective of the Convention is to achieve stabilization of greenhouse gas concentrations in the atmosphere at a level that prevents dangerous anthropogenic interference with the climate system. A total of 191 countries and the EU have ratified the Convention, which entered into force on 21 March 1994.

The Convention sets an overall framework for intergovernmental efforts to tackle the challenge of climate change. “Under the Convention, governments:

- gather and share information on greenhouse gas emissions, national policies and best practices
- launch national strategies for addressing greenhouse gas emissions and adapting to expected impacts, including the provision of financial and technological support to developing countries
- cooperate in preparing for adaptation to the impacts of climate change”.³

The Kyoto Protocol is an international agreement linked to the UNFCCC. Its major feature is that it sets binding targets for 37 industrialized countries and the European Community (EC) for reducing greenhouse gas (GHG) emissions. This represents the

² http://unfccc.int/essential_background/convention/background/items/1349.php

³ http://unfccc.int/essential_background/convention/items/2627.php

major distinction between the Convention and the Protocol. Under the terms of the Protocol, 37 industrialized countries and the EU (Annex B countries) have ratified commitments that would cut their total emissions of greenhouse gases on average between 2008 and 2012 to levels 5% below 1990 levels.⁴ The EU's target is an average of 8% below 1990 levels over the 2008-2012 period. Canada originally committed to an average 6% target. The Protocol places a heavier burden on developed nations under the principle of "common but differentiated responsibilities".

The Kyoto Protocol was adopted in Kyoto, Japan, on 11 December 1997 and entered into force on 16 February 2005. 183 Parties of the Convention have ratified its Protocol to date. The detailed rules for the implementation of the Protocol were adopted at COP 7 in Marrakesh in 2001, and are called the "Marrakesh Accords."

Under the Treaty, countries must meet their targets primarily through national measures. However, the Kyoto Protocol offers them an additional means of meeting their targets by way of three market-based mechanisms: emissions trading (i.e. the carbon market), the Clean Development Mechanism (CDM) and the Joint Implementation (JI). Each of these mechanisms is illustrated in more detail in the following paragraphs.

The Kyoto process began with emission reduction targets and only afterwards began to consider instruments for implementation. Rather than using a true cap-and-trade scheme that allocates emission "rights" (permits) equal to emissions cap and then allows permit trading, a credit-trading scheme was adopted. Credit trading occurs when the

⁴ http://unfccc.int/kyoto_protocol/items/2830.php

government mandates that firms (usually large industrial emitters) each reduce emissions by a certain amount (generally expressed as a proportion of baseline emissions) and then allows firms that reduce emissions below the required level to receive credits that can be sold to firms that cannot meet their targets. Nothing prevents emissions from growing because, for example, new firms can enter as the economy expands. But Kyoto permits other forms of credits that could be traded (substituted) for emission reduction credits, thereby enabling countries and/or companies to achieve targets without addressing emissions per se. These other forms of credits are discussed below.

The Protocol's Annex B countries can achieve their CO₂-reduction targets in the following different ways.

- Countries can simply reduce own emissions of CO₂ to the target level.
- A country can achieve part (or all) of its Kyoto Protocol target by sequestering carbon in domestic terrestrial ecosystems. It can obtain credits (up to 9 MtC per year) for activities that reduce carbon release from net Land, Land-use Change and Forestry (LULUCF) if it had net emissions in 1990 (Article 3.7); claim unlimited net removals by sinks as a result of afforestation and reforestation activities that are truly additional (Article 3.3); demand unlimited net removals by changes in agronomic practices (cropland and grazing land management, and revegetation actions) under Article 3.4; and claim limited removals as a result of forest management activities (Article 3.4)
- Joint implementation (JI) allows an Annex B country to participate in an emissions-reduction or sink activity in another Annex B country (Article 6),

thereby earning “emission reduction units” (ERUs) that are credited toward the country’s own commitment

- Under the “clean development mechanism” (CDM) of Article 12, an Annex B country can earn “certified emission reductions” (CERs) by funding emissions-reducing and/or sink projects in developing (non-Annex B) countries. Only afforestation and reforestation are permitted sink activities and their use is limited (in each year of the commitment period) to 1% of the Annex B country’s base-year emissions, although this constraint is likely not binding
- Finally, Annex B countries can simply purchase excess emission credits from other Annex B countries (Article 17). Emission credits in excess of what a country needs to achieve its commitment are referred to as “assigned amount units” (AAUs) that can be purchased by other countries. These are particularly important to economies in transition (EIT) that, because of economic decline during the 1990s, are thought to be able to exceed Kyoto Protocol targets quite easily, thus having “hot air” (AAUs) available for sale. The purchase and sale of AAUs, CERs and ERUs is referred to as “international emissions trading” (IET). The availability of a variety of emission-reduction and carbon sequestration options for achieving targets poses greater challenges for monitoring and enforcement than is the case with simple emissions reduction. In principle, enabling emitters to purchase carbon offsets in lieu of emission credits, and allowing Annex B countries to purchase credits from developing countries via the CDM, should reduce compliance costs relative to the situation where restrictions

are placed only on emissions, because it should not matter how CO₂ is removed from the atmosphere.

Since the 1992 establishment of the UNFCCC, the adoption of both the Convention (in 1994) and the Kyoto Protocol (agreed in 1997, entered into force in 2005) took a number of years of negotiations. At the time of their establishment, the belief was that an effective international instrument had been put in place with flexible enforceable mechanisms that would allow for direct emissions reductions which would ultimately yield concrete results. The presence of all major greenhouse gas emitters (with the exception of the US which was deemed only temporary) was also reason for optimism as emerging countries had not yet emerged and were not as significant contributors to greenhouse gas emissions. EU and Canada followed two very different paths in the process that led to their becoming Parties to both as well as in concretely implementing the commitments to which they subscribed. Comparison and analysis of these two different paths is the subject of the following section.

2. Implementation of the Kyoto Protocol in Canada and the EU

This section presents an overview and examination of the different patterns of implementation of the Kyoto Protocol in Canada and the EU. The respective legislative, institutional and political contexts are reviewed and compared. Key success factors and major obstacles are identified.

2.1. The EU and the “burden-sharing” agreement

The EU is considered to have effectively implemented the Kyoto Protocol through an internal “burden-sharing” agreement between Member States which establishes a common but differentiated approach to the achievement of greenhouse gases reduction targets. This agreement allows Member States to have different targets, expressed in terms of percentages, the overall objective of EU’s 8% reduction commitment under the Protocol remaining paramount. In that context, some Member States may hold or even increase their emissions compared with the base year level (1990). The specific individual targets are made available, amongst other sources, by the European Environment Agency.⁵ The genesis of the agreement, its rationale and its capital importance in understanding EU’s success in being on track on its commitments is highlighted in the following subsections.

