

**FROM LEGISLATIVE DECISIONS
TO POLICY COORDINATION -
COLLABORATIVE FEDERALISM AND
THE CHANGING CHARACTER OF
INTERGOVERNMENTAL RELATIONS
IN CANADA AND THE EUROPEAN UNION**

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ABSTRACT

Intergovernmental relations in Canada often led to a formal transfer of competences between the different orders of government in the past (e.g. pension policy, unemployment insurance). However, more recent cases (e.g. inter-provincial trade, labor market development) show that intergovernmental interactions can also substitute for changes in the constitutional distribution of powers and subsequent collective, legislative decisions. In a similar manner, the latest developments within the European Union suggest that intergovernmental relations do not necessarily facilitate legislative decisions under the ‘Community method’, but rather lead to different solutions where intergovernmental relations substitute formal, centralized, legislative decision-making procedures. Despite the growing salience of this phenomenon, the topic still lacks a comprehensive and comparative study that would answer the following questions: under which conditions and how intergovernmental relations come to substitute formal transfers of competences and subsequent collective, legislative decisions to settle cross-jurisdictional policy challenges? How does it impact on the character of intergovernmental relations and the actual allocation of powers among the different orders of government?

Contrary to existing theories which address intergovernmental relations either from a macro- (e.g. Hueglin and Fenna, 2006) or micro-structural (e.g. Bolleyer, 2009) point of view, this thesis argues that the nature of policy challenges often has a systemic impact on the character of intergovernmental relations. While complexity of a policy challenge encourages constituent units to open discussions in areas under their own jurisdiction, the sensitivity of the topic creates skepticism among the same actors towards centralized, legislative decisions. As these policy challenges present constituent units with a federal dilemma of ‘unity and diversity’ (Jachtenfuchs and Kraft-Kasack, 2013), this study suggests that federal principles will emerge and develop in separate constituent unit jurisdictions to inform the character of intergovernmental relations. Within the revised theoretical framework of *collaborative federalism* this thesis will demonstrate how the federal principles of self-determination and autonomy, partnership, loyalty, comity, unity in diversity, proportionality, and flexibility are gradually adopted by constituent units in certain policy areas. Focusing more on the political dynamics of intergovernmental relations as opposed to ‘constitutional statics’ (Nicolaidis, 2001), the thesis explores an alternative development path from competitive to collaborative federalism (as opposed to Schütze, 2009).

Bringing the latest findings of European integration studies (e.g. ‘new governance’ approaches, and ‘new intergovernmentalism’) and federalism (e.g. the revitalization of the federal *idea*) to the literature on Canadian federalism will lead to a federal theory that provides a more sophisticated and elaborated understanding of ‘executive federalism’, and thus intergovernmental relations, demonstrating that shared rule is often achieved through a more informal process of intergovernmental policy coordination as opposed to legislative decisions. Inter-provincial trade and labor market development in Canada will be complemented with studies on EU economic governance and employment policy to test the propositions of the theoretical framework advanced in the thesis. Using document analysis and interview materials an alternative narrative will be provided to these different yet inter-related cases to underline some of the general characteristics of the procedures responsible for the emergence of collaborative federalism.

Keywords: federalism, intergovernmental relations, principles, policy coordination

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DECLARATION

I hereby declare that no parts of this thesis have been accepted for any other degrees in any other institutions. This thesis contains no materials previously written and / or published by another person, except where appropriate acknowledgement is made in the form of bibliographical reference.

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Robert I. Csehi

Budapest, Hungary, 19 May, 2014

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LIST OF ABBREVIATIONS

AGS	Annual Growth Survey
AIT	Agreement on Internal Trade
AOTA	Adult Occupation Training Act
APC	Annual Premiers' Conference
BNA Act	British North-America Act
CAALL	Canadian Association of Administrators of Labor Legislation
CJS	Canadian Jobs Strategy
COF	Council of the Federation
COREPER	Committee of Permanent Representatives
CMEC	Council of Ministers of Education, Canada
CMIT	Committee of Ministers on Internal Trade
CSR	Country-Specific Recommendations
DG	Directorate General
DI	Deliberative Intergovernmentalism
EC	European Commission
ECB	European Central Bank
ECJ	European Court of Justice
ECU	European Currency Unit
ECOFIN	Economic and Financial Affairs Council
EES	European Employment Strategy
EFC	Economic and Financial Committee
EFSF	European Financial Stability Facility
EI	Employment Insurance
EMCO	Employment Committee
EMS	European Monetary System
EMU	European Monetary Union
EP	European Parliament
EPSCO	Employment, Social Policy, Health and Consumer Affairs Council
ESCB	European System of Central Banks
ESF	European Social Fund
ESM	European Stability Mechanism

EU	European Union
FLMM	Forum of Labor Market Ministers
FMC	First Ministers' Conference
FMM	First Ministers' Meeting
FP	Federal-Provincial
FPT	Federal-Provincial-Territorial
HRDC	Human Resources Development Center
IGR	Intergovernmental Relations
IR	International Relations
ITS	Internal Trade Secretariat
JCPC	Judicial Committee of the Privy Council
LFDS	Labor Force Development Strategy
LI	Liberal Intergovernmentalism
LMA	Labor Market Agreement
LMDA	Labor Market Development Agreement
MP	Member of the Parliament
MEP	Member of the European Parliament
NAFTA	North American Free Trade Agreement
NDP	New Democratic Party
NES	National Employment Services
NTA	National Training Act
OMC	Open Method of Coordination
PEI	Prince Edward Island
POGG	Peace, Order, and Good Government
SCC	Supreme Court of Canada
SGP	Stability and Growth Pact
SPV	Special Purpose Vehicle
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TSCG	Treaty on Stability, Coordination and Governance
TVTA	Technical and Vocational Training Assistance
US	United States of America

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Table 2.	Summary of the interviews conducted in relation with the EU

1.) INTRODUCTION

1.1.) Real-world puzzle, research questions and relevance

In most federal systems, policy challenges often necessitate the reallocation of competences among the different orders of government. From time to time, legislative jurisdictions get transferred from the constituent to the federal level, as governments realize that a specific policy question could be better addressed at a higher level of governance (see e.g. Hueglin and Fenna, 2006, Watts, 2008). This process has expanded with ‘glocalization’ dynamics (e.g. Robertson, 1992) and the emergence of the welfare state (Bakvis et al., 2009): what used to be considered as an independent local issue often has become an interdependent matter. Canada has been no exception, and intergovernmental relations or ‘executive federalism’ (Smiley, 1974) often played an essential role in the formal transfer of competences and subsequent federal legislative acts to settle cross-jurisdictional challenges, as in the cases of pension plans, unemployment insurance or even fiscal arrangements between the provinces and the federal government (see Simeon, 1973). However, the developments in the areas of inter-provincial trade and active labor market measures suggest that intergovernmental relations do not necessarily lead to such formal re-allocations of constitutional competences. As a general phenomenon, in many areas the “effective loss of control (...) at the [constituent unit] level has not been compensated by a concurrent shift of resources to the federal level” (Nicolaidis, 2001: 463), rather intergovernmental relations facilitate policy coordination through more informal agreements which increasingly come to substitute the legislative measures settling cross-jurisdictional matters. The Agreement on Internal Trade (AIT) was considered as a “step toward new federalism (...) [where] the provinces have shown that the federation can reform itself without reforming the Constitution”¹. Changes in institutions and processes were

¹ The nation-tinkerers versus the trade barriers, in *The Globe and Mail*, 20 July, 1994. In fact, it was argued elsewhere that “the details of the agreement provide confirmation (...) [that] many issues do not lend themselves to easy resolution through broad constitutional principles”, in Some barriers are higher than others, in *Financial*

best summed up by the claim that “the federal cabinet has all but been supplanted by the First Ministers’ Conference as the locus of important national decisions, except that here the Prime Minister is no longer first among equals, or even equal among equals”². In an analogous way, active labor market measures led to “an administrative agreement between the two levels of government, without a constitutional amendment”³. In each case, there was a tension between system-wide policy solutions and a demand for decision-making authority at the constituent unit level (see Jachtenfuchs and Kraft-Kasack, 2013).

Interestingly enough, the dynamics described above are not unique features of federations, such as Canada but can also be witnessed in the European Union (EU)⁴. Member states of the EU “find it equally difficult to reconcile the preservation of high levels of territorial segmental autonomy within a nascent, yet politically uncrystallized, system of political co-determination” (Chryssochoou, 2000: 127-128, see also Chryssochoou, 1997; Koslowski, 1999, Neyer, 2006). Similarly to the Canadian case, intergovernmental exchanges traditionally played an essential role within the ‘community method’ of collective, legislative decision-making in areas under the first pillar of the Maastricht Treaty (e.g. the economic and monetary union and social policy). However, the latest developments in the area of economic governance suggest that intergovernmental relations increasingly come to facilitate policy coordination based on rather ‘soft law’ measures as opposed to legislative decisions. As *Angela Merkel*, the German Chancellor summed it up: “a coordinated European position is not necessarily the result of the application of the community method. This common position is sometimes an outcome of the intergovernmental method. The main thing is to have a common position on important issues (...) a coordinated action in a spirit of solidarity, each one of us [i.e. EU institutions and member states] in the sphere which comes under their responsibility but while focusing on the same aim”⁵. The Treaty on Stability, Coordination

Post, 14 September, 1995.

