Subnational Sabotage or National Paramountcy? Examining the Dynamics of Subnational Acceptance of International Agreements

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Abstract Federal states, such as Canada and the United States, face unique problems in implementing international agreements because they require the acceptance by subnational governments of these treaties even when the negotiations (i) do not involve them and (ii) may be impeding the rights of those subnational governments. Ever since the "watertight compartments" decision of Lord Atkin in the 1937 Labour Standards case, provincial autonomy within its sphere of influence has been a primary foci of Canadian jurisprudence. The primacy of provincial legislatures in the respective realms means that international obligations cannot be forced on them without their consent. On the other hand, both the interstate commerce clause of the US Constitution and the federal power to make treaties has been interpreted broadly to prohibit state interference in US government-signed international treaties. Even non-federal states such as the People’s Republic of China have had to deal with this problem given the Special Administrative Regions of Hong Kong and Macau and the SARs’ ability to sign international agreements without PRC involvement. This issue even affects sovereign states such as Jamaica when they are part of a common market superstructure, such as the proposed Caribbean Common Market (CARICOM). This paper examines, using examples drawn from Canada, the United States, Hong Kong, and the Caribbean, the influence subnational governments (and sovereign governments that are part of a common market) have on the viability of international agreements and uses game theory to suggest ways to balance the need to avoid subnational sabotage of such agreements without invoking a national paramountcy argument that could destroy a country’s federal structure and create irreparable harm to the rights of subnational governments.

INTRODUCTION
About 1 in every 8 countries in the world today is a federation, ranging in size from tiny St. Kitts and Nevis (only 38,800 people and 261 sq. km) to India (1.07 billion people and 3.3 million sq. km) and Russia (143.8 million people and 17.1 million sq. km). Some general observations can be made: Large countries (in area) tend to be federations. Of the eight largest countries (Russia, Canada, United States of America, China, Australia, Brazil, India, Argentina) in the world, only China is not a federation. All federations, with the exception of the United Arab Emirates, are at least partial democracies. The theoretical problem for federations is that when one has two levels of government, these levels can come into conflict with one another. Nowhere is this problem more evident and problematic than in the realm

1 Although one could argue that it is a de facto one, given the inability of the central government to control its provinces and the creation of Special Administrative Regions (SARs), especially the relationship between Hong Kong and the rest of the country since 1997.
of international relations. While formally the national government may appear to hold all of the cards as it is the internationally recognized actor, the federal structure makes it mandatory to consult with the subnational governments in reaching any agreement that would interfere with the area of juridic competency of the subnational government. This is because actions taken by a subnational government can wreck havoc on the nation as other countries retaliate against the nation or common market as a whole.

In game-theoretic terms, the national government/common market moves first, signing a trade agreement between itself and another party. It presumably does so because the agreement is beneficial. This agreement is supposed to be binding on its subnational parts. However, the subnational government will defect from the agreement if the gains from defection outweigh the cost of defection. These defections from free trade result in retaliatory trade action taken by another country against the federalist country. There are two types of actions that the other country can choose. First, they can try to target the subnational government in question. Such a tactic was employed by the United States government in increasing import duties on Canadian softwood lumber in a dispute with the province of British Columbia over stumpage fees. In this case, the province pays the cost of the sanction. This is principally useful when the trade sanction involves subsidies. One can correct the subsidy by imposing a tariff equivalent to the subsidy.² Second, it can target other products in the national or common market. This was the case in the banning by Europe of growth hormone in beef coming from the United States. The WTO authorized retaliatory trade sanctions by the United States against several European products such as Dijon mustard, foie gras, truffles, canned tomatoes and other products. In this case, there is no easy means of balancing harm so action is taken against other products. To the extent retaliatory trade sanctions (which are designed to cause an equivalent harm to the originating country/common market) are targeted in direct proportion to the damage done by each subnational government, we have an equivalent situation. However, if they are not, subnationals may feel effects not comparable to their own actions. This creates an externality. As such, subnational governments may receive benefits from imposing sanctions greater than the cost and will, therefore, be more likely to engage in trade-disruption behavior. Under conditions of uncertainty, it is unclear whether the subnational will be appropriately punished.

There is a flip side to this. Federal states and common markets are political as well as economic entities. The idea is to create friction between subnational governments and have them enforce discipline against their common partner. Thus retaliatory trade sanctions may be designed more to ensure enough political pressure is exerted against the offending entity as opposed to economic pressure.

THE CASE OF CANADA
Hugh McLennan once wrote a novel describing Canada as being two solitudes, the French and the English, but a better description would be there are a multitude of solitudes, each working against one another as much as toward a common goal. A clear example is in international and interprovincial relations. Canada cleaves into a variety of factions exerting multiple influences on the international system. There is the formal policy of the federal
government protected by the Constitution but there is also a significant informal policy conducted by individual provinces, and the growing globalization of the world economy is impinging upon areas of previously exclusive provincial jurisdiction.

As provinces have become international actors in their own right, they have been subject to the pressures of the international system. To a lesser extent, they exert influence on the international system. The constitutional “watertight compartments” legal doctrine established in the Labour Conventions case is at odds with these forces. Provinces are discovering federalism allows them greater flexibility to act in discord with the federal government. There are also conflicting pressures of centralization (trade agreements and other effects of globalization increasingly requiring the transfer of power to supranational organizations) and decentralization (mounted by the Conservative Party and the Bloc Quebecois in Ottawa and by various provincial governments) impacting Canada.

RATIONALE FOR RESTRICTING TRADE

I have written elsewhere on why countries decide not to enter into free trade agreements. For example, if the country is interested in power (commonly modeled in game-theoretic terms by making the country a relative gains maximizer) then it accepts free trade so long as this trade increases its world income vis a vis the rest of the world to a greater extent than the increase in bilateral income for the other country. However, there is little theoretical justification for a province to be interested in power in the international sphere and typically international relations ignores subnational actors, which are thought to be principally interested in increasing their absolute level of wealth.

At the same time, there are several economic objections to free trade from the provincial perspective even if the nation has decided to enter into a free trade agreement. These are usually seen along ten lines of attack: (1) the “infant industry” argument; (2) high adjustment costs; (3) economic externalities; (4) the need to pressure others to open up their markets; (5) imperfect markets (including oligopoly); (6) protection of “high-wage” industries; (7) backward linkages; (8) “strategic” industries; (9) worsening of the terms of trade; and (10) incomplete information or uncertainty. There are at least two more political economy arguments: (1) declining marginal benefit to trade coupled with high maximizers in a free trade regime, note that free trade will be preferred to autarky even by relative gains maximizers unless the terms of trade are pronoucedly unbalanced or the countries suffer from high inflation, which serves to make the countries myopic and thus more worried about high adjustment costs.

4There are several non-economic and pseudo-economic objections to free trade. Root (1984, 281-283) lists pseudo-economic arguments expressed in the media, on “buy domestic” commercials, and in labor union advertisements. These include the mercantilist argument that money spent on foreign goods goes overseas and thus impoverishes the nation; the “buy domestic” argument that states that money spent on domestic goods creates domestic jobs while similar expenditures on foreign goods only create foreign jobs; the “equalization of costs” argument that asserts that tariffs should equalize costs so as to ensure a “level playing field”; the wage disparity argument that maintains that price and wage differentials will force domestic “high wages” down to foreign “low wages”; and the “prevention-of-injury argument” that attempts to shield domestic industry from harm by allowing the raising of tariffs if the market share of foreign firms increases too quickly or to a level that threatens the domestic industry’s survival.
transactions costs for concluding agreements; and (2) the most powerful players in the market make the “rules” governing trade.

Infant industry protection is an old argument Mill (1917) and Marshall (1926) favored. GATT recognized its validity with article XVIII(B). It is an argument of intertemporal market failure, a market failure correctable only if an industry receives protection during the period of time when market forces would force a premature exit. It may be argued the industry is one benefiting from scale economies in production (Krugman 1984) although then it is only worthwhile to have protection if there is no retaliation (Krugman 1992). According to Corden (1984, 91-92), market failures used to justify infant industry protection include capital market imperfections (such as investment myopia), labor market imperfections (such as an inability of firms to recoup investment in labor due to labor mobility), and network externalities (such as knowledge diffusion and growth stimulation in other sectors of the economy). In all cases, the first best policy is one attacking the central problems (either correction of the market imperfection or direct financing to compensate firms for the loss of labor or to create knowledge) as opposed to using tariffs or export subsidies. There are four key problems with the infant industry approach: (1)

5See Baldwin (1969) for why tariffs cannot create incentives for greater knowledge diffusion by individual firms.

6Grimwade (1989, 27) incorrectly argues subsidies are economically more efficient because they lower prices, as opposed to raising them through the tariff. The reason subsidies are pareto-superior is deadweight losses are lower than for the tariff.

7As pointed out by Johnson (1971, 147-148), the argument against extending infant industry protection, which asserts infant industries often continue to be protected after they have matured, is technically invalid because gains from protection may lead to a social gain, despite the continuance of such protection, over the non-introduction hypothesis.

8As there is a difference between the conditions surrounding a protected market and those surrounding a free trade zone, the outcome will differ (Bhagwati 1988, 97). Indeed, competition may be a lubricant for industrial change. For a good institutionalist argument about the merits of competition, see Auerbach (1988). For an evolutionary discussion, see Nelson and Winter (1980).