⁵ <http://www.eea.europa.eu/data-and-maps/figures/kyoto-burden-sharing-targets-for-eu-15-countries>

Legislation

The ratification of the Kyoto Protocol by the European Community was enshrined in the European Council Decision 2002/358/EC⁶ concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the UNFCCC and the joint fulfilment of commitments there under. The following paragraphs restate what the main articles prescribe:

“In deciding to fulfil their commitments jointly in accordance with Article 4 of the Kyoto Protocol, the Community and the Member States are jointly responsible, under paragraph 6 of that article and in accordance with Article 24(2) of the Protocol, for the fulfilment by the Community of its quantified emission reduction commitment under Article 3(1) of the Protocol. Consequently, and in accordance with Article 10 of the Treaty establishing the European Community, Member States individually and collectively have the obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations resulting from action taken by the institutions of the Community, including the Community's quantified emission reduction commitment under the Protocol, to facilitate the achievement of this commitment and to abstain from any measure that could jeopardise the attainment of this commitment”.⁷

The preceding paragraph states in legal terms the obligations and implications for the Community and its Member States deriving from the provisions included in the burden sharing agreement. Since the objectives of complying with the Community's

⁶ [Council Decision 2002/358/EC](#)

⁷ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002D0358:EN:HTML> (10)

commitments under the Kyoto Protocol, in particular the monitoring and reporting requirements laid down therein, cannot, by their very nature, be sufficiently achieved by the Member States and can therefore be better achieved at the Community level, the Community may also adopt measures, in accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty.

The principles of subsidiarity and proportionality were introduced in European Law through the Treaty of Maastricht in 1992 and then reconfirmed in the Treaty of Lisbon in 2007 (entered into force in 2009). Subsidiarity means that that EU may only act and make laws where Member States agree that the actions of individual countries is insufficient. Proportionality states that the EU may only act to the extent that is needed to achieve its objectives and not further. It is to be noted that under the Treaty of Lisbon, the EU also formally gained a legal personality. The EU can negotiate international agreements and sign treaties on behalf of all the EU member states, agreements which become directly binding in all Member States overriding national legislation.

The Kyoto Protocol requires the EC (consisting of the 15 Member States of before May 2004) to reduce greenhouse gas emissions by 8% below 1990 levels by 2008-2012. When the EC became Party to the Kyoto Protocol in 1997, it consisted of 15 Member States. Further to two enlargements in 2004 and 2007, 12 new Member States from Central and Eastern Europe joined. Most of the 12 new Member States have the same target.

Decision 280/2004/EC⁸ of the European Parliament and of the Council constitutes the building block of the European Community's greenhouse gas monitoring system and the new legal basis for the compilation of the EC inventory in accordance with the UNFCCC and the Kyoto Protocol.

“This decision:

- reflects the reporting obligations and guidelines for the implementation of the UN Framework Convention on Climate Change ("UNFCCC") and the Kyoto Protocol, as set out in the political agreement and legal decisions taken at the sixth (part two) and the seventh Conferences of the Parties ("COP7") in Bonn and Marrakech;
- provides for further harmonisation of emission forecasts at Member State and Community-level, in the light of experience with the current reporting practices;
- addresses reporting and implementation requirements relating to the ratification of the Kyoto Protocol and the "burden-sharing" between the Community and its Member States under Council Decision 2002/358/EC.⁹

The purpose of this decision is to monitor all anthropogenic greenhouse gas emissions not controlled by the Montreal Protocol in the EC Member States, to transpose related requirements under the Kyoto Protocol into EC Law and to evaluate progress

⁸ [Decision 280/2004/EC](#) of the European Parliament and of the Council (and implementing provisions) [Commission Decision 2005/166/EC](#)

See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004D0280:EN:NOT> and <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32005D0166:EN:NOT>

⁹ [Commission Decision 2005/166/EC](#) lays down the rules for implementing Decision 280/2004/EC.

towards meeting greenhouse gas reduction commitments under the UNFCCC and the Kyoto Protocol”.¹⁰ The preceding legislative text sets the parameters within which the burden-sharing agreement will operate. The concept of burden-sharing is discussed in the next section on implementation.

Implementation

According to the latest statistics available, the EU-15 is well on track and likely to surpass its Kyoto Protocol target. In fact, as of 2010, the EU-15 had achieved a reduction of GHG emissions by 10.7% over 1990 levels.¹¹ What are the reasons explaining this achievement? The burden-sharing agreement briefly illustrated in the introduction to this section is explained in detail below by Lefevere and can be certainly considered one of the main pillars of the smooth implementation.

Having been heavily involved in the negotiations on the EU side as a European Commission representative, Lefevere summarizes what triggered the decision to conceptualize and put in place a burden-sharing agreement: “The origins of the idea of the burden-sharing can be traced back to the elaboration of the EU negotiating position in preparation for Conference of the Parties in December 1997 in Kyoto, when the Protocol was adopted. Identical targets for each EU Member State were not seen as feasible, in

¹⁰ http://ec.europa.eu/environment/climat/gge_leg.htm

¹¹ European Commission, 2011, *Report from the Commission to the European Parliament and the Council. Progress towards achieving the Kyoto objectives* COM(2011) http://ec.europa.eu/clima/policies/g-gas/docs/com_2011_624_en.pdf

view of the widely different energy-generation infrastructure, economic development and energy consumption patterns.”¹²

And then adds: “Coming up with a differentiated set of targets at the international level would have significantly complicated and even jeopardized the success of international negotiations. Rather than negotiate an individual target for each Member State, the EU sought to negotiate a target for the EU as a whole, and subsequently redistribute this target internally among Member States through a burden-sharing agreement.”¹³

This view is reinforced by Oberthür when he asserts that “By means of Article 4, the Kyoto Protocol in fact delegated the task of fixing targets for individual EU member states to the EU itself. The Kyoto Protocol thus indirectly made use of the comparatively sophisticated framework of decision-making of the EU to reach binding agreement between member states, which is the daily bread of the Union. As a result, the international negotiations were relieved of the burden of establishing targets for 15 states. Furthermore, the codification of the Burden-Sharing Agreement in supranational law has created an additional incentive for EU Member States to comply with their commitments under the Protocol and thus supports climate protection.”¹⁴

¹² Lefevre, J., 2005, “The EU Greenhouse Gas Emission Allowance Trading Scheme” in Yamin, Farhana, ed., *Climate Change and Carbon Markets*, London: Earthscan, p.77

¹³ Ibid. p.77

¹⁴ Oberthür, S., 2006, “Vertical Interaction between Sectoral Institutions: EU Legal Instruments and International Regimes”, Paper presented at the annual meeting of the International Studies Association, Town & Country Resort and Convention Center, San Diego, California, USA.

Oberthür further notes that the Protocol had the effect of transposing the Kyoto targets in supranational law, which triggered EU's supranational means of adjudication and enforcement in support of the targets' effective implementation.¹⁵ Oberthür in fact contends that, finally, both the collective responsibility and the enforceability of the agreement provisions through possible infringement procedures initiated by the European Court of Justice are bound to guarantee a full adhesion and compliance by Member States. It is to be noted that while such a regional burden-sharing agreement has not been replicated by any other party to the Protocol, it has been proven quite effective in ensuring widespread compliance, as the statistics mentioned above indicate.

Key Success Factors

From the preceding legislative texts, it is clear that one of the main reasons of success in reaching an agreement over an EU-wide target is the institutional setup of the Union. The European Commission, the European Council, and the European Parliament together with the Member States of the Union worked together effectively to make and implement joint policy. They did so because of the presence of functioning formal mechanisms of cooperation but also because enforceable legislative measures were in place to insure its implementation.

The three main institutions involved in EU legislation each hold specific competencies and prerogatives: the Commission is the executive branch and has the legislative initiative and, as such, proposes, new laws that it will subsequently also implement. The Council and the Parliament, respectively representing the Member States

¹⁵ Ibid.