² Federalism works! We have it on the highest authority, in *The Globe and Mail*, 25 July, 1994.

³ Ottawa balks at passing power to Quebec, in *The Gazette*, 11 November, 1992.

⁴ The federal characteristics of the EU are hard to deny. See reference to the EU as „federal-like” in Burgess (1996), as an „emerging federation” (Börzel and Hosli, 2003), as „neither a federation nor a confederation” (Abromeit, 2002), as “neither an international organization in the classic sense of the word, nor a federal state” (Egeberg, 2001), as an entity that „has moved beyond confederation, yet (...) [it] may never become a federal state” (Koslowski, 1999) or one that „is undergoing a process of federalization” (Trechsel, 2005), as a „supranational governance organization that is more federal than unitary” (Schmidt, 1999), etc., in general, “a new kind of federal model” (Burgess, 2006).

⁵ Extract from the speech given by Federal Chancellor Angela Merkel at the opening ceremony of the 61st academic year of the College of Europe in Bruges on 2 November, 2010. p. 7. <http://www.brussel.diplo.de/contentblob/2959854/Daten/>

and Governance (TSCG) is only an intergovernmental agreement, yet “its effects will be deep and long-standing”⁶ as *Herman Van Rompuy*, the President of the European Council argued.

Despite the different constitutional settings in Canada and the EU, surprisingly enough, intergovernmental relations in both polities seem to have developed in a similar fashion. Consequently, the thesis aims to understand *under which conditions and how do intergovernmental relations substitute formal powers of competences and subsequent collective, centralized, legislative decision-making to settle cross-jurisdictional policy challenges? How does the character of intergovernmental relations change to facilitate these developments and what impact does it have on the actual allocation of powers?*

The relevance of a comparative federalist study on the changing character of intergovernmental relations can be summed up in the following points. First, a comparative study between Canada and the EU can enhance the existing analytical framework inasmuch as common challenges require concepts that can be applied within different political contexts (see Jachtenfuchs and Kraft-Kasack, 2013). Empirically, as federal political systems are increasingly faced with the problem of further coordination without formal, legislative competence transfers (see also Nicolaidis, 2001), it can be assumed that more and more areas shall come under the umbrella of intergovernmental policy coordination both in Canada and the EU. Environmental, energy or health care issues, for instance, are all potential candidates for intergovernmental developments. In fact, the more indeterminate the issue of competence allocation proves to be the more likely it will be resolved through the intergovernmental arena. Intergovernmental relations in many instances are an unavoidable fact of the Canadian federation and political life which is becoming more and more evident for the most relevant actors. Unilateral action, in other words, “the Ottawa-led cooperative federalism” (Cameron and Simeon, 2002: 49) is becoming less and less prevalent. As a response, horizontal, inter-provincial relations become more and more significant in dealing with pan-Canadian policy challenges. This is already manifested in the activism of the Council of the Federation (CoF), the meeting point of the Premiers of the individual provinces and territories. As *Jean Charest*, the former Premier of Québec, argued there were “totally new federative dynamics in Canada based on consultation, and joint-management, and decision-making”⁷, where the different orders of government worked “in cooperation to defend common interests”⁸. Furthermore, the

⁶ Twenty five EU leaders sign German-model fiscal treaty, <http://euobserver.com/political/115460> .

⁷ Charest breaks with past, sounds pro-Canada tone, in *The Globe and Mail*, 16 April, 2003.

⁸ Charest breaks with past, sounds pro-Canada tone, in *The Globe and Mail*, 16 April, 2003.

more successful examples there are concerning intergovernmental policy coordination, the greater the chances are to replicate them in other areas.

Secondly, from the perspective of theory, a closer look into the character of intergovernmental relations and their role in settling cross-jurisdictional policy matters pushes scholars to revisit and revise the essential fundamentals of the theory and practice of federalism. It is argued that intergovernmentalism “is an inherent part of a genuine federal vision” (Nicolaidis, 2001: 454). Consequently, instead of simply focusing on the existing constitutional structures, analyzing intergovernmental developments from the perspective of cross-jurisdictional policy challenges shall reveal important correlations concerning the idea and exercise of federalism. To that end a comparative study can be used in a fruitful way to test the actual impact of different factors on the institutional and procedural developments in a more systematic way as opposed to a sporadic, single-case specific analysis that would lack a much needed level of abstraction.

Thirdly, a comparison between the EU and Canada allows for the incorporation of the latest scholarly discussion within European integration studies into the literature on Canadian federalism. The theoretical and conceptual development, and the important correlation found in the ‘new governance’ (Mosher and Trubek, 2003) and ‘new intergovernmentalist’ (see e.g. Puetter, 2013) approaches with the deliberative turn and the idea of ‘soft’ law mechanisms can improve the analytical framework of federalism that is increasingly moving from understanding allocative outcomes to processes of change (see Nicolaidis, 2001: 443). In fact, it is surprising how little consideration has been given to comparing intergovernmental relations between the EU and Canada despite the fact that the latest developments “would signal a profound transformation of the Canadian federal system, from a classical parliamentary federation to a new model more akin to the (...) European council governance” (Hueglin and Fenna, 2006: 226). This allows the researcher to use the EU not simply as an empirical case but rather something through which a common understanding of intergovernmental relations can be established in a step-by-step manner. How much further the EU case may be, it is instructive of what might be missing from the Canadian federalist narrative. This study intends through a comparative study to advance a federalist understanding of the changing character of intergovernmental relations, and thus, bring the two literatures (i.e. Canadian federalism and EU integration studies) closer together.

Last but not least, it is important to add that “not only are Canadians often inadequately inattentive to what they can learn from Europe, but Europeans also often fail to understand the contributions that Canada and Canadians make in seeking innovative

responses to vital issues” (DeBardeleben and Leblond, 2010: 3). Even though Canada and the EU may not be compared through their formal, constitutional structures, the analogous challenges they face, and the similar patterns of intergovernmental interactions they have developed allows for a comparison which may prove to have an added-value for both contexts.

The rest of the chapter unfolds as follows. The next sub-chapter turns from the empirical puzzle to the theoretical one and through a short overview of the scholarly literature the most important gaps will be identified. This part will also demonstrate how a comparative study between the EU and Canada can be beneficial in understanding intergovernmental dynamics. This will be followed by the main argument of this thesis with brief methodological considerations. Last, but not least, a general overview of the dissertation will be provided.

1.2) Intergovernmental relations: what’s beyond the structural dimension and executive federalism?

The current state of research does not provide an obvious answer to how intergovernmental relations come to substitute formal transfers of competences and subsequent collective, legislative decisions to settle cross-jurisdictional policy challenges and what it means for the character of intergovernmental relations. Even though studies have been conducted *across* federal systems to understand the variation in the nature of intergovernmental relations (e.g. Hueglin and Fenna, 2006; Bolleyer, 2009), considerably less effort has been spent on systematically account for the diverging intergovernmental outcomes *within* a specific federal political system such as Canada. This thesis aims to fill this gap by using valuable insights from the ‘new intergovernmentalism’ and ‘new governance’ literature on the EU and by connecting them to the latest findings of comparative federalism (Burgess, 2013) in a quest to revisit and revise the basic concepts of Canadian federalism.

The study of intergovernmental relations has been in the focus of scholarly studies for decades in Canada. Since the first, most valuable appearances of the topic in the works of Simeon (1973), Hodgetts (1974), Smiley (1974), and Verney (1989) numerous different aspects of intergovernmental relations have already been addressed. What these early studies have in common is their central focus on the formal, constitutional elements and their impact on the character of intergovernmental relations, despite acknowledging that other factors may also have an effect. The term ‘executive federalism’ was advanced to describe the essential

nature of the Canadian federation, where the parliamentary system and the inadequate representation and accommodation of provincial interests in the federal decision-making processes made the role of the executive highly relevant in the management of the federation. Oddly enough, executive federalism is very much connected to a legislative approach to federalism which was highlighted first by Simeon (1973) who described federal-provincial diplomacy leading to legislative acts and even constitutional amendments (see Canada Pension Plan). In other words, even though they emphasized the role of the executive over the legislative, and how ‘extra-constitutional’ institutions such as First Ministers Meetings and Conferences (FMMs or FMCs) came to matter, their role was essentially judged by their contribution to centralized, collective, legislative decisions. This also reflected the prevalence of a legislative approach to federalism. There was no further specification and categorization of the character of executive federalism based on the outcomes the underlying procedures facilitated and how it could be related back to different characteristics of intergovernmental relations. After all, executive federalism could mean a mechanism where one order of government is capable of dominating the negotiations on policy coordination (e.g. the federal government influencing the debate through ‘the power of the purse’) to one where the individual actors are horizontally placed therefore neither order of government is capable of influencing the other. Where the provinces start to act together in order to counterbalance the dominant position of the federal government in pan-Canadian policy-making, a different nature of intergovernmental relations arises. Even though Cameron and Simeon (2002) used the concept *collaborative federalism* to describe the ‘changing nature of intergovernmental relations’ that led to the co-determination of national policies, their work simply described the new institutions and procedures but failed to provide a theoretical framework within which those dynamics could be understood. Questions of how the character of intergovernmental relations has changed and how this has led to different intergovernmental outputs have not been addressed at a more abstract level in a more comprehensive and theoretical manner. As before, very little consideration has been given to the role of ideas and principles and rather the authors argued that failed attempts to revise the constitutional framework have led to these new methods and institutions.