9As pointed out by Johnson (1971, 146-147), there is a present cost to protection that must be at least matched by the future stream of income generated after the removal of protection for the policy to be economically efficient.
trade is long-term, a case for protection may be justified.  

Externalities may exist. In general equilibrium, if the price of a good fails to reflect its true social cost, free trade is not warranted. One may need to inspect imported fruits and vegetables to ensure there are no harmful insects imported into the country (such as the Mediterranean Fruit Fly). The government may use a tariff equivalent to the marginal cost of inspection to compensate for this cost. Similarly, there may be consumption externalities (such as cigarettes or gasoline causing pollution) warranting tariffs.

Protectionism can force others to open up their markets. This is an argument against unilateral free trade but in favor of trade agreements. Power allows countries to use the threat of protectionism to extract favorable trade conditions or if the cost of introducing punitive tariffs is less than the benefit from opening the new markets (once again, if the future discounted return to tariff protection exceeds the future discounted cost of the same, tariff protection is the optimal strategy). In practice, such strategies tend to be anything but temporary measures and instead create a situation where foreign tariffs are a given. However, for political reasons, tariffs may be answered with tariffs. In such cases, it is an unfortunate circumstance but one restoring equity within a country (at a lower level of efficiency and overall income).

“Strategic trade policy” of “new international economics” promoted by Helpman and Krugman (1985) shows where imperfectly competitive markets exist (such as in oligopolistic industries), laissez-faire is suboptimal. Hagen (1958) argues if there is distortionary pricing in the labor market (such as found in discriminatory wage payments or labor union power), a laissez-faire policy is not the optimal policy.

Reich (1991) says one must protect “high wage” industries. This is unlike the pseudo-economic argument as he does not argue competition with “low wage” countries will drag down wages. Instead, he believes a country needs to maintain its base of “high wage” industries (those that require high levels of skill and are thus “high wage” industries in all countries) to maintain a high standard of living in the country. This, and its related argument, the strategic industries case, share the same defect: if a country is going against its comparative advantage, it will lose business to other countries and the “high wage” jobs saved will only be at the cost of higher unemployment and greater efficiency losses in other industries.

Some commentators emphasize “backward linkages.” Development of one

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10 For example, if a country has high inflation, it will place greater emphasis on short-term costs than long-term benefits. However, perhaps by trade linkages, reductions in inflation can be transmitted. If that occurs, the country may want to enter into trade agreements in order to reduce policy myopia.

11 In such cases, domestically produced goods should also be affected so they should also be taxed, leading to the possibility that an excise tax should replace tariffs. However, it is important not to discount the possibility that the social cost of imported goods might be higher than the domestically produced goods, rendering the need for a tariff.

12 This argument differs from the proposal that a country could attempt to use monopoly power temporarily by imposing a tariff (the temporary nature because the rest of the world would retaliate) and the short-term exploitation would more than compensate the long-term loss. Johnson (1953) showed that this is generally not the case while Rodriguez (1974) showed that it is the case if quotas substitute for tariffs (showing as well that the long-stated equivalence property between tariffs and quotas is not valid). This is one reason why under GATT certain non-tariff barriers are allowable if they are converted into “equivalent” tariffs, but the reverse is not allowable.
industry may be dependent upon development of another. The car industry supports the steel industry so if one is lost, the other will be lost too. While one can argue economics of agglomeration are important, this is an argument for subsidization of generation of linkage benefits, not tariff protectionism.13

Then there is the “strategic industries” argument. This is a political argument veiled as an economic one. Proponents believe certain industries are “strategic” in that they are required for a country’s viability. The points made against the “high wage” industries argument are equally applicable as it is a variation on the same theme. Cohen and Zysmen (1987) argue “manufacturing matters” as services and manufacturing are linked in such a “tight and concrete” way that if one removes the manufacturing base, the service sector will fail to develop. Kaldor (1966) argues manufacturing is important because it is more technically progressive than service industries. Libicki (1989, 1) argues strategic industries “are those that best foster the systematic application of knowledge to generate more and better outputs from inputs.” Many countries use this argument cloaked in the guise of protection of national security to argue for protection of agriculture. While there may be a good reason not to dislocate millions of subsistence farmers for political reasons, the economic rationale is suspect. Indeed, a protectionist policy may actually reduce food security due to a lack of import substitutability in the aftermath of a natural disaster as witnessed in the Caribbean following recent hurricanes, which wiped out the agricultural sector in several island nations.

Johnson (1958) and Bhagwati (1958) note growth can be “immitterizing”: a deterioration in the terms of trade is generated by growth so overall welfare falls as the terms of trade decline causes a greater reduction in welfare than overall growth adds to welfare.14 This argument is based on two paradoxes an optimal tariff15 can fix: the Metzler paradox and the Lerner paradox. Under normal conditions, the demand curves of both countries are elastic so tariffs have the effect of protecting domestic industry. On the other hand, if the domestic curve is inelastic and there is the introduction of a sub-optimal tariff, the Lerner paradox can occur, leading to a deterioration of the terms of trade. If the foreign curve is inelastic, the Metzler (1949) paradox may ensue, leading to a reduction in the price of imports.16

The presence of uncertainty and incomplete information provides the last economic argument against free trade. Under uncertainty, autarky may be pareto-superior to free trade (Newbery and Stiglitz 1981), leading to tariffs as insurance against the uncertainty of the market (Eaton and Grossman 1981).

13This all comes down to a question of path-dependency. Dynamic protectionist arguments (which are arguments for subsidization) are arguing that path-dependencies exist while those who give static free-trade arguments are implying that these are path-independent variables.

14Neither Johnson nor Bhagwati argued for protectionism. They merely noted theoretical possibilities for declining welfare following growth in both open and partially open economies. Furthermore, Johnson (1967) and Bhagwati (1968) argue the presence of tariffs does not alleviate this problem.

15An “optimal” tariff is one that reconciles the terms of trade such that the net national gain is maximized. Optimal tariffs correct distortions in the international market. These distortions are only correctable with a tariff and not a subsidy (which corrects distortions in the domestic market). Johnson (1965, 4) goes so far as to say the “only valid argument for protection as a means of maximizing economic welfare is the optimum tariff argument; all other arguments for protection [are] arguments for [taxes or subsidies].”

16Jones (1989) shows an optimal tariff may not resolve the Metzler paradox.
The last two arguments are based on political economy, not pure economics. Trade agreements have costs associated with them and declining marginal benefit to each additional widening (addition of countries) or deepening (reduction of trade barriers) of trade relations. The second of these arguments is the country with the most “power” is the one making the rules. This uses the concept of the economic hegemon (Kindleberger 1981; 1986; Keohane 1980). While it may be beneficial to conclude free trade agreements nonetheless, it is not entirely clear that following the hegemon’s rules would be the best course of action for increasing world welfare. Thus, in order to reduce trade dependency and harmonize policies, multilateral free trade may be preferable to bilateral trade agreements with the hegemon. Diversification and greater worldwide welfare may result from having small countries choose to liberalize trade with other small countries before liberalizing with the hegemon.

Any of the arguments can be applied by a subnational government desiring to interfere with international trade. When one of these concerns is expressed by the subnational government but not the national government, there will be the potential for a conflict of wills. For example, adjustment costs may be greater in the Maritimes than in the rest of Canada. While the Canadian government perhaps should remedy such inequities and placate provinces adversely affected by free trade, such an attitude could create a system for extracting concessions where none need be given. The Canadian government will likely take a hard line against compensation demands of provincial governments.

THE CANADIAN CONSTITUTION ON INTERNATIONAL RELATIONS
A central question is whether provinces have any ability to impede the national government. The Canadian Constitution has changed from being mute on the question to granting Canada the right to conduct international relations. Varying juridical interpretations have altered the balance of power, despite the growing irrelevance of both the “watertight compartments” argument of enabling legislation found in the Labour Conventions case and the “exclusive federal jurisdiction” argument given by detractors.

The distribution of power in a federal state helps determine the role subnational governments have in international relations. Some federations give explicit rights to subnational jurisdictions. The German [article 32(1)] Constitution provides that the Laender can enact treaties with foreign powers within the purview of their legislative powers. The Swiss Constitution (article 9) says that cantons can negotiate treaties regarding “public economy, frontier relations, and police” but the federal government screens these treaties to ensure they are not detrimental to the interests

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17One could argue there is a rising marginal cost to concluding trade agreements. This is easily demonstrated: widening carries with it the costs associated with securing agreement among an ever increasing number of market participants (hence costs increase with the number of participants) while deepening requires a more involved political process as ingrained interests are increasingly attacked as the process continues (the first “casualties” [for those who see “losses” under trade agreements] of trade agreements are usually those in politically marginal constituencies).

18Of course it could also be the case that the subnational government wants to liberalize trade but the national government does not. This possibility is not addressed in this paper.

19For a comprehensive discussion of the rights to conduct foreign policy by the Lander, see Nass (1989).
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of the federation. The Belgian Constitution stipulates that each of the Communities (French, German and Flemish) can make treaties in the areas of their competence “but a special-majority law is still needed to elaborate the procedure for making treaties before this power becomes effective” (Alen, Tilleman, and Feerschaut 1992, 135).