(both at head of state and government level and at ministerial level) and the citizens of the EU (the European Parliament is directly elected by them) approve or reject proposed legislation. This process is defined as the "Ordinary Legislative Procedure" (or "co-decision") and ensures widespread application of laws and policies throughout the EU. Although it is sometimes complex and lengthy as it is likely to undergo many iterations before final approval of legislative acts, the process is inclusive of all main stakeholders and interests which represent the main guarantee of implementation. In particular, in the specific case of environmental policy, the delegation of power to the supranational level allowed the EU governing bodies to direct and coordinate the actions of Member States extremely effectively.¹⁶

Also, the fact that climate change has been characterized as being one of the few areas where contentious political hurdles could be more easily overcome has contributed to shape a united EU position and ensuing action.¹⁷ In fact, climate change was considered to be an important area potentially enhancing the drive and legitimacy for further EU integration overall.¹⁸ A collective consciousness about the concrete risks associated with climate change has progressively emerged and the adherence to increasingly scientific evidence of the climate change phenomenon and the serious risks associated with it contributed to coagulate an evenly shared and vast support for action across the EU. This emerging awareness led to the belief that "climate policy appeared

¹⁶ Macdonald, D., et al (2012), "Allocating Canadian greenhouse gas emissions reductions amongst sources and provinces: learning from Germany and the EU", p.117-120

¹⁷ Hayden, A. (2011) "Europe's Climate and Energy Policy: Lessons for Canada in Sharing the Effort of Emissions Reductions?", p. 10-11

¹⁸ Macdonald, D., et al (2012), p.121

to be one of the few fields where the EU could act with a single voice" as Macdonald et al put it.¹⁹

The institutional actors, although fundamental in reaching a consensus, were not the only important factors. Non-state actors such as industry lobbyists and environmental groups, both very influential were also fundamental in contributing to the implementation of the burden-sharing Agreement. Industry, in particular, had a clear interest in influencing the discussions as the decisions would directly impact their operations and production costs. Their lobbying activities were positively geared towards the institution of a system with clear and fair rules which would provide certainty. In fact, it was more directed at improving the upcoming Emissions Trading System (ETS) provisions of the package rather than contesting the national individual GHG emissions targets and blocking the overall initiative.²⁰ The ETS is a scheme for greenhouse gas emission allowance trading within the EU. It's the cornerstone of the EU's market-based strategy to reduce GHG emissions cost-effectively. It imposes mandatory caps on absolute emissions from around 10,000 large energy-intensive facilities across EU and covers around 2 billion tonnes of CO₂ emissions, half of the EU's total CO₂ emissions.

This is to say that traditional industry was also on board very early on, their influence and input geared towards making the new ETS more business friendly. In addition, the presence of other strong industrial groups in the field of renewable energy

¹⁹ Ibid, p.126

²⁰ Ibid, p.123

(in particular, nuclear, solar and wind) also produced some favourable lobbying in support of stronger climate policies.²¹

In fact, as Hayden has underlined,²² although referring to the 2008 Energy Package adoption process, the EU had accepted before anybody else the fact that climate change was a pressing issue requiring timely action. This was already true in 1997 when the Kyoto Protocol participation was being discussed.

In conclusion, the success of the EU's adoption and implementation is the consequence of a number of key factors that combined have put the EU well on track to achieve its Kyoto targets. The existence of formal institution mechanisms which allowed for the adoption of the burden sharing agreement coupled with a strong political will and the support of both the industry and the civil society at large were instrumental in its path to achieving the committed targets. Canada, instead, lacked all these key elements to achieve that same level of effectiveness, as illustrated in the next section.

2.2 Canada and the lack of federal-provincial joint coordinated action

In Canada, while the climate change has been fuelling the public debate for many years, a clear position has never coagulated to the point where social pressure would result in political support to the proponents of stringent and nationally coherent climate change

²¹ Ibid, p.122

²² Hayden, A. (2011) "Europe's Climate and Energy Policy: Lessons for Canada in Sharing the Effort of Emissions Reductions?", p.10

policies.²³ It seems that political forces have been either unwillingly to address or systematically failed to address the profound regional economic differences in view of implementing comprehensive green house gas emission reduction policies. Of course, had that social pressure been significant, the absence of formal institutional mechanisms of cooperation between the various jurisdiction levels would still have represented a very difficult obstacle to surmount.

Legislation

It was only in 2007 and under intense pressure from the opposition parties, that the Government of Canada tabled implementing legislation for the Kyoto Protocol. On June 22, 2007 the *Kyoto Protocol Implementation Act* received Royal Assent.²⁴ This document essentially elaborates on the Government's existing plan to regulate greenhouse gas emissions and air pollution, *Turning the Corner*.²⁵ This action plan was introduced in April 2007 establishing the following objectives: to reduce Canada's greenhouse gas emissions by 20% relative to 2006 levels by 2020, and by 60 to 70% below 2006 levels by 2050. That target has since been revised and aligned with the US target of 17% reduction relative to 2005.

The plan represented months of work by the Conservative government, who realized by the end of 2006 that the environment had acquired a higher profile in the

²³ The federal elections of 2008 saw the crushing defeat of the Liberal Party which ran on an environmental platform, “The Green Shift”, soundly rejected by Canadian voters. The “Green Shift” foresaw the implementation of a Canada-wide carbon tax.

²⁴ http://www.ec.gc.ca/doc/ed-es/p_123/CC_Plan_2007_e.pdf

²⁵ Government of Canada (2007), *Turning the Corner: An Action Plan to Reduce Greenhouse Gases and Air Pollution*. See <http://www.ec.gc.ca/envirozine/default.asp?lang=en&n=9A8BA8EA-1>

Canadian public debate. The plan was a clear attempt to strike a balance between the general public's expectations and key national industries' interests (oil and gas in Alberta, automobile in Ontario) whose support was needed at the time for the government to win a majority in the following election. It has been considered a realistic plan which was taking into account Canada's inaction for the previous ten years and included, for the first time, mandatory targets. The plan set intensity-based targets and allowed for a limited use of Kyoto's flexible instruments. It definitely represented a progress compared to the existing provisions. However, the plan was still very far away from effective compliance to the Kyoto Protocol requirements.

Implementation

Climate change and the implementation of the Kyoto Protocol have been receiving growing attention in the political debate in Canada. The opposition parties have continuously challenged the environmental performance of Prime Minister Stephen Harper's Conservative government since he came to office in February 2006. The current Government of Canada has consistently claimed to be unable to comply with its Kyoto Protocol commitments.

In December 2007, at the Thirteenth Session of the Conference of the Parties to the UNFCCC, on the "Post-2012 arrangements" held in Bali, the minority Conservative government restated that it would not make any commitments that conflict with its economic development but nevertheless signed the "Bali Action Plan". "The Bali Action Plan" was an agreement reached on launching intensive negotiations on a global and comprehensive agreement for effective global action on climate change after 2012, when

the first commitment period of the Kyoto Protocol would end, and to end these negotiations in 2009. As illustrated in the previous section, the national plan to fight climate change (*Turning the Corner*²⁶) is largely based on setting intensity targets for major emitters rather than absolute reduction targets. Intensity targets, as opposed to absolute reduction targets, are a relative measure of emissions reductions as they specify emissions reductions relative to productivity or economic output. While reductions can occur per unit of production, they do not necessarily outweigh a possible increase of total production. This approach has been widely criticised by environmentalist hardliners because of their voluntary nature and an arguably lesser impact on overall emissions..