As opposed to the macro-structural perspective outlined in the previous paragraphs, Bolleyer (2009) and Bolleyer and Börzel (2010) argued that the divergence of intergovernmental institutions could be understood based on the existence and type of power-sharing mechanisms at the constituent unit level. However, similar to the macro-structural approaches, micro-structural explanations have a hard time understanding diverging outcomes

and changing characters when the underlying structures remain intact. Consequently, as it was argued before, they might explain diversity across different federal political systems (e.g. between Switzerland, Canada, Germany and the United States), but they come short in explaining various outcomes within a particular federal political system, such as Canada. Furthermore, the role of ideas, norms, perceptions, and the internalization of different values and principles have not been studied in a comprehensive manner. Yet, it is admitted by the authors that „the constitutional make-up is *not an immediate force* driving patterns of institution building in the intergovernmental arena of a polity”⁹ (Bolleyer, 2009: 8).

As both micro- and macro-structures of federal systems tend to be rather stable over time, yet the character of intergovernmental relations has changed considerably, the explanatory power of these structural approaches has been questioned. Even though ideas, norms and perceptions were already mentioned as important factors in intergovernmental relations by Simeon (1973), they haven't been studied in depth so far. Consequently, as separate jurisdictions increasingly face an essentially *federal* dilemma where system-wide policies need to be balanced with decision-making authority at the constituent unit level, this thesis argues that there is a need to study intergovernmental relations from the perspective of federal values and principles. The policy-centered approach advanced here provides a systemic understanding nevertheless, where the nature of a policy challenge instead of the overall structure of the federal system affects the character of intergovernmental relations. As Nicolaidis (2001: 448) argues, there is a “need to reassert the importance of process over substance, the need to move beyond comparative statics, in the study of competence and federalism”. In a similar way, this thesis rejects a rigid delineation of competences, and rather argues that often intergovernmental policy coordination has an impact on the exercise of policy responsibilities therefore it is essential to analyze the factors underlying the character of intergovernmental relations more closely. Even though Nicolaidis (2001) highlights the importance of a more sophisticated way of shared competences (from reserved through national but coordinated to partially or mostly transferred powers), she leaves the question open “when various components of ‘shared competence’ are activated and under what conditions” (Nicolaidis, 2001: 451). Sbragia (2004) even goes further to stress the possibility of shared rule achieved through intergovernmental coordination. However, she also leaves the conditions open under which such a sharing shall take place.

⁹ Emphasis added by the author.

Last, but not least it is important to note that there is a revitalization of the idea of federalism (see Burgess, 2013) that aims to understand how constitutional realities often diverge from the actual practices in different federal political systems and what role the different values and principles of federalism play in that process. It is quite puzzling that despite its central role in federal political systems, the basic values and principles of federalism has not been studied from the perspective of intergovernmental relations in Canada. Burgess (2013) fails to fill this gap as well, nevertheless he calls for a deeper and more systematic understanding of the circumstances under which those principles can emerge and perform certain influence over the dynamics of a political system.

The empirical challenge Canada is facing with regard to its intergovernmental relations is also manifested in the European Union. However, despite the federal character of the policy dilemma labelled as ‘integration paradox’ (Puetter, 2012), intergovernmental relations in the EU have been surprisingly understudied from a federalist perspective. Instead, they were always considered to be tools to defend member states’ preferences. In 1993, Andrew Moravcsik devised the term ‘liberal intergovernmentalism’ (LI) and argued that states achieved their goals through intergovernmental bargaining and negotiation rather than through centralized decision-making bodies. As LI was embedded within the study of international relations (IR), it was based on the assumption of international anarchy as a structuring factor (Moravcsik and Schimmelfennig, 2009: 73), and therefore questioned the changing character of intergovernmental relations. However, liberal intergovernmentalism has a hard time dealing with complex and sensitive policy interdependencies where preferences are hard to establish and more attention has to be given to open deliberations in the practice of sharing competences.

As a response to the shortcomings of LI, Puetter (2012) advanced the analytical concept of deliberative intergovernmentalism (DI) to describe new intergovernmental institutions and procedures that relied heavily on policy deliberation. Even though the DI framework put a special emphasis on the nature of policy challenges and deliberation, it failed to address the nature of values and principles developed in the process which becomes highly relevant in cases where preferences are hard to determine before negotiations. This ‘new intergovernmentalist’ approach is a reflection of the ‘deliberative turn’ (see Neyer, 2006) in EU studies which advanced less comprehensive and more policy-oriented approaches to understand European political and institutional dynamics through an emphasis on deliberative interactions. Neyer argued that a great number of empirical cases showed that new, discursive modes of interaction have been used by governmental actors. Despite the great importance of

interactions between the different levels of government this ‘deliberative turn’ has never been applied to the theory and practice of federalism. The thesis aims to fill this gap by bringing the two bodies of literature closer together.

As the institutional structure of the EU matured, the focus of research on intergovernmental relations shifted as well. Governance approaches aim to understand the mechanisms through which collective needs are managed (see Peters and Pierre, 2009: 92). Consequently, intergovernmental relations came to be studied from the perspective of policy-making. Beyond the ‘community method’ to generate legal compliance among the member-states, governance approaches emphasized the importance of the adaptation of new styles of governing which has been greatly induced by the expansion of EU competences. As governance approaches “can be applied to a range of policy-making systems” (Peters and Pierre, 2009: 92), it has opened up the EU to comparative studies. Furthermore, ‘new governance’ approaches emphasized the need to study more informal mechanisms of policy coordination that lacked command-and-control type mechanisms and relied more on ‘soft law’ mechanisms. Even though ‘soft law’ and the Open Method of Coordination (OMC) started to describe arrangements “that operate in place of or along with (...) ‘hard law’” (Trubek et al., 2006: 65), little consideration has been given to the underlying principles and values that actually made them possible. Once again, it is argued here that since constituent units are increasingly faced with an essentially federal dilemma, it is relevant to study how the different federal principles emerge and develop to inform intergovernmental relations.

In sum, it will be demonstrated that important elements of the latest theoretical developments in the fields of federalism and European integration studies can be incorporated within a theoretical framework that would advance our understanding of the changing character of intergovernmental relations in Canada in a more comprehensive and systematic way.

1.3.) Collaborative federalism and intergovernmental relations

To be able to reflect on the real-world puzzle and the gaps in the existing literature the thesis advances a theoretical framework that builds upon a combination of the different approaches and theories within the literature on comparative federalism and European integration studies. As opposed to the micro- and macro-structural approaches to intergovernmental relations, a new approach is advanced by this thesis that argues that the nature of a cross-jurisdictional policy challenge has a great impact on the character of intergovernmental relations. While

complexity, understood as the interdependence of a policy matter, encourages constituent units to open deliberations in areas falling under their own jurisdiction, the sensitivity of the topic, as it involves the coordination of separate jurisdictions, makes the same actors skeptical about formal competence transfers and pushes them towards more informal intergovernmental arrangements. As a response, it is argued that particular federal principles emerge and develop which affect intergovernmental interactions within the areas involved. The adoption of a unique combination of the principles of self-determination, partnership, loyalty, comity, unity in diversity, proportionality and flexibility is responsible for the particular character of intergovernmental relations that substitutes formal transfers of legislative powers between the different orders of government.

In order to be able to test the main proposition advanced by the thesis, first of all, intergovernmental relations will be conceptualized on three different dimensions: cultural, procedural and structural. Combined they constitute the *character* of intergovernmental relations. The first dimension refers to the accepted norms, values, role perceptions and principles that would in turn have a major influence on the patterns of interaction and institutions (the other two dimensions) that emerge between the individual actors. This thesis emphasizes the role of ideas (i.e. the normative basis) in the overall conduct of intergovernmental relations. This coincides with the idea that the moral basis of federalism is much more important than its legal basis (see Livingston, 1956: 106-108), consequently any analysis of it shall start with those moral imperatives to avoid placing the cart in front of the horse (see Burgess, 2013: 84). This explains why the focus on the cultural dimension as opposed to purely looking at the institutional and procedural practice shall have an added value in understanding the changing character of intergovernmental relations. The culture of intergovernmental relations is an essential concept as it tries to understand how the different actors approach one another, what their perception of the Other is, what the accepted norms, values, and visions are, what their language is like, what patterns of behavior are approved, etc.

Three different patterns of interaction will be distinguished based on the cultural dimension. Depending on the existence and dominance of the federal principles of self-determination and autonomy, partnership, loyalty, comity, unity in diversity, proportionality, and flexibility intergovernmental interactions will be described as competitive, collaborative or cooperative. The thesis aims to understand the development from competitive to collaborative patterns of intergovernmental interactions therefore it looks further into the circumstances under which these principles are likely to be adopted by the individual actors

and through which methods such a development manifests itself. It will be argued that deliberative procedures increase the probability of adopting new federal principles in areas that fall under the exclusive jurisdiction of a constituent unit, therefore it is essential to theorize first under which conditions deliberations are more likely to emerge. As argued in the main proposition, complexity and sensitivity of a policy challenge is likely to increase that probability. As the different actors face more and more difficulties in assessing their preferences in connection to a policy matter, they are more likely to turn towards open deliberations. Complexity will be assessed through the horizontal interdependence of an issue, in other words how many different departments need to be involved in settling a policy matter. Sensitivity refers to the extent to which a policy challenge cuts into the idea of sovereignty and therefore requires the involvement of the highest political levels to settle it.