The Australian (section 51, xxix) and American (Article I, section 10) constitutions, on the other hand, prohibit the use of the treaty-making power by subnational governments, except with the blessings of their respective national governments; the American one goes so far as to prohibit “agreements or compacts” with other states. These two countries allow the federal government to preempt local jurisdiction using formal international treaties. Although legal scholarship in the United States held for some time, on the basis of Edye v. Robertson (1884) 112 U.S. 580, that preemption was not exclusively a federal prerogative where it was decided that whenever federal statutes and treaties were in conflict, the one later in date took precedent; a later decision placed the jurisdiction firmly in the federal arena. In Missouri v. Holland (1920) 252 U.S. 416, the Supreme Court of the United States specified those treaty obligations impinging on areas of state legislative competence took precedence over the corresponding state legislation.

An intermediate case is Nigeria. Under the 1963 Constitution (section 74), a state may refuse to implement legislation in areas of state jurisdiction (Akindele and Oyediran 1986, 610).

Even unitary systems have issues. The Hong Kong and Macau Special Administrative Regions have some autonomy to conduct foreign economic policy, but this authority is granted by the Basic Law and the final interpretation of that law rests with the central government. Since there are duties and tariffs as well as immigration restrictions between the SARs and the mainland, the issue of judicial competence is less divisive. This cleavage allows for a separation when trade retaliation is taken against the SAR as opposed to the People’s Republic of China or vice versa. With separately recognized international personalities, international law allows retaliatory action to be taken only against the entity instituting trade distortion.

Common markets such as the European Union or the Caribbean Community may have less flexibility than in the Chinese case. With a common external tariff and internal free trade, trade sanctions affect all areas within the common market. For example, if a law in Jamaica were discriminatory in trade relations, trade sanctions could be undertaken against the entire Caribbean Community, even if the law did not apply elsewhere. The rationale for this is clear. By impacting one’s trading partners, one creates additional political leverage in the case against them. Indeed, in common markets, it is often less clear what the exact origin of a good is. In such cases, retaliatory measures would have to be undertaken against the whole of the country as opposed to just one segment. In addition, if the retaliatory measure restricted exports of a certain type, leakages within the common market would make such restrictions untenable.

The case for Canada is not as clear. Although the federal government has maintained there is no provincial competence for signing international agreements, it has agreed the exclusion of Ottawa from “direct negotiations between the provinces and foreign nations [is] constitutionally permissible” (Fry 1984, 204). In fact, the section granting exclusive authority in the Constitution to the federal government to implement treaties refers only to British Empire Treaties (British North America Act, section 132).
As early as 1865, two years before Confederation, an agreement between the provinces and the British government established an interprovincial council on commercial treaties that consulted with the British government on the conclusion of reciprocity treaties for the benefit of the provinces and, in negotiations with the United States, provided for direct provincial representation at the negotiating table (Porritt 1922).

The Dominion government also attempted to expand its purview. Using the 1865 agreement as a precedent, Ottawa was a participant in negotiations in 1871 with Washington and was a signatory to the final agreement. However, Britain carried the lion’s share of representation with four of the five negotiators, Prime Minister Sir John A. Macdonald being the lone Canadian. Included in the treaty was a stipulation installed at the insistence of Macdonald that the Dominion government and provincial government of Prince Edward Island could exercise their rights in rejecting the treaty’s provisions.

The Dominion did not hold jurisdiction over external affairs. In *Nadan v. the King* (1926) A.C. 482, the Judicial Committee of the Privy Council used the Colonial Laws Validity Act, 1865 to strike down a Canadian law passed in 1888 abolishing right of appeal in criminal cases to the Privy Council, a body resident in England (Mallory 1984, 28). This decision affirmed external affairs as the Empire’s exclusive domain: the Canadian government had tried to abolish the right of appeal to a body external to Canada.

With the Statute of Westminster on December 11, 1931, Canada gained competence to sign treaties of its own and the classification of British Empire Treaties ceased. The statute established an “international legal personality” necessary to conclude binding treaties and the authority of the Canadian government to act was enshrined with the Letters Patent constituting the office of Governor General adopted in 1947:

In this document no prerogative power over Canada is withheld: by clause 2 the Governor General is authorized “to exercise all powers and authorities lawfully belonging to Us [the King] in respect of Canada.” This language undoubtedly delegates to the federal government of Canada the power to enter into treaties binding Canada. (Hogg 1985, 242)

The Statute of Westminster was not the final word. Under parliamentary sovereignty, the British Parliament could overturn the Statute in the future, or simply ignore it by legislating directly for the Dominion, even without its consent. This only ceased with patriation of the Constitution in 1982. As Lord Sankey wrote in the *British Coal Corporation Case* (1935) A.C. 500, P.C. 520,

[T]he power of the Imperial Parliament to pass on its own initiative any legislation that it thought fit extending to Canada remains unimpaired; indeed, the Imperial Parliament could, as a matter of abstract law, repeal or disregard section 4 of the Statute.

Prior to the Statute, Canadian implementation of “British Empire treaties” overrode provincial law in areas of provincial legislative competence. In *A.-G. B.C. v. A.-G. Can.* (1924), A.C. 203, British Columbia’s
prohibition of employment of Japanese nationals when a company was on a government contract was struck down as in violation of implementing legislation of the Japanese Treaty Act, 1913 even though it fell under the category of “property and civil rights,” a matter of exclusive provincial jurisdiction under section 92. Still, in the 1920s, shortly after becoming a member of the International Labor Organization, the Canadian government avoided areas of provincial legislative competence and, hence, decided not to ratify several conventions of the organization (Soward 1958, 133-134).

In the Regulation and Control of Aeronautics in Canada (1932) (A.C. 54 (P.C.)) case, Lord Sankey stated the regulatory power over aeronautics was a matter of federal competence because it consisted of legislation implementing an Imperial treaty signed in 1922. As section 132 of the British North America Act gave the federal Parliament all powers necessary to implement British Empire treaties, it enabled Ottawa to legislate in areas of provincial legislative competence. However, this power must be examined in light of the fact Canada retained colonial vestiges. The right to legislate resulted from an obligation Canada maintained as part of the British Empire to uphold the treaty obligations of the Empire. It was not an option for Canada to ignore these obligations; it was an administrative power, not a legislative one.

In Regulation and Control of Radio Communication in Canada (1932) (A.C. 304 (P.C.)), the Privy Council narrowed of the scope of federal government jurisdiction. In question was not a “British Empire treaty” as interpreted in the Aeronautics case but a convention signed by Ottawa and granted a confirmation of assent by Great Britain. The problem was this convention did not explicitly fall under the purview of section 132. Quebec argued, although certain sections of the legislation in question were under federal jurisdiction as dealing with enumerated powers in section 91, the remainder fell within the jurisdiction of the provinces under section 92 as being either “property and civil rights” or “matters of a merely local or private nature in the Province.” Viscount Dunedin attempted to resolve this conundrum:

In a question with foreign powers the person who might infringe some of the stipulations in the convention would not be the Dominion of Canada as a whole but would be individual persons residing in Canada. These persons must so to speak be kept in order by legislation and the only legislation that can deal with them all at once is Dominion legislation. The idea of Canada as a Dominion bound by a convention equivalent to a treaty with foreign powers was quite unthought of in 1867. It is the outcome of the gradual development of the position of Canada vis-a-vis to the mother country, Great Britain, which is found in these later days expressed in the Statute of Westminster. It is not, therefore, to be expected that such a matter should be dealt with in explicit words in either s. 91 or s. 92. The only class of treaty which would bind Canada was thought of as a treaty by Great Britain, and that was provided for by s. 132. Being, therefore, not mentioned explicitly in either s. 91 or s. 92, such legislation falls within the general words at the opening of s. 91 which assign to the Government of the Dominion.
the power to make laws “for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces.” In fine, though agreeing that the Convention was not such a treaty as defined in s. 132, their Lordships think that it comes to the same thing.

Leeson and Vanderelst (1973, 62) argue Viscount Dunedin wanted an expansive view of the treaty implementation power: “[The] decision obviously meant that the Dominion government would acquire authority over matters normally under provincial jurisdiction if legislation was required to carry out an international obligation with that subject.” Hogg (1985, 252) and Russell (1982, 107) argue the case was decided based on this expansive view, although Russell argues the Privy Council had additional justification for the federal government’s regulatory power as radio communications “came under the power over lines of telegraphs and undertakings connecting the provinces or extending beyond a province which section 92 (10) (a) of the B.N.A. Act assigns to the federal Parliament.”

On the other side of the debate, one finds Mallory (1984, 386) arguing the power [to implement treaties] was given such a narrow construction in the Radio case that in effect it meant that Parliament could give legislative effect to a treaty only if it could pass the necessary laws under its ordinary power to legislate under the constitution.

McConnell (1977, 376) agrees, adding there is no “consolidation of the peace, order, and good government clause and the treaty power.”