Section three of the Kyoto Protocol requires that Canada reduce its average annual greenhouse gas emissions (GHG) during the period 2008–2010 to 6% below 1990 levels (563 Mt). Nevertheless, in 2006, Canada’s emissions were at 721 Mt and had increased by 22% compared to the 1990 levels. These emissions are nearly a third higher than the 2008–2012 annual Kyoto limit of 563 Mt.²⁷

Canada’s geographic area is the second largest in the world. Even though its emissions only represent 2% of total global emissions, Canada is second worldwide, behind the United States, for CO2 emissions *per capita*. The rise of GHG emissions in Canada from oil and gas industries is attributable to the increase in exports to the United States (largely from Alberta, the main source of GHG emissions, amounting to about 40% of Canada's total).

²⁶ http://www.ec.gc.ca/doc/ed-es/p_123/CC_Plan_2007_e.pdf

²⁷ http://www.ec.gc.ca/pdb/ghg/inventory_report/2006/som-sum_eng.cfm

While Kyoto targets have become irrelevant, Canada will have to lean heavily on carbon capture and storage combined with offset credits to meet even its own GHG emissions targets for 2020 and 2050. In fact, recently released statistics by Environment Canada²⁸ show that Canada is almost 50 per cent of the way towards meeting its own stated 2020 goal, different from the one committed under the Kyoto Protocol. This is considered a significant leap in progress over the 25 per cent announced a year ago, according to the government. Multiple sources indicate that the surge is a result of provincial measures and more efficient technology. In fact, some provincial policies for reducing emissions are proving to be effective and clearly represent a step in the right direction but are not sufficient to decisively invert the trend without the complementary effort of the federal policies. Québec is implementing a cap-and-trade system to encourage a low-carbon economy, while British Columbia has implemented a carbon tax. Also, newly constructed buildings and new vehicles are far more efficient and contribute to the significant reduction.

Reputable expert organisations, such as the National Round Table on the Environment and the Economy (NRTEE)²⁹, and the federal environment auditor³⁰, have all warned the federal government that it will not come close to reaching its target if it relies solely on sector by sector regulations. These are taking a long time to develop, and

²⁸http://www.ec.gc.ca/Publications/253AE6E6-5E73-4AFC-81B7-9CF440D5D2C5/793-Canada's-Emissions-Trends-2012_e_01.pdf

²⁹ NRTEE (2012), "Reality Check: The State of Climate Progress in Canada" available at <http://nrtee-trnee.ca/reality-check-the-state-of-climate-progress-in-canada>

³⁰ Government of Canada, *2012 Spring Report of the Commissioner of the Environment and Sustainable Development* available at http://www.oag-bvg.gc.ca/internet/English/parl_cesd_201205_01_e_36773.html

an even longer time to actually impact industry output. It is also to be noted that a sizeable portion of this year's emissions reductions are due to changes in measurement methodology as now Canada is taking into account land-use change or forestry in its calculations.³¹

The NRTEE, an advisory body to the federal government that was shutdown in the 2012 budget but remained in operation until early 2013, has also underlined that Canada will not achieve its 2020 GHG emission reductions target unless significant new, additional measures are taken. Among them, putting a price on carbon and investing heavily in hydro-electric power will be key.

At the political level, Canada agrees with the EU that the global threat of climate change requires a multilateral solution. After some initial uncertainty about the Conservative government's commitment to the multilateral framework within UNFCCC, it has since expressed its commitment to participating actively in negotiations for a post-2012 climate change agreement. Specifically, and most importantly, Canada believes that an agreement should include binding emission reduction targets for all major emitters. Developed countries should be required to take action more quickly, but major industrialized developing countries should also have binding targets.

The overall picture is one of a government, as well as its Conservative base, who seems to be unconvinced by the science of climate change, though reluctantly professing to accept it, who is in no hurry to move on the file and who is not under any great political pressure to do so. This has allowed for a slow and patchy implementation of

³¹ NRTEE (2012), "Reality Check: The State of Climate Progress in Canada"

modest climate change policies which have contributed to the unwillingness to correct a trend started by previous governments and ultimately to a poor emissions reductions record.

Federal policies

The Liberal government of Jean Chrétien signed the Kyoto Protocol in 1997, partly in a move to look more ambitious than the US, ratifying it in December 2002. Between 1998 and 2003, the Chrétien government allocated about C\$2 billion for measures intended to reduce GHG emissions, with the 2003 federal budget allocating a further C\$2 billion over five years – yet Canada’s emissions grew inexorably. Government action was utterly ineffective because it was largely restricted to exhortation and subsidy. Chrétien did not wish to take action that might bear more heavily on one province than another.

Paul Martin, who took over from Chrétien in late 2003, dismissed the Chrétien government’s climate change plan as inadequate and questioned whether Canada would be able to meet its Kyoto targets. Stéphane Dion was appointed federal Environment Minister. But he, too, was reluctant to introduce tough legislation, preferring to concentrate on propagation of ‘best practice’. By 2004, Canada’s GHG emissions were 27% above 1990 levels (whereas Canada’s Kyoto target was for 6% below by 2012).

Elected in 2006, the current Conservative government has stated from its inception that it would be impossible for Canada to respect the Kyoto Protocol commitments previously made by the Liberal government. In conformity with this position, in December 2011, Canada officially withdrew from the Kyoto Protocol. Prime

Minister Harper's government has set a goal to reduce GHG by 20 per cent by 2020 and by 60-70 per cent by 2050 compared to 2006 levels. If the 2020 target is met (and current plans may not be sufficient to achieve this as we have seen in the preceding section), Canada will be emitting 3 percent more than 1990 levels of GHG.

In April 2007, Environment Minister Baird announced that he would adopt a "regulatory framework" (for industrial air emissions) under the Canadian Environmental Protection Act³² in order to bypass a legislative gridlock. It is important to note that the government decided to take action through a regulatory approach rather than through the original legislative approach previously mentioned. The legislative approach had failed as the opposition parties, the Liberal Party and the NDP, were pushing to revise the provisions therein included to render them more cogent and ambitious. The government proceeded to effectively kill their own legislation and, in order to bypass the opposition parties, decided to implement *Turning the Corner* exclusively through regulatory changes that did not require parliamentary sanction.

As a result, in March 2008, the Canadian government disclosed more concrete measures to reach the chosen targets. The main features are as follows:

- Draft regulations in 16 industrial sectors to be brought forward to the autumn of 2008. The intention is to agree to them by the end of 2009, for entry into force from 1 Jan 2010. These measures will require industrial emitters to reduce their

³² *The Canadian Environmental Protection Act, 1999* is a comprehensive legislative piece designed to address in a systematic fashion pollution prevention and environment and human health and life protection from the risks associated with toxic substances.

2006 emissions intensity by 18% from 2012, and then by a further 2% a year until 2020.

- The intention to introduce limited carbon trading as a compliance mechanism.
- The other major compliance mechanism is by means of contribution (initially at a rate of \$15 per tonne of CO₂ equivalent) to a national Climate Change Technology Fund.
- From 2018, oil sands industries and coal power plants will be required to meet emissions targets based on the use of clean technologies, such as carbon capture and storage;
- The reduction of emissions from vehicles and buildings through advances in renewable energies, environmental technologies, stricter standards on fuel consumption for personal vehicles and new energy-efficiency requirements for consumer products.
- The goal to produce 90% of electricity from sources that do not emit GHG (the current figure is 73%).
- The Government of Canada remains opposed to a federal carbon tax.