In a second step it will be analyzed how the emerging deliberative procedures increase the possibility of adopting specific federal principles even in areas of exclusive jurisdictions of the constituent units. With the use of official documents, news clippings, and extensive personal interview materials backed at times with excerpts from legislative debates, the thesis attempts to formulate an alternative narrative to intergovernmental relations that emerges through the adoption of the federal principles highlighted above. With a focus on previously understudied aspects, some new light will be shed on earlier cases where intergovernmental arrangements substituted a constitutional revision of competences among the different orders of government and subsequent centralized legislative decisions. The level of internalization and dominance of the particular federal principles will determine the character of intergovernmental interactions as competitive, collaborative or cooperative which would allow for a more elaborated take on the notion of 'executive federalism'. The level of internalization and dominance of the individual principles will be assessed through the personal interviews with officials who have been involved with the intergovernmental file in the cases studied by this thesis, which will be further supported by the analysis of official documents and news clippings.

The thesis incorporates the concept of intergovernmental relations within federalism as the latter will be defined based on Elazar (1979) as a combination of self-rule and shared rule. This conceptualization of federalism brings the legal and political elements of federalism to equal footing, as it allows for a more informal and process-based understanding of shared rule. After all, federalism is as much a process as it is a structure, therefore depending on whether self-rule or shared rule is the dominant feature and the way shared-rule is achieved competitive, collaborative and cooperative types of federalism will be differentiated. The

dissertation argues that over time, under specific circumstances a development from competitive to collaborative federalism becomes possible as an alternative / complementary path where the collaborative type serves as a mezzanine between the more formal, constitutional types of dual / competitive and cooperative federalism. Within the collaborative type ‘shared rule’ does not mean centralized policy-making manifested in legislative decision-making procedures (as in the cooperative) but rather emerges from an essentially intergovernmental process, the prerequisite of which is a change in the cultural dimension of intergovernmental relations which is based on the internalization of the different federal principles even in areas under the exclusive jurisdiction of the constituent unit governments.

As opposed to Cameron and Simeon (2002) then, collaborative federalism will be used in this thesis as a distinct type of federalism that is built upon a particular culture of intergovernmental relations which is different from that known in the two legally driven types: dual and cooperative federalism (see Hueglin and Fenna, 2006; Watts, 2008; Schütze, 2009)¹⁰. Collaboration refers to policymaking through promotion of dialogue, shared understanding of values, mutual engagement, deliberation, consensus-building and agreements. It is about building commonality, alignment of activities, discussion, and preparedness to compromise. In the collaborative framework the question is not how certain issues can be best achieved by the federal level of governance, but rather, how the effective management of a given task is provided for in a non-hegemonic, horizontally driven intergovernmental way?

The idea of collaborative federalism will be fine-tuned through lessons drawn from the literature on EU integration. Taken from liberal intergovernmentalism is the idea that “states achieve their goals through intergovernmental negotiation and bargaining, rather than through a centralized authority making and enforcing political decisions” (Moravcsik and Schimmelfennig, 2009: 68). Taken from deliberative intergovernmentalism is the idea that intergovernmental institutions are increasingly occupied with policy-coordination as opposed to law-making (Puetter, 2012: 162) and consequently rely on deliberation more. It will be shown that a change in the nature of intergovernmental relations is to be traced not only through formal institutional arrangements (otherwise different setups would produce diverging practices), but also through informal elements such as norms, perceptions, and role attributions.

¹⁰ Painter (1996) in a different context has also differentiated among competition, collaboration and cooperation.

It will be argued that there is more to the logic of intergovernmental relations in Canada than competition and cooperation, as the existing literature would suggest. Rather, in order to deal with cross-jurisdictional matters without centralizing decision-making at the federal level, provincial governments develop a different culture of intergovernmental relations to ensure policy coordination which does have a major impact on the allocation of competences. The thesis suggests that the nature of this intergovernmental change goes beyond a simple shift in the behavior of the individual actors trying to maximize their utility under changed circumstances (see also Lewis, 2003: 99)¹¹. Rather, there is a transformation of the basic culture of intergovernmentalism which is mainly informed by the adoption of different federal principles in separate jurisdictions. This process then implies the internalization of certain norms and perceptions which could serve as reference points in tracing this cultural change.

An important differentiation between collaborative and cooperative types of federalism which is informed by the different patterns of intergovernmental interactions that are based on the different levels of internalization of certain federal principles derives from their output. Taken that this thesis uses a federalist approach it is important to analyze the impact of collaborative federalism on the overall allocation of competences. It will be argued that even though the constitutional framework around a specific topic did not change, as intergovernmental agreements are essentially non-binding, their political rather than legal enforceability does alter the exercise of power within the areas under scrutiny. These, on the other hand will also be traced back to the adoption of particular federal principles (i.e. instead of subsidiarity, greater reliance given to proportionality). Last, but not least, it will be analyzed how robust and sustainable these collaborative mechanisms prove to be by looking at the institutionalization of the federal principles that drove the intergovernmental interactions.

In general, this thesis aims to theorize further the argument made by Bolleyer (2009) that the horizontal axis of intergovernmental relations and its institutional setting could influence the vertical relations and thus, it affects the overall nature of the federal structure. The empirical analysis in the areas of inter-provincial trade, and active labor market measures in Canada and economic governance and employment policy in the EU will be supportive to this end. The study attempts to capture the major elements leading to a changed character of

¹¹ Again, think of the reference by Cameron and Simeon (2002) about the changing *nature* of intergovernmental relations.

intergovernmental relations (from competitive to collaborative interactions), and understand the mechanisms through which this has been facilitated.

1.4.) Brief outline

In *Chapter 2*, the theoretical framework of collaborative federalism is outlined in details. First, a more in-depth literature review is provided that draws from two distinct bodies of literature: Canadian federalism, and European integration studies. Once the major gaps are identified in a more detailed and systematic manner, the chapter addresses the most relevant concepts from intergovernmental relations through federalism to policy coordination. After the conceptualization, the chapter turns to the theoretical framework that aims to understand under which conditions and how intergovernmental relations substitute formal transfers of competences and subsequent collective, legislative decisions to settle cross-jurisdictional policy challenges. Within the framework a development from competitive to collaborative federalism will be described and a number of propositions are put forward to test the different elements that may have an influence over the process. Within this sub-chapter the methods used to test the propositions will also be described in details. Last, but not least, the argument is made for a comparative study between Canada and the EU with a short description of the selected case studies that are addressed in further detail in the individual empirical chapters.

Chapter 3 turns to the Canadian federation and the case of inter-provincial trade barriers. The first part describes the constitutional framework and argues that little consideration has been given to the complexity and sensitivity of the policy area which resulted in competitive relations between the different orders of government. Based on extensive interview materials (both personal and over-the-phone) conducted with both intergovernmental and line department officials collected through various research trips to different provinces and the federal capital, supported by government and parliamentary documents and media reporting of particular events, this chapter traces the evidence to competitive intergovernmental interactions and then highlights the incremental process through which the different federal principles were adopted within intergovernmental relations. It will be demonstrated that deliberative procedures facilitated the gradual internalization of particular federal principles among the actors that led from competitive to collaborative federalism concerning the internal trade file. Last but not least, the robustness of these collaborative dynamics is assessed through the analysis of the Agreement on Internal Trade that is responsible for the on-going coordination process.

Chapter 4 will match the Canadian case with an analysis of intergovernmental developments in the EU concerning the issue of economic governance. Here, in a similar manner to that of the Canadian case, based on interview materials, government documents, speeches and media reporting, the thesis aims to reconstruct the process that substituted centralized legislative decisions with intergovernmental policy coordination. First a historical account is provided to highlight the competitive nature of intergovernmental relations and the underlying principles that were responsible for that competition. Similarly to the Canadian case, process tracing based on the methods and materials highlighted before is conducted to demonstrate the emergence and internalization of federal principles by member states that pushed them towards intergovernmental arrangements to coordinate their fiscal policies. Once again the different propositions outlined in the theoretical chapter are tested in this case study to establish their validity. Last, but not least, the reflection of the newly adopted federal principles within the established institutional framework will be analyzed with special attention given to the intergovernmental treaties of the Euro Plus Pact and the Treaty on Coordination, Stability and Governance.

Chapter 5 returns to the Canadian context and puts the development of the character of intergovernmental relations within the area of active labor market measures under closer scrutiny. Based on the analogous methods used in previous chapters, this part will first compile the ambiguous constitutional framework and the competitive intergovernmental relations this created within labor market policy in Canada. The subsequent sub-chapters establish the process through which the progressive adoption of federal principles within cross-jurisdictional areas took place and came to inform intergovernmental relations. First, it will be highlighted how the complexity and sensitivity of the active labor market development file was slowly acknowledged by the individual actors, then it will be demonstrated how federal principles have driven intergovernmental relations that resulted in the signing of the different Labor Market Development Agreements.

Chapter 6 will complement the Canadian case of labor market policy with that of the European Union. Similar to the previous chapters, first the competitive nature of intergovernmental relations will be indicated by a closer look at the ‘constitutional framework’ and the early practice of employment policy within the EU. The subsequent parts will describe the process how the complexity and sensitivity of the labor market dossier has been gradually acknowledged by the member states and led them to adopt certain federal principles that changed the character of intergovernmental relations in the area.