In analyzing the text of the judgment, it would appear to be more reasonable to take the latter view than the former. If the question concerned the treaty-making power and allowed for the legislation to be carried forth in areas of provincial legislative competence, it would not be necessary for the secondary justification of the interprovincial nature of radio communications. The Privy Council would merely state that all treaties entered into by Canada were, for the purposes of the BNA Act, equivalent to “British Empire treaties.” Nowhere is such a claim made. The use of the phrase “the Convention” when referring to its assignment as a de jure treaty under the meaning in section 132 is a specific reference to this treaty through the use of the definite article. Only the use of the indefinite article “a” could be taken as a claim of precedence over all agreements entered into by the government of Canada and a foreign power.

The problem was clarified with Labour Conventions (1937) case (A.-G. Can. v. A.-G. Ont. et al., Reference Re Weekly Rest in Industrial Undertakings Act, Minimum Wages Act and Limitation of Hours of Work Act. A.C. 327 (P.C.)), Lord Atkin’s judgment for the privy council was [f]or the purposes of ss. 91 and 92, i.e. the distribution of legislative powers between the Dominion and the Provinces, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects: and as a treaty deals with a particular class of subjects so will the legislative
power of performing it be ascertained.

*Labour Conventions* spells out the “watertight compartments” doctrine. Even if the federal government negotiates a treaty, treaty implementation must respect the constitutional divisions of powers set forth: “When the ship of state now sails on larger ventures and into foreign waters she still retains the water-tight compartments which are an essential part of her original structure” (emphasis as in original). What it constrains is appropriation of provincial legislative competence purely based on the prerogative federal power to make treaties. It affirms provinces as fully competent in their respective domains but denies them the opportunity to seek international obligations as the means of furthering their aims. To allow provinces to conclude treaties directly violates principles of international sovereignty. As they lack international legal personality, their actions, if contrary to the agreements that they sign, would be subject to reprimand at the national level. Such actions would directly contravene the principle of the limitation of provinces to internal sovereignty as it would guarantee provinces deciding to renege on treaty obligations would receive only a portion of the penalties imposed. Moreover, it could result in provinces being in legal limbo if a federal law were passed that, although being fully within the competence of federal jurisdiction, affected incidentally the provincial ability to carry on its treaty obligations. Even more worrisome is the constraint placed on the federal government if provinces acted to conclude treaties in areas of concurrent legislative competence, given the federal mandate must take precedence in cases of conflict.

On the other hand, the principle of “watertight compartments” does strengthen the ability of the federal government to police actions by the localities. Whereas if provinces could negotiate treaties with other countries, they could negotiate legal obligations contrary to those found in other provinces. In furthering the economic union, the federal government can use the powers given it in the Constitution to coerce provinces to act in accordance with treaty obligations. Furthermore, other provinces will place pressure on renegade provinces to comply with these dictates.

This decision has been called “a poorly reasoned decision” (Hogg 1985, 253) and Russell (1982, 123) argues “[m]ost of those who have studied this area of Canadian constitutional law have found it difficult, if not impossible, to square Lord Atkin’s judgment in the *Labour Conventions* case with Viscount Dunedin’s in the *Radio* case.” Morris (1974) argues the separate classification of treaties as is implied in *Labour Conventions* is unnecessary and basic principles of federalism should direct this power as being solely with the federal government. However, such an action would allow the federal government to legislate by international commitment what it could not by national statute. As noted by Szablowski (1986, 169-170):

[A] decision to grant Ottawa unilateral and exclusive treaty-implementing power would be inconsistent, in general, with the Supreme Court’s innovative approach to the role of constitutional convention in relation to federalism. [Furthermore], the constitutional division of responsibilities in treaty implementation that resulted from the decision in the *Labour Conventions* case is consistent with the principle of federalism and in keeping with the current and evolving political values.
and principles that characterize the Canadian polity.

When viewed in this context, it naturally follows from the Radio case. The Supreme Court will not vacate provincial authority solely due to a treaty obligation (the Australian courts take exactly the opposite position). The Court has viewed this in a narrow context. In A.-G. Ont. v. Canada Temperance Federation (1946) (A.C. 193), the Supreme Court outlined the doctrine that legislation concerned with more than a purely provincial or local nature but instead that is of concern by its inherent nature to the entirety of the Dominion falls “within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch upon matters specially reserved to the Provincial Legislatures.” This provision also allows for intrusion into provincial jurisdiction in times of emergency. In A.-G. Ont. v. Scott (1956), 1 D.L.R. (2nd) the Court ruled international agreements between provinces and foreign governments were allowed only if they do not involve treaty obligations but merely “reciprocal or concurrent legislative action” (Laskin 1967, 112).

However, globalization, especially with trade agreements, has made it necessary for the federal government to act in areas normally considered the purview of provincial governments. While attempting to get provincial acquiescence in these matters, the federal government has acted in areas of provincial jurisdiction through two powers granted to it under the Constitution and recently used by the Supreme Court to justify a partial encroachment on provincial power. First, there is the trade and commerce power, section 91(2), of the Constitution. The second is the peace, order, and good government power (POGG). These two potential attacks on Labour Conventions are found in General Motors of Canada Ltd. v. City National Leasing (1989) 1 S.C.R. 641, and R. v. Crown Zellerbach (1988) 1 S.C.R. 401.

The commerce power appears quite broad in Canada. It specifies the Canadian Parliament has exclusive jurisdiction over making of laws affecting “the regulation of trade and commerce.” But, the courts have repeatedly seen this as limited. In Citizens Insurance Company v. Parsons (1881) 7 App. Cas. 96, 1 Cart. 265 (P.C.), provincial authority to regulate property and civil rights came into conflict with federal authority to regulate trade and commerce. The Supreme Court ruled with the province. In A.G. Can v. A.-G. Alta. (Insurance) (1916) 1 A.C. 588 and Can. Indemnity Co. v. A.-G. B.C. (1977) 2 S.C.R. 504, the Court held regulation of the insurance industry came under the property and civil rights section of the constitution, an provincial jurisdiction area, even if its impact was beyond the borders of the province.

However, in General Motors of Canada Ltd. v. City National Leasing Ltd. (1989), the Supreme Court held the trade and commerce clause took precedence even though the dispute centered upon activity solely within one province. A foreshadowing of this decision is found in the Insurance Reference (1916):

The second question [of the reference] is, in substance, whether the Dominion Parliament has jurisdiction to require a foreign company to take out a licence from the Dominion Minister, even in a case where the company desires to carry on its business only

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20 Although, as shall be seen, it is not as broad as in the United States and Australian constitutions.
within the limits of a single province. To this question their Lordships’ reply is that in such a case it would be within the power of the Parliament of Canada, by properly framed legislation, to impose such a restriction. It appears to them that such a power is given by the head in s. 91, which refer to the regulation of trade and commerce and to aliens.

The General Motors case was based not on a matter of abstract law but on the practical matter of regulating competition. The Combines Investigation Act, under attack in this case, was a general act designed to preserve competition in all sectors of the economy. However, the interpretation by Hogg (1993, 351) that this act was upheld because “only a national scheme of regulation could possibly be effective, because of the ability of factors of production to move freely from one province to another” (emphasis added) appears to be overly broad and based on a misunderstanding of economic principles. Automobile leasing is a service that cannot be easily transported across provincial lines (although the leased automobile may be a good). The contract between leasee and leasor is based on the residence of the leasee (and delivery of the good is typically close to that residence). If the ability of business to move to avoid legal entrapments were the basis for the trade and commerce power, the federal government could complete preempt nearly all regulatory processes (the primary regulatory exceptions being those that are granted expressly to the provincial authorities in the Constitution).

Instead, the criteria are the legislation must be one where “the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country” (General Motors [1989] 662) and be “of a nature that the provinces jointly or severally would be constitutionally incapable of enacting” (General Motors [1989] 681). The Act satisfies these criteria and, therefore, was valid.

Hogg (1993, 351) notes this judgment (along with the case of R. v. Crown Zellerbach [1988], discussed later) has put the principle of subsidiarity in action in allowing “the more distant federal level of government to act only when the nearer provincial level cannot effectively do so.”

This principle cannot apply to treaty implementation. The critical treatment is whether the nearer provincial level is capable of effectively acting, not whether it chooses to. If the action is wholly within provincial legislative competence and the province chooses not to exercise it, there is no federal basis for the use of the trade and commerce power to usurp this power, even under the General Motors case.

Richards (1991, 62) argues “[t]he revitalization of the trade and commerce power was deliberate. It no doubt reflects a concern that Parliament must have the tools necessary to manage the national economy.” Other countries take a broader view with their trade and commerce clauses. In Australia, the commerce clause (section 51(i)) grants exclusive authority to the Commonwealth Parliament to make laws affecting “[t]rade and commerce with other

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22 This is not to say all services are nontradable. However, the nature of services is they are typically harder to trade than goods. This misinterpretation is based on confusion between the service (leasing) and the good for which a service is provided (the car). A similar problem occurs in computer software: computer programming is a service but the resulting computer program from this service is a good.
countries and among the States” and section 92 reinforces this provision by stating “trade, commerce, and intercourse among the states . . . shall be absolutely free.” However, until 1920, with the decision in Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd, 28 C.L.R. 129 (1920), the commerce clause was strictly limited by the courts through the reserve clause granted all powers not vested in the federal government to the states and by the “doctrine of intergovernmental immunities” (Zines 1990, 21-22). This doctrine held each level of government was sovereign within its own realm.