Because Canada was beginning to feel international criticism (at UN COP meetings) which reflected negatively in the public opinion, and because the opposition parties (Liberal Party, NDP and Bloc Québécois) were starting to play on this theme to some political effect, the Conservatives had to be seen to be taking the agenda seriously. That's why one of Harper's most trusted Ministers, John Baird, was therefore appointed to the file to offer a way forward. The plan he produced, "Turning the Corner", promised sectoral emission limits to start to take effect from 2010. Independent analysts criticised

the plan as inadequate, not least because it proposed intensity-based targets rather than hard caps, but it was enough to convince public opinion that the government was now serious about its international obligations. Yet when Harper said, only a few months later, that the government was abandoning its Kyoto target (before formally withdrawing in December 2011) this caused little controversy. It had become evident for a long time that Canada would miss its Kyoto target comprehensively.

Provincial policies

In contrast to the federal government, Canada's largest provinces have all announced, or are currently crafting more aggressive climate change legislation. This matters, as in Canada, energy policy (extraction as well as electricity generation), transportation and building regulations are all subject to provincial jurisdiction.

Five provinces accounting for 90% of Canada's emissions have targets (Ontario, Québec, Alberta, British Columbia and Saskatchewan). All use different base and target years, some have adopted absolute caps and other intensity-based targets and all are more aggressive than the federal plan with the notable exception of Canada's largest emitter, Alberta, who adopted an intensity target of 14% below 2005 levels by 2050. The preservation of the oil sands development remains Alberta's major concern.

On many issues, the provinces have indeed acted before the federal government - for instance on the introduction of emissions targets, the calls for the introduction of emissions trading, and on more aggressive regulations. However, because of stark policy differences and diverging emissions reduction targets, the resulting patchwork quilt of

measures across Canada will make it more complex and costly for industry to comply and will make potential inter-provincial linkages on emissions trading more difficult. But, as already happens in other spheres, north-south links between the provinces and neighbouring US states are often stronger than linkages with Ottawa and with other Canadian provinces. This trend could pave the way for a North American cap-and-trade market in the future but for the moment it only adds to the picture of internal Canadian disaggregation. The extent and schedule of climate change measures between provinces vary, representing a wide range of views on how actively a strong mitigation regime should be pursued within Canada. These views reflect differences in reliance on fossil fuels, difficulties in reducing emissions, and projected economic growth and fiscal conditions. There is a genuine problem of governance.

However, a number of provinces have engaged in a more cohesive approach. In April 2008, Québec announced that it up-graded its participation in the Western Climate Initiative (WCI) to full membership. Other Canadian provinces are also involved either as full members (British Columbia, Ontario, and Manitoba) or as observers (Saskatchewan) actively exploring the possibility of joining. The WCI was established as a coalition of western U.S. states (as of 2012, although clearly the most important state, only California is still a member of the initiative) and Canadian provinces seeking to cut emissions from economy-wide sources including transportation and working towards a regional carbon credit trading market. As one of their main objectives, the WCI set a group-wide greenhouse gas emissions target of 15 percent below 2005 levels by 2020. The WCI planned program start date for a regional cap-and-trade market for emissions of greenhouse gases is January 2013.

In June 2008, Ontario and Québec announced an agreement to set up a regional cap and trade system between the two provinces. The system will be modeled around the EU's ETS system and, hence, it will be possible to link them in the future. Under this system, both Ontario and Québec would be able to meet their own reduction targets of 6% below 1990 levels by 2014 (on track for Ontario and only two years late for Québec). In addition to establishing a cap-and-trade system, BC has recently implemented a revenue-neutral carbon tax. These provincial initiatives are further exposing the weakness and lack of ambition of the Federal government actions.

All in all, provinces are definitely adopting more aggressive policies than the federal government with respect to climate change mitigation. Even Alberta has put in place regulations for large industrial emitters. Nevertheless, the stark contrasts between provinces when it comes to endowment of energy sources as well as the economic interest they pursue as a consequence of their industrial base contribute to design a piecemeal of climate legislations across the country.

The general picture that emerges though is one that reveals the presence of significant gaps. The absence of a coherent and coordinated political will and, most importantly, the absence of formal mechanisms of cooperation and decision-making between different levels of government are the main reasons explaining these gaps. The next section looks in more detail at the specific rules and competencies of each government level and identifies possible remedies to the current gridlock with respect to implementation of environmental policy in Canada, in light of the failure to achieve the Kyoto Protocol commitment targets at the national level.

3. Canada should adopt an arrangement similar to that of the EU: strengthening the Council of the Federation

Given the preceding discussion, one could argue that the key factors of success in the EU correspond to the key factors of failure. The absence of political will, a lukewarm public support, diverging regional interests and, most decisively, a lack of formal mechanisms ensuring widespread implementation of international environmental agreements caused Canada's inability to comply with its Kyoto Protocol commitments. I will explore the feasibility of establishing these formal mechanisms and in doing so I will heavily draw on the international trade agreements literature as the practices relating to international environment agreements are rarely addressed and very poorly documented.

3.1 Treaty-Making and Implementation in Canada. Federal and Provincial Roles

With regard to environmental and energy policy competence, the provincial governments own the natural resources and have the exclusive right to pass laws in relation to their non-renewable natural resources, -and the federal government has the right to legislate to protect the environment. The Supreme Court has recognized Ottawa's wide-ranging ability to regulate emissions. In the event of a conflict between a validly enacted provincial law and a validly enacted federal law, the federal law would likely prevail. The potential problem is that some of the provinces are going significantly beyond the federal government's initiatives and in case of a conflict, less ambitious federal laws would be enacted. The likelihood of such a conflict actually happening is extremely low and therefore remains only a theoretical hypothesis.

This rather unclear division of competences also has obvious implications on Canada's policy stance in international negotiations on climate change in terms of its ability to come to the table with a coherent position. This aspect is also complicated by the fact that more and more provinces are present on the occasion of these international negotiations. For instance, Québec and Alberta regularly attend UN COP meetings with their own agenda of objectives.

I examine in the following paragraphs the genesis of the Canadian federal-provincial conundrum looking in particular at Canada's treaty-making power and implementation of treaties in Canada.

The power to enter into treaties is not referred specifically in the *Constitution Act, 1867* – it is part of the Crown prerogative powers over foreign affairs. The power belongs to the Government of Canada (federal government). The treaty-making power is the prerogative of the Crown, delegated by the Queen³³ to be exercised in Canada by the Governor-General on the advice of Canadian federal ministers.

The provinces do not have treaty-making power. However, as indicated above and further detailed below, the provinces play a major role in the implementation process. Therefore, while the short answer is that only the federal Executive can assume international obligations for Canada by way of treaty, the reality is that provincial consultations often play a significant role in the decision to ratify an international agreement. The federal Executive can also ratify in the face of provincial opposition.

³³ All prerogative powers are delegated to the Governor General in clause 2 of the *Letters Patent Constituting the Office of Governor General of Canada*.

With particular reference to the Kyoto Protocol, however, this does not seem to be the case. It is interesting to note that in the EU, the opposite is true: the Executive (i.e. the Commission) cannot undertake international commitments without the member states' consent (at least a qualified-majority of them).