Chapter 7 will provide with the most relevant conclusions with regard to the project. It will assess the most important empirical findings of the research while also reflecting on the theoretical added value the study has produced. Some remarks will be made concerning the institutional and policy implications of the findings. The limitations of the thesis will be complemented with suggestions for future research that could resolve some of the pending issues this research came across. The thesis will conclude with some final statements.

2.) COLLABORATIVE FEDERALISM – UNDERSTANDING THE EMERGENCE AND DEVELOPMENT OF FEDERAL PRINCIPLES IN INTERGOVERNMENTAL POLICY COORDINATION

Over the history of Canada federalism and intergovernmental relations had attracted constant revisions from both political actors¹² and members of academia¹³. The country was founded as a “quasi-federal” state (Wheare, 1963: 18-19; Watts, 1991: 170) with strong tendencies towards centralization (e.g. ‘National Policy’ measures under Prime Minister John A. Macdonald). After 1896 a ‘classical period’ of federalism emerged and legal equality between the provinces and the federal government was slowly established. The Second World War brought a new wave of centralization (e.g. wartime measures, Rowell-Sirois Commission on Dominion-Provincial Relations, etc.), but soon afterwards, the federal government and the provinces moved towards cooperative measures and launched cost-shared programs in a number of areas. The Trudeau era (from 1968 to mid-1980s) was more competitive in nature which often led to difficult, even conflicting situations (e.g. repatriation of the Constitution, Québec nationalism and referendum, etc.) between the two orders of government. From the mid-1980s on, federal-provincial relations have been fluctuating between competition and cooperation. As a result, inter-provincial relations seemed to deepen which has been further buttressed by the Harper government (2006-) which turned back to a more classical understanding under the title “open federalism”¹⁴.

This short overview of the history of Canada indicates a great variation in the character of intergovernmental relations ranging from competition to cooperation. However, empirically it is rather puzzling that in some instances ‘federal-provincial diplomacy’ (Simeon, 1973) or ‘executive federalism’ (Smiley, 1974) led to constitutional changes and federal legislation when faced with a cross-jurisdictional challenge (e.g. Medicare, Canada Pension Plan), while other cases were resolved without any transfer of constitutional powers

¹² See e.g. Understanding Charest’s vision of federalism, in *The Globe and Mail*, 7 September, 2012.

¹³ For an overview of the different phases see Brock (2003).

¹⁴ <http://www.pm.gc.ca/eng/news/2006/04/21/prime-minister-promotes-open-federalism>

and / or a subsequent collective legislative decision (e.g. inter-provincial trade policy). As it is anticipated that federal political systems increasingly face the dilemma where system-wide policies have to be balanced with policy-making processes that respect the autonomy of constituent units (see Jachtenfuchs and Kraft-Kasack, 2013), the role of intergovernmental relations is expected to continuously expand. Despite this tendency, the character of intergovernmental relations and the changes thereof in relation to this dilemma have been surprisingly understudied within the literature.

However, this tension between ‘unity and diversity’ emerged not only in fully fledged federal states such as Canada, but also in contested cases such as the European Union (EU). Contrary to the age-old dichotomy between supranationalism and intergovernmentalism (see Rosamund, 2000; Chryssochoou, 2001; Wiener and Diez, 2009), the idea of federalism has been on the rise despite the conviction that “the bigger the EU becomes the more it becomes intergovernmental”¹⁵. Politicians in the European¹⁶ and national¹⁷ contexts have – from time to time – (re)discovered the topic of federalism highlighting its growing relevance within European politics. Yet, we witness that “the community method of decision-making processes (...) is becoming increasingly eroded (...) [And] the intergovernmental method (...) prevails on the European community mechanisms”¹⁸. In sum, even though there is constant talk about the need for more federalism in certain policy areas¹⁹ (e.g. fiscal policy) there has been a move away from hard law settlements of cross-jurisdictional issues as manifested in the Community method to more informal intergovernmental policy coordination (e.g. Fiscal Compact). The Belgian Prime Minister, *Yves Leterme* argued in 2010 that “we can do a lot of things on an intergovernmental basis, a kind of coalition of the willing”²⁰. As one senior official from the COREPER argued in relation to the Lisbon Treaty and the non-legislative measures taken under economic governance, “the European Council is among the institutions now but is freer to see itself coming up with dossiers without a legislative angle (...) it represents another work-stream along the Commission with its own working and guiding principles”²¹. Another financial counselor from a member state argued that “legislative

¹⁵ E.g. National interests creating tension in EU Commission, <http://euobserver.com/institutional/30973> . See further reference to the importance of intergovernmental developments in Greens accuse Merkel of weakening EU institutions, <http://euobserver.com/political/121154> .

¹⁶ E.g. Reding predicts eurozone to become a federal state, <http://euobserver.com/political/123183> .

¹⁷ E.g. UK keen to delete ‘ever closer union’ from EU treaty, <http://euobserver.com/political/121607> . Merkel and Hollande dream of EU ‘utopia’, <http://euobserver.com/political/118795> .

¹⁸ Are we heading for a ‘half-Europe’?, <http://euobserver.com/opinion/116815> .

¹⁹ Europe’s federalism debate revived, <http://www.euractiv.com/euro-finance/europes-federalism-debate-revive-analysis-496753> .

²⁰ EU economic governance inevitable Belgian PM says, <http://euobserver.com/institutional/29695> .

²¹ Anonymous interview conducted in Brussels, 31 May, 2013. (MS_EFC05)

deliberations now often lead to non-legislative decisions”²². Similar to the case in the federation of Canada, “while policy interdependencies have grown, member state governments have resisted the further transfer of formal competences to the EU level” (Puetter, 2012: 161). How is it possible that in some instances intergovernmentalism leads to a reallocation of competences through collective, legislative decisions under the Community method, while it may result in more informal policy coordination in another? What does it say about the character of intergovernmental relations and what impact does it have on the allocation of powers?

Despite the different political systems in Canada and the EU, as a response to common challenges, intergovernmental relations seem to develop in similar directions. They move away from facilitating transfers of power and subsequent centralized, collective legislative decisions and turn towards more informal policy coordination schemes. This thesis aims to understand under which conditions and how such a development becomes possible? It is suggested here that legislative decisions and policy coordination measures require dissimilar sets of intergovernmental relations. As the basic policy paradox these systems encounter reflects the essentially *federal* dilemma of ‘self-rule and shared rule’ (Elazar, 1979) or ‘unity and diversity’²³ (Jachtenfuchs and Kraft-Kasack, 2013), it is argued that the difference in the character of intergovernmental relations and how that character changes is the result of different federal principles adopted by constituent units in their interactions.

The existing literature approaches intergovernmental relations either from a policy-oriented or a systemic perspective (see Bolleyer, 2009) depending on whether they are considered as independent or dependent variables. While the former tends to neglect the structural elements and fails to abstract from specific policy areas, the latter proves to be too much concerned with micro- or macro-level institutional effects (e.g. the existence and type of power-sharing at the constituent level and the constitutional impact on intergovernmental relations correspondingly). In general, systemic approaches have a limited explanatory power in cases where both the micro- and macro-structure (i.e. sub-federal and federal) prove to be relatively stable, yet the character of intergovernmental relations changes over time. Rather, this thesis advances an approach that combines policy-oriented and systemic approaches that would analyze the relationship between policy challenges and interaction-level dynamics (i.e. procedures). This approach follows the argument that “structures and processes of

²² Anonymous interview conducted in Brussels, 6 June, 2013. (MS_EFC07)

²³ In general, the usefulness of federalism with regard to the EU was seen in „its deeper concern about how to organize in a mutually reinforcing way the concurrent demands for ‘unity in diversity’” (Chrysoschoou, 2001: 42).

government on the one hand and the ways in which public issues are raised and resolved on the other are inextricably related” (Smiley, 1974: 7)²⁴. It is proposed here that as constituent units face the federal dilemma of ‘unity and diversity’ they will adopt federal principles in areas falling under their own jurisdiction. However, cross-jurisdictional challenges also create skepticism among these units towards constitutional power transfers in the form of collective, legislative decisions and therefore drive them towards more informal intergovernmental arrangements. Consequently, the unique combination of the federal principles of self-determination, partnership, comity, loyalty, unity in diversity, reciprocity, mutuality, and flexibility emerges and is guaranteed through intergovernmental interactions as opposed to the constitutional division of powers. This thesis advances a theory of *collaborative federalism* to understand these dynamics and describe their impact on the procedural and institutional structure of intergovernmental relations and the overall allocation of competences.

The revitalization of both intergovernmental relations and the federal idea and their transformation as a response to contemporary challenges render political scientists “to try to distinguish between different federal models as structural responses to different sets of problems” (Burgess, 2013: 2). This thesis follows this track as the core concepts of the theory and practice of federalism will be revisited and revised stressing the importance of values, principles, role conceptions, policy-learning and deliberation known in the ‘new governance’ (Mosher and Trubek, 2003) and ‘new intergovernmentalism’ literature (Puetter, 2013) on the European Union.