The 1920 court decision changed this using the principle of paramountcy and establishing a broad interpretation of the trade and commerce power. According to Sawer (1975), Engineers’

firmly established that when construing the meaning of a granted Federal power, as under section 51, no assumptions should be made about the size of the residual power left to the States—that is, “implied prohibitions” have gone forever.

The role of the commerce clause is not as broad as in the United States. In A.G. (WA) v. Australian National Airlines Commission, 38 C.L.R. 492 (1976), the Australian High Court ruled even where efficiency and profitability of interstate commerce was threatened unless regulatory power over intrastate service was granted, the clause could not be used to usurp state jurisdiction. Zines (1990, 27) argues the trade and commerce clause is less expansive in interpretation in Australia because “U.S. courts consider economic effects and commercial reality when applying the commerce power. The Australian High Court [applies] a more textual approach [without] reference to social needs or economic data.”

The United States government similarly has broad legislative power to enforce the trade and commerce power. It has been used to enforce civil rights legislation, allow for New Deal legislation, and deny states the ability to collect sales tax on goods shipped to residents of other states. However, the upholding of California’s unitary tax policy by the United States Supreme Court (that was challenged by British-based Thorn-EMI and Canada’s Alcan on the basis of tax treaties entered into by the United States government that stipulated such a method of taxation would not be used) shows this power is limited in some respects.

The second potential line of attack is the POGG provisions of section 91. In R. v. Crown Zellerbach (1988) 1 S.C.R. 401, the Supreme Court ruled areas of “national concern” clearly differentiated from “provincial concern” can allow the federal government to legislate in areas of provincial jurisdiction, provided such legislation does not alter the Constitutional division of power. There appears to be two problems with its application to enforce treaty provisions. First, it appears clear where national concern and provincial concern are dealing with the same subject but they conflict, provincial concern takes precedence in areas of provincial competence.23 Second, as judged by Richards (1991, 60), “a plenary federal treaty implementation power would not satisfy the last requirement. It would be an effectively unlimited authority and not reconcilable with the basic allocation of legislative authority between Parliament and the provincial legislatures.” Szablowski (1986, 169), in citing the Anti-Inflation (1976) 2 SCR 373 case notes

23Of course, if the national concern is great, the federal concern would take precedence under the emergency provisions of the power: see Laskin (1989).
the jurisdiction over inflation granted by the Court was based on Ottawa’s emergency powers while any permanent jurisdiction would run counter to provincial jurisdiction. Thus, he concluded:

Since treaty-making is an even broader concept than inflation because it may include any subject matter . . . it appears highly improbable that the Court would permit Ottawa’s blanket encroachment on provincial jurisdiction under the POGG clause on the basis of national interest or dimension.

Furthermore, these do not directly overturn Labour Conventions and an action will have to be brought to determine the extent of the broadening of the federal power under such provisions. However, treaties oblige Canada to take actions to ensure compliance as is seen in the GATT ruling on alcoholic beverages. Despite that a federal government need take only those measures as are constitutionally available under GATT24, this decision [Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies (United States v. Canada) (1992), GATT Doc. DS17/R, 39th supp. BISD (1991-92) 27] allowed retaliation against the country as a whole unless provincial accession was granted. Thus, the issue of a subnational government “defecting” from a trade agreement binding on the nation became reality.

This does not occur in the US where treaties automatically become federal law and, as such, exceed the state authority. Only sections found incompatible with the Constitution can be thrown out by the courts.

In Australia, the exclusive federal power to legislate in matter of “external affairs,” granted in section 51(xxix), has been used for the same purpose as in the US. In Commonwealth v. Tasmania, 156 CLR 1 (1983), the Court ruled the Commonwealth’s obligation when it signed the World Heritage Convention to preserve the integrity of a section of southwest Tasmania would be violated by the state government’s plan to build a hydroelectric plant in the area. Citing the “external affairs” power, the Court ruled international obligations could be enforced through federal legislation even when they normally fall under the jurisdiction of the state, provided federal legislation was a reasonable way of safeguarding the obligation.

If this same concept were applied to Canada, then there would be no basis for provincial refusal to implement international agreements: the federal government would merely legislate in areas where treaty obligations were present. The lack of this concept points to legal problems for international negotiations. It has been standard judicial practice to interpret treaties in ways as to resolve potential conflicts with internal statutes. This is not always possible and for Canada the choice is clear: the statute has precedence (though the federal government may have to pay damages or suffer sanctions): “A state cannot . . . plead its municipal law as an excuse for failing to fulfill its international obligations” (Greig 1976, 53).

Several authors point to a clear distinction between implementation and negotiation. Laskin (1967, 111) argues the Labour Conventions case only deals with implementation of treaties but not negotiation:

24 “Each 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” (Article XXIV, paragraph 12)
It is my opinion that if a province presently purported on its own initiative to make an enforceable agreement with a foreign state on a matter otherwise within provincial competence, it would either have no international validity, or, if the foreign state chose to recognize it, would amount to a declaration of independence on the one hand, and, on the other, to a denial of the exclusive juridical competence of Canada as such in the field of foreign affairs. It would then be for Canada to assert that competence against both the province and the foreign state. Nor could the province, in my opinion, give such an agreement domestic validity by implementing legislation because (as a matter of constitutional law) such legislation would be vulnerable as being action taken under a non-existing power to enter into international commitments. It cannot be the case that because the plenary federal executive power in foreign affairs is not complemented by a plenary implementing power, the result is that the provinces are able to implement when they have no antecedent executive power to act independently in foreign affairs.

A different point of view is found in Morin (1967) who argues individual provinces have an independent ability to negotiate treaties in areas of exclusive jurisdiction without Ottawa’s consent based on the doctrine of separation of powers.

Leeson (1977) argues the issue is still up to debate pending a legal decision resolving it. However, he also insists that this legal limbo is precisely in the best interests of all concerned:

The federal government has been concluding treaties and presumably will continue to do so. A provincial government could attempt to do so and force a legal decision but despite all the legal positioning it is doubtful either side would force a court decision. The political realities of the situation make this course too risky. (Leeson 1977, 520)

Hogg (1985, 242-3) agrees with Laskin, “the provincial claim has never been accepted by the federal government, and the federal government does in fact exercise exclusive treaty-making powers.” Treaties that do not need to change existing domestic law are not implemented by Parliament but those requiring internal changes to law need implementing legislation; otherwise the principle of parliamentary supremacy would be violated. According to Hogg (1993), this principle extends to provinces as well.

A different perspective is given by Vanek (1949-50), who argues federal and provincial legislatures are incompetent to legislate in violation of international law or treaties binding on Canada. LaForest (1961) uses similar reasoning but restricts incompetence to provincial legislatures and ordinary international law.

Morin’s argument is not valid and the distinction made by Laskin and Hogg is correct. The federal government under the Statute of Westminster (1931, s. 3) has “full power to make laws having extra-territorial operation.” Delisle (1967, 122) notes that there was a “devolution of treaty-making power to the Dominion executive; . . . the devolution of treaty-making to provincial executives is
conspicuous by its absence.” Delisle (1967, 132) goes on to an even stronger point:

The position of the provincial Lieutenant-Governors precludes the possibility of the prerogative power being given to them. They are appointed not by the Sovereign but by the Governor-General in Council by instrument under the Great Seal of Canada. . . . There is no direct contact with the Sovereign and, therefore, the Royal Prerogative of treaty-making cannot directly descend upon them by any delegation through Letters Patent or usage.

However, Lord Watson in *Maritime Bank vs. Receiver-General of New Brunswick* [1892] A.C. 437 (P.C.) clearly reasoned the Lieutenant-Governor of a province receives appointment through the sovereign authority. The process may appear to be different but the action was similar to granting a power of attorney. The action was taken in the name of the Sovereign and that, in and of itself, created the linkage. However, the Royal Prerogative was never explicitly granted to the provinces and therefore it was never granted to them: legislative competence does not equal executive competence.

Other court decisions clearly pave the way for declaring provincial executive incompetence in this regard. A province has only the right of internal sovereignty and lacks the ability to legislate extraterritorially. However, to enter into a treaty will automatically entail, under international law, an obligation upon the federal government with regard to enforcement (just as Britain would have been obligated prior to the Statute of Westminster to enforce agreements made by Canada), the individual province lacking the ability to be separated from the whole of the country for purposes of international relations. Thus to enter into a treaty obligation is to legislate extraterritorially, even if the obligation is one merely within the realm of provincial competence (this distinction becomes clear when one examines section 132 of the BNA Act that grants the government of Canada the power to legislate implementing legislation of British Empire Treaties but does not give it the right to negotiate these treaties). This does not mean the federal government can implement action against provinces in areas of provincial competence when the province refuses to be a party to the agreement but it is only the federal government that can be punished for the provincial refusal. This is similar to the relationship a parent has with her child. A parent is responsible for the actions of her child when the child acts negligently; similarly, it is the nation, not the constituent part, which is ultimately responsible for treaty obligations.