With regard to implementation, Canada follows a dualist system with regard to treaties, i.e. strict separation between treaty rules in international law and rules of domestic law. Contrary to the EU, treaties are not self-executing in Canadian law and therefore cannot be applied directly by Canadian courts. This means that it is not necessary to convert treaty obligations into domestic legal rules because such obligations can be complied with by administrative decision; however, in most instances, treaty obligations are converted into rules of domestic law by statute or regulation. Both NAFTA and the WTO Agreement were implemented by detailed statutes, which included lengthy lists of statutory amendments to various existing acts.³⁴

The statutory implementation of treaties in Canada follows the ordinary division of powers. If a treaty deals with matters within federal jurisdiction, then it must be implemented by Parliament.³⁵ Other treaties can only be implemented by provincial legislation.³⁶ This division of jurisdiction in the implementation of treaties was affirmed

³⁴ *North American Free Trade Agreement Implementation Act*, S.C. 1993, c. 44; *World Trade Organization Agreement Implementation Act*, S.C. 1994, c.47.

³⁵ For example: the *Canada United States Free Trade Agreement*, the *Bretton Woods Agreement*, taxation treaties and defense treaties.

³⁶ For example: the *Convention on the Civil Aspects of International Child Abduction*, the *Convention on Contracts for the International Sale of Goods* and the *Convention Providing a Uniform Law on the Form of an International Will*.

by the Judicial Committee of the Privy Council (formerly the final court of appeal for Canada) in the “*Labour Conventions Case*”.³⁷

The Canadian federal government negotiates treaty obligations that sometimes fall within provincial legislative jurisdiction. However, the Canadian Parliament does not have the jurisdiction to implement those obligations – that task falls to the provinces. As a result, the Government of Canada would not normally assume such obligations without first securing the concurrence of provinces. In the environmental sphere, the practice has been to create consultative processes between the federal government and the provinces during the negotiation and implementation phases of the agreements. These *ad hoc* processes generally lacked well-defined structures. For that reason, to support my argumentation, I am mostly drawing on the more relatively firmly established international trade practices and processes.

In this instance, it is worth referring to the existing consultation structures in Canada between the federal government and the authorities of the provinces and territories on international trade issues; i.e. the CTRADE committee system for international trade. It involves a series of meetings between Ottawa and the provinces that take place four times annually. CTRADE meetings are also in addition to regular contact between federal and provincial officials regarding on-going negotiations and trade disputes.³⁸ However, in general terms, it cannot be argued that Canada has really developed a longstanding practice of federal-provincial consultation and clearly this is

³⁷ *Canada (A-G) v. Ontario (A-G)*, [1937] A.C. 326.

³⁸ See C.J. Kukucha, "The Role of Provinces in Canadian Foreign Trade Policy", pages 122 and following.

the case concerning the implementation of the Kyoto Protocol requirements. As indicated above, there is no institutionalized mechanism for intergovernmental consultations and discussions in Canada in matters dealing with negotiation or implementation of international agreements on environment and climate change. As a standing body, there is only the consultative Canadian Council of Ministers of the Environment (CCME) which meets once a year to discuss national environmental priorities. I will come back to it in the subsequent section on the Council of the Federation.

When Canada assumes treaty obligations that domestically fall within provincial jurisdiction, the Government of Canada is responsible vis-à-vis its treaty partners in international law for Canada's compliance with such obligations.³⁹ However, the Government of Canada cannot force the provinces to implement treaties. As a result, Canada assumes a significant risk if the federal Executive signs a treaty whose subject matter falls within provincial jurisdiction without having provincial support.

3.2 Strategies for a harmonized federal-provincial approach

As discussed above, provinces, territories and municipalities control many of the important levers for making significant reductions in greenhouse gas emissions from particular sectors. These sectors include, among others, electricity generation, residential, commercial and institutional buildings, transportation, agriculture, and waste

³⁹ Under Public International Law, subjects of international law (e.g. States) are responsible for the activities of all branches of government within their system of governance, and also for all regional levels or other subdivisions of governments. On Treaty Law more specifically on Treaty law, see Articles 27 and 46 of the Vienna Convention on the Law of the Treaties.

management. Over 85% of Canada's total greenhouse gas emissions is emitted in areas under sole or partial provincial/territorial responsibility.⁴⁰

What are then the possible solutions for Canada to adopt a harmonized federal-provincial approach guaranteeing compliance with the requirements of an international environmental agreement? Canada is a signatory to 81 international multilateral and bilateral environmental agreements, including 34 multilateral agreements, 23 Canada-US agreements, and 24 cooperative bilateral agreements. The need for internal coordination is therefore essential. A number of existing strategies to encourage provincial implementation and compliance to ensure internal coordinated action and achievement of agreed reduction targets is outlined below.

In terms of solutions that are more specifically pertinent to environmental policy, a strategy that could be implemented would essentially consist of streamlining greenhouse gas emissions through federal-provincial agreements with each individual province through specific equivalency and administrative agreements.

As prescribed under section 10 of the *Canadian Environmental Protection Act (CEPA), 1999*, “the purpose of equivalency agreements is to avoid duplication among the various orders of government and to enable the best-positioned jurisdiction to provide the highest environmental quality for Canadians” and “when an instrument already exists in another jurisdiction (provincial/territorial) that achieves the same environmental outcome as a *CEPA* 1999 regulation, the provincial or territorial instruments apply instead of the

⁴⁰ Government of Canada (2007), “A Climate Change Plan for the Purposes of the *Kyoto Protocol Implementation Act*, p.5

CEPA 1999 regulation. For this to occur, the Province/Territory enters into an equivalency agreement (EA) with the Government of Canada.⁴¹

Chapter 5 of the 1999 Report of the Commissioner of the Environment and Sustainable Development assesses the rationale for entering into such agreements⁴². In fact, the *CEPA* authorizes the Minister of the Environment to sign “equivalency agreements” with the provinces. Equivalency agreements suspend the application of the specified federal *CEPA* regulations in the signing province, so that only the equivalent provincial regulations apply. However, the federal Minister of the Environment remains responsible for reporting annually to Parliament on the administration of the *CEPA* provisions that permit these equivalency agreements (Section 5.13).

The *CEPA* further foresees the development of “administrative agreements” with the provinces. These allow the federal and provincial governments to share administration of the specified regulations and provide industry with a "single window" to government. The agreements can cover such activities as inspection, enforcement, monitoring and reporting. However, both levels of government retain their respective responsibilities (Section 5.14).

While such equivalency agreements would be relatively devoid of political complications and more easily attainable as they would be negotiated on a bilateral basis,

⁴¹ http://www.ec.gc.ca/ceparegistry/gene_info/factsheets/fs_fi-equiv.cfm

⁴² http://www.oag-bvg.gc.ca/internet/English/parl_cesd_199905_05_e_10171.html

hence without having to take into account the different circumstances and diverging interests of each province, this arrangement would still present an *ad hoc* approach quite likely to preserve the patchwork quilt situation currently in place, notwithstanding the fact that, as a result, greenhouse gas emissions could indeed be more effectively reduced. At the moment, however, only one province, Alberta, has entered into an equivalency agreement with the federal government. The agreement is on regulations to control toxic substances in Alberta. As a result, a number of corresponding CEPA regulations do not apply in that province anymore. It is safe to conclude that, while potentially helpful in bridging gaps and avoiding legislative overlaps, equivalency agreements, are not instruments that can be realistically relied upon to achieve more coherence on environmental policy.

As a general consideration, Canada's approach to intergovernmental relations is informal, much less structured than the one adopted in the EU. It is essentially composed of a few consultative bodies (permanent and non permanent) that have no prescriptive power or enforcement mechanisms such as the Council of the Federation, First Ministers Meeting's at the highest executive level and such as the CCME at the ministerial level. Federal-provincial-territorial meetings are organized by the Canadian Intergovernmental Conference Secretariat, an administrative body which oversees inter-sectoral coordination between senior levels of government.