Federal principles were referenced in not only a number of Supreme Court decisions²⁵ in relation to different constitutional and legal matters, but also in the day-to-day procedures of policy-making and coordination across Canada. In the case of inter-provincial trade barriers fundamental principles²⁶ or guiding principles²⁷ were recurring subjects during the discussions which were all related to the idea of federalism (e.g. see reference to subsidiarity²⁸) and led to an agreement on principles before an intergovernmental agreement on internal trade itself. As one former provincial negotiator to the Agreement on Internal Trade (AIT) argued “there was an evolution of willingness among provinces which extended

²⁴ As Chrysoschoou (2001: 43) argues with reference to Watts: “it is equally important to distinguish between ‘constitutional form’ and ‘operational reality’ and study both constitutional law and the politics of a federation if we are to gain an understanding of the federal process”.

²⁵ See e.g. Re: Resolution to amend the Constitution (1981); Reference Re Secession of Quebec (1998), Reference Re Securities Act (2011).

²⁶ PM suggests power shuffle with provinces, in *The Globe and Mail*, 17 December, 1990.

²⁷ Promises, promises, in *The Globe and Mail*, 14 August, 1986.

²⁸ Powers should follow purpose, in *The Globe and Mail*, 8 June, 1992.

the reliance on certain principles in order to reach agreement”²⁹. Federal principles became highly relevant during the negotiations leading to the Labor Market Development Agreements (LMDAs) signed between the individual provinces and the federal government³⁰ as well. In a similar manner, *Herman Van Rompuy*, the President of the European Council argued with respect to a meeting on economic governance that “there was a general consensus [among the member states] that we need to strengthen the economic union”³¹ which implied the adoption of new principles. A financial counselor involved with the economic governance negotiations further explained: “member states pushed for informal processes which clearly involved different principles and mechanisms”³². As it will be demonstrated in the empirical chapters, the different principles of federalism emerged over time influencing the overall pattern of intergovernmental relations.

Taking essential elements from the classical theoretical approaches of Livingston (1952, 1956), Riker (1964), Friedrich (1968) and Elazar (1979, 1987), this dissertation formulates a specific understanding of federalism and advances a new typology accordingly. Instead of stressing how the constitutional setting determines the character of intergovernmental relations, this thesis argues that cross-jurisdictional policy challenges often invoke a specific *culture* of intergovernmental relations. Culture refers to the shared understandings and knowledge of basic norms, values, beliefs, principles, patterns of behavior, and language which provide the underlying assumptions and rules that determine intergovernmental relations. Contemporary trends show a revival of intellectual interest in the cultural aspects of federalism, however “its conceptual and empirical implications have never been fully explored” (Burgess, 2013: 3). One of the unconcealed aims of this thesis is to fill this gap within the literature to understand its implications for intergovernmental policy coordination.

The special emphasis on the cultural dimension derives from the fact that both the EU and Canada are confronted with the dilemma of ‘unity and diversity’ in certain policy areas. Since this dilemma describes one of the essentials of the federal idea, consequently, it is assumed that the emergence and development of federal principles need to be addressed more thoroughly with regard to intergovernmental relations. After all, federalism is essentially a normative concept. The term ‘federal idea’ (Courchene et al., 2011) or ‘federal spirit’

²⁹ Anonymous interview conducted in Toronto, 29 January, 2013. (PROV_LD02)

³⁰ The province of Quebec first signed an Agreement in Principle where reference to the idea of federalism was made, e.g. section on Roles and Responsibilities of the Government which served a similar purpose as a constitutional clause that allocates power among the different orders of government in a specific policy area.

³¹ Van Rompuy to draft plan for deeper economic union, <http://euobserver.com/economic/116362>.

³² Anonymous interview conducted in Brussels, 28 March, 2013. (MS_EFC02)

(Burgess, 2013) is used frequently within the scholarly and political discourse, highlighting the importance of values, visions, beliefs, principles, norms and the corresponding language and behavioral patterns that define federalism. Analyzing institutional and procedural developments could therefore start with a closer look at these factors and explore their potential in helping us understand the character of intergovernmental relations. After all³³, federalism is a *sentiment* (Riker, 1964: 111), a *behavior* (Friedrich, 1968: 39; Elazar, 1987: 154) which entails “the *spirit* of cooperative enterprise and mutual respect” (Livingston, 1956: 316). A successful form of federalism requires “a *firm determination* to maintain both diversity and unity by way of a *continuous process* of mutual adaptation” (Friedrich, 1968: 175). In sum, federalism is “a *form of political will* designed to forge a particular kind of constitutional bargain based upon elite negotiations and compromises, and secondly (...) a *culture* of political attitudes, habits, beliefs, and orientations that sustained a mode of behavior appropriate to the maintenance of that bargain” (Burgess, 2013: 12). In fact, the German concept of *Bundestreue*³⁴, understood as the principles of federal loyalty and federal comity (see Friedrich, 1968), refer to “certain unwritten norms that pervaded German constitutional development and had important implications for the basic mode of conduct for regulating the relationship between the federal government and the governments of the constituent units” (Burgess, 2013: 20). Within the pages of this dissertation more attention will be paid to how policy challenges impact on these unwritten provisions that predispose political actors to change their attitudes and thus their behavior leading to a transformation of intergovernmental relations. In sum, this thesis focuses on federal principles however it turns the focus away from their analysis in relation to the constitutional distribution of powers to that of intergovernmental relations. To this end, a comparative study between the EU and Canada is conducted within which several questions will be answered. How do cross-jurisdictional policy matters facilitate the emergence and development of federal principles in the processes and institutions of intergovernmental relations? How do these principles get internalized and institutionalized? What is the impact of these dynamics on the actual allocation of powers? How can we trace that process?

In order to be able to answer these questions the thesis will advance a revised concept of collaborative federalism first used by Cameron and Simeon (2002). It will be differentiated

³³ Emphases within this paragraph have been added by the author.

³⁴ Nevertheless, the concept of *Bundestreue* is mainly confined to mean the “limits within which constitutionally allocated powers and functions in federations can be exercised and the manner in which they are used” (Burgess, 2013: 21). However, it is important to analyze the federal values and principles that are manifested in the variety of federal institutions and procedures.

from the traditional competitive / dual and cooperative types (see e.g. Hueglin and Fenna, 2006, Watts, 2008) based on the different processes and institutions of intergovernmental relations which will correspond to different sets of underlying principles. A number of propositions will be tested through comparative empirical case studies concerning the emergence and development of federal principles in intergovernmental relations in the EU and Canada. In general, the development from competitive to collaborative federalism will be explained as an alternative to a dual-cooperative scheme (see Schütze, 2009). Even though the selected cases in Canada (inter-provincial trade and labor market policies) and the EU (economic governance and employment policy) have been analyzed before, this particular view into the cultural dimension of intergovernmental relations and federalism is still missing, and it could provide us with a more thorough understanding of the events and a more elaborated perspective of ‘executive federalism’.

As a theoretical framework, this chapter has two different aims. First, it will build valuable insights from the latest findings within the literature on European integration into the theory and practice of federalism. Secondly, and in a related manner, it will describe a more comprehensive conceptual and theoretical nexus between federal principles and intergovernmental relations.

The chapter unfolds as follows: first, a literature review will be provided within which the most relevant findings of the scholarly work on intergovernmental relations is collected. There will be two different sub-chapters summarizing the academic knowledge of both the Canadian and the EU contexts. The unconcealed aim of these parts is not only to accentuate the gaps within the two bodies of literature but also to show possible connections between them that could enrich our understanding of the specific characters of intergovernmental relations leading to policy coordination as opposed to centralized legislative decisions. The second part of the chapter introduces the most relevant concepts which then serve the basis for the theoretical framework. In the third part, collaborative federalism as a theory will be elaborated where methodological considerations in light of the theory advanced will also be added. Last, but not least, the argument will be made for a comparative federalist study between Canada and the EU.

2.1.) Literature review

The following two sub-chapters will provide a review covering two distinct bodies of literature. First, the scholarly work concerning Canadian federalism and intergovernmental

relations will be introduced which will be followed by a summary of the different theories and approaches of European integration that have a relevance in relation to intergovernmental relations. After assessing the explanatory power of each concerning the research topic, the thesis will move on with a proposal to combine different approaches and advance a revised analytical concept of *collaborative federalism* that allows for a better understanding of the role of intergovernmental relations within a federal theory.

2.1.1.) Canadian federalism and intergovernmental relations: the need for a more elaborated version of executive federalism³⁵

The study of intergovernmental relations within the literature on Canadian federalism is rather extensive and dates back to several decades. As intergovernmental relations are considered to go hand in hand with the idea of federalism³⁶ they have always been studied together within one comprehensive framework.

A considerable part of the scholarly work traditionally focused on the formal, federal constitutional settings and the impact they have had on the character of intergovernmental relations. As one scholar noted “it is the allocation of functions found in the BNA Act [British North America Act – the author] that provides the starting point for any discussion of intergovernmental relations in Canada” (Hodgetts, 1974: 171). In this sense, the genesis of intergovernmental relations is understood to lie within the constitutional framework of the federation itself, even if the original design was “a more hierarchical federalism (...) which was intended to subordinate the provinces to the central government by such means as the declaratory power of Parliament, the disallowance of provincial legislation, and the extensive powers of the federally appointed lieutenant-governor” (Stevenson, 1993: 302). As argued before, this systemic approach neglects the cultural dimension and rather presupposes that the essence of federalism is to be found in the institutional setting, as if the fundamental values and principles were exogenously given. However, within such a framework it is rather hard to understand why and how intergovernmental relations emerge and develop in relation to specific policy areas that involve provincial jurisdictions. If intergovernmental relations are a function of the constitutional, legal framework, and nothing essential changes in the latter

³⁵ As this thesis focuses on the cases of Canada and the EU, this list of academic studies only contains works conducted within these two contexts. However, intergovernmental relations are deeply analyzed in the literature on Australian (e.g. Chapman 1990; Painter, 1996), Swiss (e.g. Vatter, 2004; Bolleyer, 2006; Mader, 2013), American (US) (Stephens and Wikstrom, 2007; Ongaro et al. (eds.), 2010), etc. federalism.