The federal government maintains that provinces have no role in international affairs without prior authorization and has attempted to

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25Ref. re Continental Shelf Offshore Nfld (1984) 1 S.C.R. 86, 5 D.L.R. (4th) denied provinces jurisdiction over the continental shelf. *The Queen (Manitoba) vs Air Canada* (1980) 2 S.C.R. 303 held provinces were limited in their ability to legislate regarding the airspace above the province. In *Re Lynden Transport* (1981) 119 D.L.R. (3d) 765 (B.C. C.A.) the Supreme Court held provinces could not impose sales taxes on transitory passage of goods and services over the open road. These examples show provincial jurisdiction is limited to the territory of the province.

26As Hogg (1985, pp. 271-2) notes, however, the incidental effect of provincial legislation may be extraterritorial, provided the substance of the legislation falls within both provincial jurisdiction and deals with a problem substantively within the territory of the province. *See Re Upper Churchill Water Rights* (1984) 1 S.C.R. 297 for a distinction between the incidental and substantive effects of legislation.
deny provinces the ability to set precedents similar to those undertaken by the Canadian government under responsible government. However, one must be very careful in taking the national paramountcy argument too far. Tancrede de Groisbois, Member for Shefford of the National Assembly of Quebec said in 1889, “Nous ne sommes ni une colonie, ni une dépendance de la Confederation” (“We are neither a colony nor a dependency of the Confederation.”). Quebec, the most brazen province since the 1960s in attempting to establish an international role, found itself repeatedly pre-empted by the federal government. Thus, cultural and educational agreements between Quebec and countries such as France and Belgium were given federal authority by Canada first entering into a treaty with the foreign country authorizing the provinces to make agreements with that country. Provincial claims to attend international conferences on topics such as education have always been rejected by the federal government, although a Canadian delegation may have substantial provincial representation and may even be headed by a provincial official. By such techniques, the federal government has managed to satisfy legitimate provincial interests while remaining firm in its insistence that international affairs are an exclusive federal preserve. (Hogg 1985, 255-256)

However, this distinction is one of theoretical importance more than practical. The provinces, in fact, have made cooperative agreements that may not entirely be what the federal government wished. In these cases, these are not absolute obligations. The lack of any ability to handle international obligations is handled by automatic abrogation of benefit by the other party if the province does not handle itself according to the terms of the agreement.

**PROVINCE-BUILDING VERSUS FEDERALISM**

Mancur Olson (1982) argues the very success of democratic institutions sews the seeds for their downfall. Special-interest groups (known as distributional coalitions) lobby for the diversion of funds for their own use to the detriment of society (share-enlarging behavior):

[Stable] societies accumulate special-interest organizations over time. . . . These organizations, at least if they are small in relation to the society, have little incentive to make their societies more productive, but they have powerful incentives to seek a larger share of the national income even when this greatly reduces social output. . . . The barriers to entry established by these distributional coalitions and their slowness in making decisions and mutually efficient bargains reduces an economy’s dynamism and rate of growth. . . . Distributional coalitions also increase regulation, bureaucracy, and political intervention in markets. . . . (Olson 1982, 75)

On the other hand, the more an organization reflects the society in which it operates (a so-called encompassing coalition), the more likely it will engage in policies
Subnational Acceptance of International Agreements

Provinces are one type of special interest group. Although they enact certain pieces of legislation unilaterally (without having to lobby), they also lobby on behalf of their citizens. Unlike other groups, provincial constituencies are concentrated in one geographic location. Although they appear, at first, to be characteristic of encompassing coalitions with pie-enlarging behavior as their main target (in that they represent the vast spectrum of society based on socio-economic factors), they may have narrowly defined interests conflicting with other societal groups (and thus engage in share-enlarging behavior). They are also identifiable both within the group and outside the group. One might be able to hide one’s membership in a group from others but it is virtually impossible to hide the general area where one lives.

Their diversionary interest complicates Olson’s theory because they are also governments that create public goods. In creating a public good, the local government might engage in pie-enlarging behavior for the locality but share-enlarging behavior at the national level if the good has significant negative externalities. An example of this is the default by Orange County on its municipal bonds following its declaration of bankruptcy. Conversely, it may engage in share-enlarging behavior at the local level and pie-enlarging at the national level if the group seeking changes is a distributional coalition from the perspective of the locality but an encompassing one from the perspective of the nation.

A locality may engage in share-enlarging behavior at both levels of government if the special-interest group requesting the production of the public good is not representative of the local community (or conversely, it may engage in pie-enlarging if the group interests coalesce with those in general society).

A second problem is local government officials might engage in rent-seeking (Krueger 1974). Then costs associated with business activity may increase in the locality. If other localities can control this, this will cause an opportunity (a la Tiebout 1956) for jurisdictional mobility by business and individuals. However, bureaucracies tend to expand in size over time (Parkinson 1980) and locally-run ones are no exception. Increases in bureaucratic size creates competition based on raising costs, not cutting them.

Province-building and centralization are two examples of such concentrations at different levels of government. Province-building, the systematic effort by provinces to assert (and extend) rights under the federal constitution, has continued for decades as has centralization, the driving force behind federal “power grabs” under Trudeau.

Examples of province-building include Quebec’s entry into foreign affairs in the 1960s, Saskatchewan’s introduction of universal health coverage for its citizens in the 1940s, the multitude of provincial laws regulating interprovincial commerce and labor mobility, and Quebec’s restrictive language legislation (Bills 22 and 101) establishing French as the required language of instruction for all individuals who did not have both parents

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27These narrow interests are often called “pork barrel” policies, a reference to local constituencies “feeding at the trough.” Examples include special highway funding, bridges, military installations, and government contracts. These projects almost always bring significant benefits to localities but their benefit in the national sense may be limited. However, they remain popular because the locality only pays a portion of the bill, while receiving the full benefit.
educated in an English-language school in Canada.

Examples of centralization include Anti-Inflation legislation introduced by Trudeau, official bilingualism, Medicare, the National Energy Policy of the 1980s, and federal operating grants to provinces. These grants often impinge on areas of provincial jurisdiction and the inclusion of “strings” on such grants are little more than federal attempts to exert influence in areas where it otherwise would have no such power under the Canadian constitution.

Globalization is a contradictory influence in that it centralizes and decentralizes at the same time, mirroring Canadian federalism. Thus it is likely that there will be more conflicts over jurisdiction in the future because of increasing economic interdependence.

**PROVINCIAL INFLUENCES ON CANADIAN FOREIGN POLICY**

Partly because of the Canadian Constitution, the provinces have continuously acted in the sphere of international relations, often to the chagrin of the national government. Although the federal government can agree to any treaty, provisions are binding in areas of provincial jurisdiction only when and if a province agrees to such terms. Provinces can bind themselves to undertake such protocols using pseudo-treaty means such as the issuance of a statement of intent. After the 1979 signing of such a statement by the provinces where they undertook to liberalize the liquor trade, the provinces made little headway towards acting on this, causing a convening of a 1988 GATT panel at the behest of the European Community and a 1991 GATT panel on an action brought by the United States. These established such statements were binding agreements enforceable on both the provinces and the federal government of Canada (Irvine and Sims 1994, 14). However, it is unclear if the Canadian Constitution provides an enforcement mechanism because the provinces voluntarily abided by the decisions of the panels.

Even in areas of supposedly exclusive federal jurisdiction, provincial power can be exercised. As Breton (1989) notes there is a difference between *de facto* and *de jure* jurisdiction. Additionally, the federal government may decide to abdicate its *de jure* rule for political reasons. An example is the activity during the Canada-United States Free Trade Agreement negotiations.

As early as February 1985, the federal government consulted with the provinces at the Regina First Ministers’ Conference about the possibility of negotiating a free trade agreement. The premiers voiced their agreement that at least exploratory work on the subject be commissioned. The provinces were kept informed of the progress of the negotiations on a regular basis and could offer their advice on what they considered important elements of a free trade agreement. David Peterson of Ontario used the free trade negotiations as political capital as elections neared, much to the consternation of the other premiers, even when they were expressing similar doubts. As Premier Brian Peckford of Newfoundland stated, “All of the kinds of things Mr. Peterson has been saying, we’ve been saying for months . . . behind closed doors. We just don’t wash our dirty linen in public, election or no election” (quoted in Hart 1994, 288).

The provinces clamored for “full provincial participation” in the negotiating process and Ottawa agreed. However, the two sides differed on what this meant. The federal government felt this meant keeping the
provinces fully informed and privately negotiating with them on matters of provincial jurisdiction. On the other hand, most of the provinces believed “the negotiator would derive his instructions from the federal and provincial governments and that provincial representatives would be present at the negotiating table” (Hart 1994, 129, emphasis added).

This led to numerous difficulties between the provinces and the federal government, including the failure of Ontario and Manitoba to support the agreement (Brown 1993, 115), leading to a conflict between laws passed by the provinces and the federal government’s position. A breakdown of communications occurred during the negotiations as the provincial governments did not always keep the federal government informed as to plans that could have repercussions in the negotiating room.

28 Ontario had a different opinion on what the term meant:

This does not mean that there would be eleven negotiators at the table. Rather, Ontario sees the ten provinces in daily or even hourly contact with what is going on in the negotiating room. As particular logjams occurred [sic], it would be the ultimate responsibility of first ministers to develop a consensus. (Hugh P. O’Neil, Ontario’s minister of industry, trade and technology quoted in Barrows and Boudreau 1987, 140)

29 Brown (1993, 125) notes four pieces of legislation passed by Ontario impinged on the Canada-United States Free Trade Agreement: “The Independent Health Facilities Act; an amendment to the Power Corporation Act; an amendment to the Wine Content Act; and an amendment to the Water Transfer Control Act.”