Wood and Verdun summarize the contributions of various scholars on the matter who argue that Canada's system of intergovernmental relations is "under-

institutionalized, overly-hierarchical, executive dominated, and mostly adversarial".⁴³ Wood and Verdun further underscore how incentives to intergovernmental cooperation are weak given the institutional set up of devolution and territorial self rule.⁴⁴ Given these premises, it is almost inevitable that such dynamics and interactions would lead to a dysfunctional and unpredictable collective decision-making system.

Let's now look at how Canada deals more specifically with environment and climate change coordination. The implications of an inadequate intergovernmental system obviously had repercussions on the environmental field as well. At the beginning of the 1990s, in the early days of environmental multilateral policy development stemming from the 1992 Rio Conference, a large number of inter-institutional bodies was created specifically to address climate change issues. These were the following: federal-provincial secretariats of the CCME and the Canadian Energy Ministers (CEM) which met jointly as the Joint Ministers on Climate Change (JMM), which in turn established six technical working groups on various issues (analysis and modeling, emissions allocation; the National Air Issues Steering Committee (NAISC), the National Air Issues

⁴³ Wood, D.E., and Verdun, A. (2011), "Governing Canada and the European Union: Key Similarities and Differences", Policy Brief for the Canada-Europe Transnational Dialogue: Seeking Transnational Solutions to 21st Century Problems, p. 3. Paper available at <http://www.canada-europe-dialogue.ca>

See also Richards, J. (2001, in Wood and Verdun 2011, p. 3), Brock, K. (2003, in Wood and Verdun 2011, p. 3), Lazar, H. (2005, in Wood and Verdun 2011, p. 3), Advisory Panel on Fiscal Imbalance (2006, in Wood and Verdun 2011, p. 3)

⁴⁴ Ibid, p. 3

See also Hooghe, L., Marks, G., and Schakel, A. (2010, in Wood and Verdun 2011, p. 3),

Coordinating Committee (NAICC), the Climate Secretariat and the National Climate Secretariat.⁴⁵

All these newly created bodies had as main function and mandate to foster dialogue and coordinate climate change policies between the federal and provincial governments as well as among provincial governments. It is difficult to assess the impact of their work in great detail but, clearly, the absence of a coherent national approach to climate change policy would imply that their work wasn't either taken into due consideration by the ultimate decision-makers or that no agreed conclusions could be reached. None of these bodies still exists today with the notable exception of the CCME.

In fact, one should look at alternative possible strategies that do not have to be necessarily restricted to neither existing legislative and regulatory environmental mechanisms nor *ad hoc* processes such as the one described above. In that regard, I will now draw upon important examples cited in the international trade literature. As I have already mentioned, environmental literature on the subject is as well as the existing practices and mechanisms mentioned above don't offer solutions that would significantly enhance internal coordination and effective implementation of international agreements. In contrast, the arrangements proposed in the international trade literature are quite relevant and potentially transferrable to the environmental field. I will detail the ones that have been mostly discussed below.

⁴⁵ Macdonald, D., et al (2012), p.40-43

The following ones are a few options that have been discussed extensively in the context of the current negotiations for an EU-Canada *Comprehensive Economic and Trade Agreement (CETA)* and provide a full range of possible arrangements:

- Consultation with provinces by Canada on provincial matters during negotiations (which reflects the approach adopted for the *CETA* negotiations);
- Political commitments by provinces in support of concluded treaty; these would mostly take the form of public commitments expressed through official government communications
- Letters by provinces stating their intentions to implement concluded treaty; these would be written official communications from the provincial governments to the federal government
- Consultation with provinces by Canada in some dispute resolution procedures;
- An international treaty giving provinces a formal role in some dispute resolution procedures;
- Federal-provincial agreement with provinces such as the Agreement on Internal Trade (AIT)⁴⁶; the AIT was signed in 1995 with the objective of abating trade barriers between the provinces in a effort to achieve domestic trade liberalization.⁴⁷

The first four strategies could reasonably increase the probability of adherence to the treaty's provisions, but none of them can possibly guarantee to Canada's partner/s the

⁴⁶ Hogg, P.W., Notes for talk to European Union Heads of Mission, Ottawa, 16 May 2012.

⁴⁷ Major areas covered are: reciprocal non-discrimination, right of entry and exit, no obstacles, legitimate objectives, reconciliation, and transparency.

assurance of legal effective implementation of an international agreement at the sub-national level. They can't provide this guarantee because they don't foresee nor include any legislative enforcement mechanism from the jurisdiction holding exclusive or shared competence on the subject matter that has been agreed upon by the federal government. Provinces could also implement new legislation in contrast with treaty at any time.

The fifth strategy could partially resolve some of the emergence of potential contentious issues preventing the agreement's implementation. Developing a very well-defined dispute resolution mechanism within the international treaty itself that would take into account the presence of sub-national and other stakeholders' competencies and interests would definitely reinforce its applicability. The international treaty would have to include provisions enabling provinces to have a formal role to play in dispute resolution mechanisms and calling for the set up of committees including provincial representation. However, as the provinces would not be signatories to the international treaty, their participation in the dispute resolution mechanism would most likely be the result of a concession from the federal government, who would still remain the only legal personality potentially liable for the infringement of any provision of the treaty.

The sixth strategy, a separate federal-provincial agreement with the purpose to implement an international agreement, could certainly be considered a more powerful complying instrument. However, it seems very unlikely that it can be achieved. For instance, the only precedent is the federal-provincial trade agreement. It has not been done with key international trade agreements such as NAFTA and the WTO.

Specifically addressing trade agreements and their challenges for Canadian federalism, Fafard and Leblond further identify five scenarios for provincial support for a trade agreement, for *CETA* in the specific case. It is to be noted that some of the following scenarios are in part similar to the ones identified by Hogg but I will list them all in order to have a complete picture.

- Status quo scenario: Canada concludes an agreement without any role played by the provinces and the international agreement is then approved and ratified at the federal level;
- Limited buy-in: provinces' commitments are included into an annex to the international agreement;
- Moderate buy-in scenario: provinces agree to enact implementing legislation to implement the international agreement;
- Full buy-in scenario: provinces sign the international agreement becoming, for all intents and purposes, full formal parties to the international agreement;⁴⁸
- A high-level intergovernmental summit: a First Ministers Conference between the provinces and the Government of Canada to negotiate a political agreement indicating provinces' commitment to implement an international agreement.⁴⁹

The authors recommend this last proposal as the way forward as “it would represent the best way for the provinces to make clear their commitment”⁵⁰ expressing

⁴⁸ Fafard, P., and Leblond, P. (2012), “Twenty-First Century Trade Agreements: Challenges for Canadian Federalism”, p.17-19

⁴⁹ Ibid, p.25

though reservations on the willingness of the current Conservative government to engage in lengthy intergovernmental negotiations. The authors explain that would be the case as the cost of complex intergovernmental negotiations with the provinces would outweigh the expected benefits of an agreement and also as it reflects a general historical trend of decreasing frequency of intergovernmental negotiations.

As discussed, all these proposed qualitatively differing arrangements have merits and limitations in particular with respect to the likelihood and potential effectiveness following their adoption. In terms of transferability to the environmental field, they could all be envisaged but would also present comparable merits and limitations. What I would like to underscore, however, is that they all have one major shortcoming in common. They fail to address the main weakness of the current constitutional set-up by focusing on proposing exclusively either top down and/or *ex-post* solutions. This is a fundamental weakness and also represents the major difference with how the EU proceeds to negotiate and implement its trade agreements.