³⁶ In fact, it has been underlined by many officials during the interviews.

how are we to understand the institutional and procedural development of intergovernmental relations? What explains the development in the area of inter-provincial trade barriers where decades passed and the premiers “systematically refused to address the barriers they erected to trade within Canada (...) [But] at last, they've moved”³⁷? Beyond the fact that intergovernmental processes and institutions developed, it is noteworthy that they came to substitute for a formal transfer of competences and a subsequent centralized, collective legislative decision, unlike in the case of the Canada Health Act or the Canada Pension Plan.

In his seminal work from 1973, Richard Simeon described intergovernmental relations and policy making as an inter-play among three sets of separate yet interrelated factors: (1) social and cultural³⁸ characteristics, (2) institutional and constitutional elements, and (3) particular norms, attitudes, goals and perspectives. Through three different case studies³⁹, Simeon identified the most relevant actors, the working rules, the issues, the interests, goals, and objectives of the different actors, the strategies they used during the negotiations, the interactions in general, and the outcomes as well. He argued that intergovernmental relations became important inasmuch as federal legislation could not act as an arena “for the expression and accommodation of local and regional interests” (Simeon, 1973: 8). Yet, in the case of the pension system, the process ended with federal legislation (with Quebec establishing its own system through provincial legislation), and also led to a constitutional amendment⁴⁰. Federal legislation⁴¹ was also the result of the negotiations around the financial relations between Ottawa and the provinces, highlighting the lack of “spirit of partnership” in the process (Simeon, 1973: 86). In terms of the constitution, negotiations failed, and the matter was not addressed again until its repatriation in 1982. Even though Simeon argued that particular norms, attitudes, goals and perspectives also had an impact on intergovernmentalism, their role remained rather marginal and understudied, since he focused more on the ‘strategic environment’ in which decision-makers operated. Furthermore, as argued before, his empirical studies did not cover cases where intergovernmental procedures and institutions came to substitute centralized, collective legislative decision-making. To the contrary, in his analysis intergovernmental relations were used as a tool to facilitate law-making and constitutional revision. In fact, he argued in favor of a House of Provinces or Council of the

³⁷ A mild blow at interprovincial barriers, with Quebec sitting this one out, in *The Globe and Mail*, 16 August, 1990.

³⁸ In this context culture simply refers to such elements as diversity of language, (national or ethnic) identity, religion, rules, etc.

³⁹ The three studies cover negotiations around pension, financial arrangements and the constitution.

⁴⁰ See *Constitution Act, 1964* which extended federal jurisdiction over pensions while allowing provinces to run their own systems.

⁴¹ Bill C-278 passed on 26 April, 1967.

Federation, a permanent intergovernmental forum the *legislative powers* of which shall not have been wide (Simeon, 1979: 22). In sum, there was no specification whether this informal practice was used to law-making or policy coordination and no theory was advanced to understand the difference. This thesis aims to fill this gap and look deeper into the complex interaction between the character of policy challenges and the development and emergence of federal ideas and principles in intergovernmental relations in cases where federal legislation is lacking at the end of the process. In that, it aims to analyze the conceptual and empirical implications of the cultural aspects of federalism and intergovernmental relations on policy-making. As our real-world puzzle demonstrated in the previous chapter, the question today is not whether and how collective legislative decision-making is capable of accommodating provincial interests, but rather if provincial governments are willing to give Parliament that ability⁴².

Simeon's conclusion was that intergovernmental relations were best described as federal-provincial diplomacy, which has led other scholars to coin the term "executive federalism". First advanced⁴³ by Smiley (1974, 1987), Verney (1989), and later by Watts (1991) it described a "pattern of interaction in which much of the negotiating required to manage the federation takes place between the executives, elected and unelected, of the main orders of governments" (Bakvis et al., 2009: xii). In general, it was argued, that since the Senate did not accommodate for provincial interests in national legislative matters and the parliamentary form of government emphasized the role of the executive over the legislative branch (see e.g. Bakvis et al., 2009: 71) ongoing negotiations between provincial executives was to work out legislative decisions outside the parliamentary system. As Verney (1989: 243) argued: "the upper chambers did not provide an adequate means for the expression of regional sentiments, [and thus] an alternative avenue had to be sought". In a similar tone, Bakvis and Skogstad (2012: 4) implied a connection between intergovernmental relations and "federal policy-making institutions". Once again, the idea was that the existing constitutional framework created incentives for greater reliance on intergovernmental relations to deal with cross-jurisdictional issues. However, this descriptive concept lacked a dynamic element that would differentiate between various forms of this executive leadership in policy-making

⁴² In relation to intergovernmental agreements, Poirier (2001: 12) argued that they were used "as concrete mechanisms enabling provinces and the federal governments to work together, without having to clearly determine borders of constitutional responsibility. The strategy is to seek to avoid direct and difficult constitutional questions and confrontations".

⁴³ There was an alternative understanding of the concept 'executive federalism' advanced by Dawson (1987) which argued that the federal cabinet represented regional interests as opposed to the Senate in 'legislative federalism' or separate external mechanisms such as First Ministers' Meetings (Smiley's understanding of executive federalism).

depending whether it led to federal legislative decision-making or not (see Simeon's examples previously). In fact, paradoxically enough, executive federalism is a concept very much connected to centralized, legislative decision-making inasmuch as it aims to understand intergovernmental negotiations outside the parliamentary processes that would nevertheless facilitate federal legislation. This is indicated by Verney (1989) who considered executive federalism as half-federalism, or a transitional stage on the road to full-blown legislative federalism which he described as a federal system where regional interests are represented and accommodated in a federal legislative body (i.e. an elected Senate) that would counterbalance the principle of representation by population. Furthermore, he argued that "strengthening federalism means a transition from executive federalism to legislative federalism (...) [where] brief encounters of first ministers (and finance ministers) are transformed into permanent *legislative* sessions"⁴⁴ (Verney, 1989: 256). This understanding of executive federalism allows little insight into cases where federal law-making is avoided and substituted by policy coordination among the different orders of government, as in the case of inter-provincial trade where no 'enabling legislation' has been passed across the federation.

The idea of executive federalism has been preserved, although it has been renamed in the most recent studies. The connection between executive and legislative federalism has been dubbed as 'intergovernmental Canada and parliamentary Canada' (see Simeon and Nugent, 2012). Even though, it was argued that "there is no single model of 'right' intergovernmental relations" (Simeon and Nugent, 2012: 64), and that "there have been important changes in I[n]ter[G]overnmental[R]elations]" (Simeon and Nugent, 2012: 60), they were still considered as 'add-ons' to the parliamentary system (Papillon and Simeon, 2004). Even though this thesis emphasizes the political over the legal aspects of federalism, it has to be noted that legislative decision-making procedures also imply a particular form of intergovernmentalism (see Hueglin and Fenna, 2006: 218). In general, two contrasting models have been outlined in the Canadian literature on federalism (see among others Painter, 1991) a competitive and a cooperative one. The former refers to an image in which governments keep their distance from one another and remain responsible for their separate jurisdictions. This model is generally symbolized with 'watertight compartments' and is most widely known as dual federalism (see e.g. Hueglin and Fenna, 2006, Watts, 2008) or competitive federalism (Smiley and Watts, 1985; Kincaid, 1990; Painter, 1996). In the latter version governments come together to cooperate in cross-jurisdictional areas, and usually refers to the model of

⁴⁴ Emphasis added by the author.

cooperative federalism. As both models are embedded within a legal understanding of federalism, they describe mainly legislative decision-making procedures. Therefore, in a dual / competitive system, intergovernmental relations are practically non-existent as the different orders of government legislate in their own jurisdictions and exchanges are mainly ad hoc in nature. In the cooperative type, federal level dominates intergovernmental relations either through the legislative decision-making process (e.g. participation of constituent units) or through the administrative procedures implementing federal law (see Hueglin and Fenna, 2006). This differentiation, nevertheless, fails to account for policy developments where legislative decision-making is lacking yet there is considerable coordination among the different orders of government.

“Executive federalism works in two reasonably distinct ways” (Bakvis et al., 2009: 14) one carried out at the bureaucratic and one at the ‘summit’ level. While the former is concerned with permanent public servants and their work in implementing and administering federal policies, the latter covers exchanges between cabinet ministers or premiers who are responsible for establishing cross-jurisdictional policy frameworks. In fact, empirical evidence suggests that the summit level is becoming more and more important in settling cross-jurisdictional policy problems. As one senior, provincial official argued in relation to the employment negotiations: “Ministers and deputies were deeply involved...in certain cases, the Premier’s principal secretary was involved, unlike in cases where nobody cared and the issue was more a bureaucratic effort”⁴⁵. In a similar manner, to settle the case of inter-provincial trade barriers, First Ministers served as “the political pressure and muscle from the top (...) [they] provided the necessary political environment in which these [intergovernmental] institutions could work successfully” (Doern and MacDonald, 1999: 53). Once again, the important distinction between intergovernmental relations leading to federal legislative decisions in certain cases and policy coordination through more informal intergovernmental agreements in others has not been made. Consequently, important questions have not been addressed in this framework. What makes the ‘summit level’ become more potent and substitute coordination on a federal legislative framework with more informal intergovernmental arrangements? What impact does it have on the institutional and procedural elements of intergovernmental relations and its underlying principles? What influence does it have on the allocation of powers?