With NAFTA’s side deals, the provinces were involved from the start (Kukucha 1994, 32):

The provinces saw all of the Mexican and American position papers and were completely involved in the drafting of the Canadian proposals. The provinces were also invited to the final stages of the negotiations in Washington in August of 1993. Six provinces attended various stages of the discussions and Alberta and Quebec were present for all of the negotiations. Provincial representatives were also involved in daily or twice daily meetings with federal officials to discuss the American and Mexican submissions.

An indication of the importance of the Canadian constitution’s role in provincial jurisdiction is while the federal governments of Mexico and the United States were made responsible for the activities of their respective subnational governments, Canada was not. Annex 41 of the side deal on the environment dealt with provincial compliance and how provinces failing to abide would not be eligible would seize any pretext to undermine the federal government’s negotiating position. For a detailed account of the behind the scenes confrontations, see Hart (1994).
to seek redress under by the agreement (Government of Canada 1993, 39-40).

Even in “high politics” not normally believed to impact on the locality, avenues available for provincial external relations loom large.31 This is attributed to the public’s clamor that politicians “do something.” The adage of “think globally, act locally” fits in well with this motif. Resolutions denouncing human rights abuses in China (the Tiananmen Square massacre of June 4, 1989) and calls for nuclear free zones have all the pronouncements of “high politics” but with little substantive value. The federal government has typically ignored such activities. But when provincial actions are substantive (especially when they conflict with pronounced policies of the federal government), the activity will met with stern reproachment. It would appear the federal government is not so much interested in having the country speak with one voice as it is in having the country act with one fist.

One such case is that of South Africa. Provincial actions against South Africa differed widely. While NDP governments in Saskatchewan, Manitoba, and British Columbia,32 and the Parti Quebecois government in Quebec had placed at least minimal restrictions on trade and relations with South Africa over concern for its apartheid policy, Ontario refused from 1971 to 1985 to impose trade sanctions. In fact, a trade mission in 1973 was made to South Africa and a planned exchange program between one of South Africa’s homelands and the Ontario government was dropped only after intense federal pressure (Nossal 1994, 116-117). It was not until 14 August 1985 the Ontario Liquor Control Board stopped carrying imported spirits from South Africa and this came only after the federal government announced a series of sanctions against South Africa on 6 July 1985 (Nossal 1994, 121). Ironically, Ottawa was not happy with the move by Ontario, considering the action to be competitive rather than complementary:

What could not be said publicly by the federal government was that the unilateral action of a provincial government, or worse, a number of provincial governments, might have the effect of pushing the federal government into adopting harsher policies towards South Africa, which for its own parochial reasons Ottawa did not want to do. (Nossal 1994, 123)

Provinces take their own measures to try to blunt intrusive federal policies. Alberta was upset about federal energy policy during the 1970s, prompting Alberta Premier Peter Lougheed to say, “Alberta must look after itself in some areas of international relations because the federal government is not doing a satisfactory job” (Vancouver Sun 1977 quoted by Groen 1993, 4). Alberta’s position was so different from the federal government’s that Premier Lougheed tried to conduct direct tariff negotiations and requested to be at the negotiations when Canada and the United States discussed petroleum product exports during the 1973 oil crisis (Groen 1993, 5).

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31 Examples from the US include the nuclear-free zone of Marin County, California (restricting the county in the purchase of goods and services from companies involved in nuclear weapons programs) to anti-apartheid legislation in a number of jurisdictions (restricting the ability of the jurisdiction to purchase from companies doing business with South Africa) to Proposition G, passed in 1992 in Los Angeles, California (providing for a “buy American” policy).

32 Contrary to the wishes of the federal government, an attempt to strengthen trade relations with South Africa was undertaken by the Social Credit government of Premier Vander Zalm (Groen 1994, 60).
Alberta has attempted to strike deals with the United States to provide natural gas in exchange for preferential tariff action, even when the Canadian government opposed that activity (Premier Peter Lougheed in *Alberta Hansard* 1976, 1544-1548). These activities were brought to a halt after natural gas from Mexico became an alternative source in 1978 (Groen 1993, 7).

British Columbia’s major efforts include charting an alternative to the Trans-Alaska Pipeline, attempting to reopen the Columbia River Treaty, and activities in the softwood lumber dispute. In each of these cases, the provincial government attempted to instigate policies directly contrary to the express wishes of the federal government. The province has always seen itself on the periphery of Confederation both geographically and politically. As Groen (1991; 1994) has shown, it has attempted to create linkages with external actors to gain leverage with Ottawa.

For example, British Columbia’s NDP government of Dave Barrett attempted to negotiate directly with the US in the Trans-Alaska Pipeline negotiations. This activity was seen as meddlesome by both American and Canadian officials (Stewart 1973). Especially irksome for the Canadian government was that Barrett went to Washington independently and “offered the Yukon as a transit route without having jurisdiction over it”; that B.C. knowingly undermined the federal government’s international stature and its stated alternative to [the Trans-Alaska Pipeline], the Mackenzie Valley Pipeline; and that Ottawa would be financially committed to a plan it had not endorsed. (Groen 1994, 63-64)

In the softwood lumber dispute, British Columbia played American interests against the Canadian federal government. In the 1980s it was Social Credit Premier William Vander Zalm who ended up scuttling the official Canadian government position that provincial stumpage fees were adequate and did not represent a subsidy to industry. As a federal official cited by Fife and McIntosh (1987, A16) noted, “the turning point in the dispute occurred when Vander Zalm declared that the province was not charging the industry enough for its trees.”

Groen (1994, 72-73) argues the Social Credit government “used the international dispute as a cover for its unpopular mandate of increased stumpage rates.” The final Memorandum of Understanding between the United States and Canada called for the Canadian government to impose a 15 percent tax on softwood exports to the United States. These funds were later sent to the province, which received $320 million in the first year, an increase in charges to the industry of nearly 250% (Groen 1994). As *Western Report* (1987, 4) stated, “There is no doubt why the Premier finds the deal so ‘tremendous’. It nearly resolves Mr. Vander Zalm’s deficit problem, and if the industry objects, he can blame the Americans.”

Ontario’s relationship with the United States has focused on trade and tourism and its approach has traditionally been far less confrontational than Alberta’s. Intergovernmental Affairs Minister Thomas Wells (Ontario 1984, 1217) noted:

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33British Columbia also caused headaches for the federal government when its representative in Hong Kong went on a trade mission to Taiwan with Canadian businessmen, even though it was the official Canadian policy to oppose official ties in deference to mainland China. See Fitterman (1987).
It should be made clear that our aim has always been to have the Canadian embassy formally represent Ontario’s interest. Canada must be seen to speak with one voice in Washington. Ontario’s consultants are not lobbyists. They do not press Ontario’s point of view to administration or to members of Congress.

This does not mean lobbying did not occur in state capitals. By 1980, “Buy American” legislation was in place in 35 states and Premier Bill Davis met with several governors to discuss Ontario’s concerns over such legislation and the fact this had triggered a similar effort in the province to “Shop Canadian” (Groen 1993, 30-31). One lobbying success was in the mid-1980s when Pennsylvania changed its legislation to a “Buy North American” initiative (Groen 1993, 39).

Attitudes began to change under the Peterson administration in regard to the province’s relationship with the United States. No longer would the province consider its interests to be naturally in line with the federal government. Instead it wanted an office in Washington. Just as Alberta had been told before, it was rebuked. Instead, the province hired Washington-based lobbying firms to represent their interests. It also asserted it could refuse to implement portions of trade agreements with which it did not agree (Peterson in Ontario 1987, 5078).

THE SPECIAL CASE OF QUEBEC AND INTERNATIONAL AFFAIRS

An interesting question arises when attempting to analyze the Quebec Independence movement in the context of globalization. As stated by the Parti Quebecois’ manifesto (1994), “Quebec in a New World,” there is a case to be made for increasing the available economic tools of areas such as Quebec. Globalization is creating pressures on the Canadian federal system that is making it possible for provinces to bypass the federal government in developing linkages with the world economy and polity. However, it is precisely these new linkages that decouple the Quebec government from its own ability to maneuver.

Sovereignty is the ability to make choices regarding one’s destiny. However, international agreements are not liberating, but inhibiting. Trading off sovereignty for economic gain is at the heart of international trade agreements. Repeatedly, however, Quebec has recognized the need to gain increased access to the world economy. Its government supported both the Canada-United States Free Trade Agreement and the North American Free Trade Agreement (Government of Quebec 1993). This is in sharp contrast to Ontario that opposed both initiatives (Ontario Ministry of Intergovernmental Affairs 1993).