As Wood and Verdun point out, the main difference between the EU and Canada as regards the multilevel governance set-up is the degree of institutionalization of its stakeholders. The preceding discussion has highlighted how the EU has created formal institutions and mechanisms while Canada has historically adopted a much more informal approach to intergovernmental relations. Given the complexity of constitutional

⁵⁰ Ibid, p. 25

negotiations and past failures, the federal government and provinces usually tend to discuss and negotiate on a bilateral basis.⁵¹

All in all, Fafard and Leblond's proposal seems to be the one more likely to overcome obstacles towards the implementation of international agreements in Canada. It is not a scenario that contemplates a full buy-in by the provinces but it is considered the most achievable and likely to be applied, given the existing legal and political constraints. I believe that its approach can be transferred to the environmental policy field in some specific aspects. In particular, I refer to the role that can be played by the First Ministers within the Council of the Federation configuration. I will build on it in the following section and develop the idea of a collaborative bottom-up formal institutional mechanism attributing a central role to the Council of the Federation.⁵²

3.3 The Council of the Federation

The solution advanced by this paper can be described as being difficult to achieve but whose impact would significantly contribute to invert the trend of increasing greenhouse gas emissions and, in addition, might profoundly modify both the federal-provincial and inter-provincial relationships.

What I am proposing is a Canadian-style burden-sharing agreement where provinces would negotiate an agreement between themselves, and between them and the federal government, before entering any negotiation to conclude an international treaty

⁵¹ Wood, D.E., and Verdun, A. (2011), p. 6

⁵² The Council's objectives and mandate are detailed in its Founding Agreement signed on 5 December 2003, p.3-4 http://www.councilofthefederation.ca/pdfs/COF_agreement.pdf

involving multilevel competencies. Just as in the EU, under this agreement, each province would contribute toward achieving a new, post-Kyoto, global Canadian target of greenhouse gas emissions reductions, according to each sub-national party's capacity.

This arrangement would consider the different energy-generation infrastructure, economic development and energy consumption patterns of each province. For instance, Québec and British Columbia would likely have to bear the most stringent reductions as they are in a better position to do so thanks to their energy sectors heavily dominated by production of clean hydroelectricity. Alberta would likely be allowed to stabilize or even increase its emissions in order to continue exploiting the oil sands, until new cleaner technologies to extract these resources are to be developed and implemented.

How can this agreement be achieved when formal institutional mechanisms are lacking? Two foreseeable options could be considered: a top-down or a bottom-up approach.

An *ex ante*, top-down approach would entail the federal government taking the initiative and opening the discussion with all provinces at the table through an *ad hoc* First Ministers Conference. The advantage of this approach is that it could be put in place in a relatively short time frame.

However, given the great number of stakeholders, such a negotiation risks to be very difficult in terms of coordination between the various actors, the political ramifications would likely be uncontrollable and it all could end up in a public relations exercise where each actor would like to be seen as either strongly defending their own

interests or playing a competition about who is more environmentally virtuous. In addition, it could be perceived by provinces as the federal government maneuvering to impose its own agenda.

The *ex ante*, bottom-up approach is the one I would recommend. It might reveal itself as arduous in its first stage as the preceding approach but likely much more viable in its second stage. In fact, I am suggesting that the Council of the Federation should be convened by its Chair and negotiate a burden-sharing agreement among all the provinces and territories themselves.

The Premiers' discussion and negotiation stage would be preceded by an experts' discussion and negotiation stage at the environment ministers' level. There is in fact a forum that is already in place and could be put to use for this purpose. It is the Canadian Council of Ministers of the Environment (CCME), which is comprised of federal, provincial and territorial ministers of environment. Their technical work could feed the final discussions at the highest level.

Once this multistage complex negotiation yields its results, the Chair of the Council would receive a mandate from its peers to present a common position to the federal government on behalf of all provinces and territories. The subsequent negotiation would be extremely simplified and conducted on a bilateral basis between the Chair of the Council and the Prime Minister. This approach would in some ways replicate the way of operating of the EU where the European Council instructs the Commission to negotiate on its behalf upon an agreed mandate.

Obviously, there are no precedents at this point of such an intergovernmental decision-making mechanism. In fact, it could be one indeed that establishes new ground-breaking parameters and could hence be institutionalized.

Despite its relatively recent foundation, the Council seems to be becoming more cohesive and resolute on issues of mutual provincial interest. For example, in 2009, the Council repeatedly and strongly endorsed Canada in its intentions to pursue negotiations with the EU on a deeper economic partnership. This is a positive sign as provinces, once again, have very diverging interests, both offensive and defensive, in liberalizing trade among them and the EU. It is indeed a testimony to the fact that they are ready to work together with greater commitment and focusing on concrete results. The last meetings of the Council which took place in July and November 2012 had climate change and energy issues very high on the agenda, a testimony to the fact that provinces realize the importance of this forum to address the most challenging and divisive intergovernmental issues. In fact, further to a proposal advanced by the Alberta Premier, there was agreement to start seriously working on a possible national energy strategy.⁵³ Discussions also took place around the idea of building a west-to-east pipeline which would move oil from Alberta to Québec.

Notwithstanding its enhanced prominence, it is clear that the Council is still a highly political consultative body, which can't enforce any directives deriving from its meeting conclusions on its members. This is actually the step needed to bring the Council

⁵³ See press release of the July 2012 meeting on the development of a common energy vision entitled *A Shared Vision for Energy in Canada* at <http://www.councilofthefederation.ca/pdfs/Energy-FINAL.pdf>

in the position where it could function much more effectively as a formal interlocutor to the federal government.

The Founding Agreement includes final provisions that state that “ It is envisaged that the Council of the Federation will evolve, as required, to ensure its maximum effectiveness. This Agreement may be amended from time to time with the consent of all of its Members.” While it is unrealistic to expect modifications to the Canadian constitution as a result, such a decision would carry so much political weight that it could not be ignored by any of the federal and provincial stakeholders involved in the process, insuring an ex-ante coherent and agreed upon negotiating position.

4. Conclusion

In this paper, I have presented two different approaches to the Kyoto Protocol implementation. Both the EU and Canada represent complex multilevel institutional environments, which are characterized by a certain degree of similarity. However, both entities have responded very differently in enacting effective legislation.

The EU decided to avail itself of its supranational incarnation and to negotiate a total greenhouse gas emissions reduction target to be achieved through a burden-sharing agreement involving all its 15 Member States. This choice contributed to acquiring a greater political clout on the international scene and to successful reductions in line with the Protocol's requirements.

Canada, instead, seems to be paralyzed by its lack of internal decision-making mechanisms between the federal and the provincial governments. Treaty-making and treaty-implementation remain intricate issues when it comes to shared competences. The result is a profound divide between federal and provincial policies aimed at greenhouse gas emissions reductions.

It is not likely that a harmonized solution will see the light in Canada soon unless external events, such as policy developments in the United States, will force all Canadian levels of government to coordinate. I maintain that an EU-like proposal to find a cohesive approach to greenhouse gas emissions reductions is viable.

As proposed in this paper, this could happen through an *ex-ante*, bottom-up approach involving negotiations between the provinces, represented by the Council of the Federation and the federal government. This intergovernmental decision-making procedure on environmental matters could establish new, ground-breaking parameters and could hence be institutionalized, in order to make other agreements possible in other spheres of Canadian public policy.

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