The Quebec government has argued it would automatically be able to gain accession to the North American Free Trade Agreement if it became independent, a position that is denied by both the American and Canadian governments. Instead, Canada and the United States argue an independent Quebec would have to (1) gain approval from all three signatories to the original agreement (Mexico, Canada, and the United States) to gain accession; and (2) reenter negotiations causing the elimination of

34It also argued it could continue to use the Canadian dollar and all Quebecers would be dual citizens of Canada and Quebec. The latter comment is especially egregious.
some preferential treatment currently received by the fact it is a province of Canada. Furthermore, independence would likely place an enormous short-term burden on Quebec given it would be forced to assume a percentage of Canada’s total debt and replace many government services currently provided by the federal government. According to a Royal Bank (McCallum 1995) study, Quebec would experience, even under the best circumstances, a recession worse than the Great Recession of the early 1980s. Similar conclusions have been reached by economists who are favorable to Quebec independence.

However, fervor for independence grew during much of this time. In 1980, on the question of should Quebec enter into sovereignty-association with the rest of Canada (one step below an act of secession), the “yes” vote was only a little more than 40%. In 1995, despite alarming indicators economic disaster would befall a newly independent Quebec, a referendum on the much stronger question of allowing the Quebec government to declare independence if a suitable offer from Canada for reformulated federalism was not forthcoming within one year only lost by the slimmest of margins, 49.4% to 50.6%. Prime Minister Chretien argued the Quebec government can not secede with a simple majority on an unclear question but this conveniently ignores how Newfoundland entered confederation with a slim majority vote in 1949—and that majority was only secured on a second ballot after one of the initial three options was dropped. If a party can enter an agreement with a majority of the votes, why can it not abrogate it in the same fashion?

Economics plays a significant role in support for independence. One way to show this is to examine interest rates to see if these play a factor in the decision-making process. In 1980, real interest rates were much higher than in 1995. High interest rates reflect a bias towards a short-term outlook in all matters. Given that all projections of Quebec secession conclude that Quebec’s fall in economic prosperity will be steep but short-lived (so that within ten years, all of the economic costs of Quebec independence should have been borne), economic theory would suggest that the higher the real interest rate, the less likely that Quebeers will opt for independence. Examining real interest rate policy from 1975 to 2000 and charting it against polls regarding independence over this time period, one finds that they are highly correlated.

This provides some evidence the insistence on a low-interest rate, low inflation policy by the government of Canada lies behind this resurgence in popularity for Quebec independence. Thus, one may conclude economic factors play a role in decision-making processes regarding Quebec independence.

In 1961, the Lesage government began transforming Quebec’s international policy from one focused exclusively on trade relations with the United States (and, in particular, New England) into a role where Quebec would be treated as an international “player.” Opening offices in Paris in 1961 and London in 1962,

35The initial referendum question allowed Newfoundland to gain independence, join Canada, or remain a British dependency. None of the choices received the requisite majority. After dropping the option receiving the lowest response, a new referendum was held.

36Running a linear regression of data points obtained from Statistics Canada (on 3-month T-bills) and regressing the natural log of this on the support for sovereignty polling information obtained from Gallup Canada, Inc. from 1979 to 2000 shows a highly significant negative correlation between interest rates and sovereignty and an adjusted $R^2$ value of .40923, meaning that almost 41% of the variance of support for sovereignty can be explained using interest rates.
Lesage’s government reconnected Quebec with its European roots. In 1965, Lesage received permission from the federal government to independently sign a student and professor exchange program with France and accredit the equivalence of university degrees in Quebec and France. This accord was signed on 27 February 1965 (Morin 1987, 22-27). Shortly after, the African country of Gabon invited “Quebec to send an official delegate to a conference of educational ministers from . . . French-speaking countries” (McWhinney 1979, 40). However, Gabon neglected to send its invitation through Ottawa causing a diplomatic row and the breaking of relations by Canada. Since these humble beginnings, Quebec has exerted increasing influence in international affairs, taking over immigration responsibilities (with the exception of setting its own medical and security standards) with the signing of the Cullen-Couture Agreement (Hero and Balthazar 1988, 118), joining the Francophonie with New Brunswick, and signing more than 300 international agreements and memoranda of understanding.

Even areas of provincial legislative competence have international ramifications. Hydro-Québec causes concern in Canadian-US and Quebec-New England relations due to disputes over the environment and the Indian population. Nor is it only in hydroelectricity where division exists between Quebec’s position and the US one. With asbestos, which the Quebec government continues to maintain is safe (not unsurprisingly given its ownership of the principle producer of the material [the Société nationale de l’amiante]), the United States has repeatedly questioned the safety of the product and has cited evidence that links exposure to the substance to lung cancer.

The case of the environment is not one-way. Quebec has been forceful objected to US actions. Chicago’s attempt to divert water from the Great Lakes to the Mississippi River in order to treat its raw sewage as well as proposals to replenish the aquifers of the region would lower the water table, reduce water speed and amount through the Saint Lawrence Seaway, and reduce Quebec’s hydroelectric production (Carroll and Curtis 1984, 81). Quebec has also complained about how states are dumping toxic waste into the Seaway without first adequately treating it. On the other hand Quebec’s proposals to alleviate flooding along the Richelieu River by creating flood control channels have caused American agitation over the reduction of their own water supplies.

Of course, in this increasingly interdependent world, even what seems to be strictly provincial policies have ramifications that go far beyond their borders. While some of these policies (such as Quebec’s ban on the use of non-provincial produced brick in construction) are designed to distort trade flows (especially on an interprovincial basis), others have affected Quebec’s trade even though their intentions were far from the economic area. An example is its language laws that have the effect of encouraging trade with francophone countries and discouraging it with Anglophone ones. However, the net effect of these laws is it allows Quebec to maintain a greater diversity of operational businesses than would otherwise be possible.

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37Quebec in 1991 had 26 offices around the world and was the only province with representatives in the Middle East, Africa, or South America. There were eight offices in Europe, seven in the United States (since then the Los Angeles and Lafayette, Louisiana offices have closed due to budget cutbacks), three in Latin America, one in Haiti (responsible only for immigration and located in Port-au-Prince), one in Africa, one in the Middle East (that is located in Damascus and handles only immigration matters), and five in East Asia (Bernier 1993; Quebec Ministere des Affaires internationale 1991).

38The Francophonie is the French equivalent of the Commonwealth.
The language law in the province allows it to engender in its population norms of behavior that favor provincially-made goods over goods from the United States. Thus, the Quebec pop and best seller charts are dominated by local artists and authors.39

Economists typically see this as economically inefficient because the laws have constrain choices made by individuals. Such an analysis from the individual perspective so common in neoclassical theory is the correct one. However, from a societal point of view, the Quebec language policy’s implications for cultural goods is much more complicated.

While individual choice is limited by constraining the free market, it is also increased in the long run by protecting the cultural and linguistic identity of the Quebecois. In addition, Quebec’s cultural and linguistic identity can be considered a “public good” in that in the absence of government intervention, less than the socially optimal amount will be procured by the society. Following on the analysis first proposed by Mancur Olson (1971), the individual benefits from the provision of the Quebec culture to the extent it is provided by the rest of society but the cost for her to provide part of this public good (by learning more French, for example) is greater than her individual benefit, so she will not decide to take additional amounts of French. However, everyone in society would benefit from her learning more French, so she needs to take all of the benefits accruing to society into consideration when she is making the decision to take more French. However, in the absence of Quebec’s language laws, she may fail to do so as all of the costs of learning more French are borne by her while the benefits are dispersed throughout the population.

DIVISION OF POWERS FOR FEDERAL SYSTEMS IN THE NEW ECONOMY

Federations need rules to govern the distribution of power between various levels of government. However, “no other federal constitution is as silent on the issue of the rights and powers of the constituent units in international affairs as the Canadian constitution” (Nossal 1994, 113). In this case, however, silence speaks volumes. It ensures provinces are able to exert influence over and, in some cases, directly conduct external policy. The conundrum is that the nation can only speak with one voice (the federal one) in the making of international treaties because these obligations are considered to be binding on the federal jurisdiction even when the province is the one making the agreement. The only exception for this would be if the provinces receive international personality (and thus their actions would be binding unto only themselves) but this is unlikely. Similarly, it is equally improbable the provinces will become subservient to the wishes of Ottawa on these matters. Thus, given the status quo, it is clear that provinces must play a role in the formulation and conduct of external policy. Such issues as transborder pollution have more impact on the locality than the nation so the natural conductor of such a policy should be the province. Similarly, different issues affect the interests of different provinces. Agreements of fishing rights are more in the interest of the Maritimes than in the Prairie provinces and so the former should be granted greater standing in such negotiations than the later. The only key element that must be in hand is that the federal and provincial governments must come to terms with the division of responsibility prior to actions being

39This is especially true as Quebec has over 80% of the Canadian French-speaking population.
taken so that the two sides do not enter into contradictory or conflicting agreements. Furthermore, to ensure that provinces receive proper encouragement to abide by international treaty obligations of the Canadian government, a strengthening of the Agreement on Internal Trade should be considered that would allow other provinces to take punitive action for retaliatory tariffs launched against Canada because of the action of one of the provinces. Only by ensuring that each province pays the full cost of their subnational sabotage of such agreements can Canada ensure that it speaks with “one voice” on such matters in the international arena. In this regard, separation of powers in federalism need not result in national paramountcy but instead will allow itself to be expressed in a new form of cooperative federalism wherein each province sees their fate integrally interwoven with the others.

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