⁴⁵ Anonymous interview conducted in Ottawa, 15 November, 2012. (PROV_LD07)

In 2002, Cameron and Simeon advanced the idea of collaborative federalism to describe the pattern of intergovernmental relations that started to emerge from the early 1990s. Collaborative federalism referred to the “co-determination of broad national policies” (Cameron and Simeon, 2002: 49) by the different orders of government. The authors argued that it was the failed attempts to amend the constitution and the politics of fiscal deficits⁴⁶ that led to a change in intergovernmental relations, which was to a great extent a repetition with minor modifications of Simeon’s legalistic perspective from the 1970s. In fact, they argued that “many of the issues unresolved in the failures of Meech Lake and Charlottetown have re-emerged in the intergovernmental arena” (Cameron and Simeon, 2002: 55). In other words, even though they tried to understand the turn away from legislative decisions, they explained this turn based on formal, constitutional elements, or rather their rigidity. However, a closer look into the case studies could also suggest that intergovernmental policy coordination is the explicit aim of the provincial governments to avoid federal law-making and constitutional redistribution of powers in the first place. For instance, the issue of inter-provincial trade barriers has not been addressed in detail during the talks of the repatriation of the constitution in 1982, and even later during the Meech Lake Accord negotiations it became clear that, as one senior federal official argued, “you simply did not want to constitutionalize”⁴⁷. By the time of the Charlottetown Accord⁴⁸ the established intergovernmental ministerial council has already agreed to dismantle a couple of inter-provincial barriers to trade which demonstrated that “the intellectual and political impetus for the reduction of intergovernmental trade barriers in Canada transcended the constitutional arena” (Doern and MacDonald, 1999: 39). This also implies a level of skepticism among the provincial governments to address the issue through legislative or even constitutional tools which could explain the difference in established intergovernmental procedures and institutions. Such an attitude was also characteristic to the area of labor market development where one former provincial assistant deputy minister argued that “the topic of labor market development was such an opaque area where different jurisdictions focused on different parts that there was no definite way to define it in a constitution”⁴⁹.

The authors argued that they were “not positing a dramatic break with the past” (Cameron and Simeon, 2002: 50), but rather collaborative federalism emerged as a result of

⁴⁶ Although it is not clear how fiscal capacities influenced the issue of inter-provincial trade barriers.

⁴⁷ Anonymous interview conducted in Toronto, 9 January, 2013. (FED_LD01)

⁴⁸ Even the *Consensus Report on the Constitution* in Charlottetown from 28 August, 1992 mentioned that “Section 121 of the Constitution Act, 1867 would remain unchanged” (p. 3.) and rather First Ministers agreed to detailed principles and commitments on the topic of economic union.

⁴⁹ Anonymous interview conducted in Ottawa, 17 November, 2012. (PROV_LD08)

regional and global integration, the regionalization of the national parties, and the ascendancy of new public management (see Bakvis and Skogstad, 2012: 8). Not only was there no clear distinction made between the concepts of cooperation and collaboration, but surprisingly enough, the literature on new public management was not matched with considerations of collaborative governance and public management (e.g. Thomson and Perry, 2006; McGuire, 2006; Ansell and Gash, 2008; Choi and Robertson, 2014) and the role of policy deliberations despite their growing importance in settling cross-jurisdictional challenges. Cameron and Simeon made a distinction between collaboration among the federal, provincial and territorial governments and collaboration among provincial and territorial governments. However they failed to provide with a more abstract theoretical framework within which such intergovernmental dynamics could emerge, and there was no propositions made on how the different types of collaboration could emerge. There was no explicit distinction made between collaboration at the administrative level and collaboration at the ‘summit level’, and very little consideration was given to the circumstances under which the collaborative scheme was to succeed. Cameron and Simeon took collaborative federalism as a response from the provincial (and federal) governments to the unsuccessful attempts to revise the constitutional distribution of powers with additional macro-structural elements in certain policy areas, however evidence suggests that on-going intergovernmental exchanges aimed at the avoidance of federal law in the first place which would imply different dynamics as far as the underlying norms (i.e. different principles lead to federal law-making than to more informal policy coordination mechanisms), processes and institutions are concerned. As far as this difference is concerned, no theory is advanced within Cameron and Simeon’s framework that would look closer into the interaction level to uncover the reasons for the divergent results. Although collaborative federalism as advanced by Cameron and Simeon described the phenomenon, even if in a rather limited way, it lacked a comprehensive theoretical approach that would explain its emergence and diverging developments with the necessary level of abstraction. A comparative study across different federal political systems could fill this gap and have an added value.

In sum, intergovernmental relations within the Canadian federal system are generally perceived through the lenses of ‘executive federalism’ which might be separate from, but is, as it was argued before, very much co-existent and interdependent with the idea of legislative federalism. Even though the concept of collaborative federalism described the move away from legislative decisions towards more informal solutions to cross-jurisdictional policy

challenges, it failed to advance a comprehensive theoretical framework, and tried to explain these developments as rational decisions of the different orders of government “developed as a response to (...) constitutional inflexibility” (Hueglin and Fenna, 2006: 215). Yet, it is suggested here that certain cross-jurisdictional policy challenges actually push provincial governments towards more informal policy coordination in the first place. In other words, there is an explicit aim not to change the legislative and constitutional framework while reorganizing the roles and responsibilities of the different orders of government in a given policy area. In fact, it was acknowledged before that the results of executive federalism “vary from agreements on fiscal mechanisms and transfers from the federal government to the provincial government, to the harmonization of policies and administration within the provinces (...) to the constitutional amendments” (Brock, 2003: 69), however no explanation was given to such variation between legislative or even constitutional and rather political outcomes. To be able to account for such diversity it is essential that we looked closer into the complex relations between the nature of the policy challenge, and the federal principles that get adopted within intergovernmental relations and the procedures and institutions that follow. As policy problems increasingly cut across jurisdictions and unit level skepticism grows concerning further centralization, the constitutional allocation of competences (see Nicolaidis, 2001, 2006) is put under extreme pressure. Within this rather rigid setting formal changes become almost obsolete. Consequently, the dual-cooperative typology and the development they describe (see Schütze, 2009) seems to be losing most of its explanatory power as well. Instead, one needs to focus more on executive federalism and its dynamics. To this end, the principle of “self-rule and shared rule” as the main idea behind federalism (see Elazar, 1979: 2) is to be revisited and revised so as not to suggest that shared rule can only manifest itself through federal legislation⁵⁰, but rather also through intergovernmental procedures of bargaining and deliberation with no formal constitutional change or federal law passed at the end of the process. Turning to the European context, one official from COREPER argued that “it has become clear that higher level decision-making does not necessarily mean giving power to the [European] Commission”⁵¹. This resonates with Sbragia’s suggestion (2004) who argued that shared rule could follow two distinguished models: a supranational and a confederal one. However such categorization blurs the relative importance of the difference between law making and policy coordination, something this thesis aims to address more

⁵⁰ Federalism has often been defined as “a combination of shared rule, *through a central government*, on matters common to all citizens, and local self-rule, through provincial governments, on matters involving regionally distinctive identities, within a balanced structure” (Bakvis and Skogstad, 2012: 2).

⁵¹ Anonymous interview conducted in Brussels, 6 June, 2013. (MS_EFC07)

explicitly. It will be argued that Canadian federalism relies heavily on a delicate balance between intrastate and interstate relations (see Hueglin and Fenna, 2006; Simeon and Nugent, 2012), therefore the political procedures behind intergovernmental relations shall be on equal footing with the legal, constitutional elements. After all, “any evaluation of how federal (...) [a system] is cannot be based solely on the formal division of competences, but must include consideration of the additional features and institutions that can modify the actual practice of the division of competences” (Baier, 2005: 211)⁵². As soon as provinces prove less and less *willing* to accommodate their preferences in the form of federal law-making the importance of intergovernmental relations in cross-jurisdictional areas increases considerably, yet with different characteristics. Consequently, one has to analyze how the basic federal values and principles emerge and develop through the different practices of intergovernmental policy coordination that would make up for the lack of federal legislation.

It is argued here that the literature on Canadian federalism could be enriched by a revision of the idea of federalism that speaks to the problematique advanced here more directly. Before attending to that task, it is relevant to address the topic in light of the different approaches of European integration to highlight its potential added value to a federal theory.

2.1.2.) Different theories and approaches⁵³ of European integration: the need to think of intergovernmental relations in federal terms

As opposed to the comprehensive framework within the literature on Canadian federalism, intergovernmental relations⁵⁴ are studied under different lenses in European integration

⁵² See also: “without mining below the formal surface of (...) constitutional terrain, we will fail to tap into the informal fountainheads of [an] ever fluid integration phenomenon” (Stacey and Rittberger, 2003: 858).

⁵³ A note on the difference between theories and approaches has to be added here. In relation to liberal intergovernmentalism, for instance, it was argued that it was „a methodologically sophisticated *approach* to the study of European integration, not a *theory* of integration” (Wincott, 1995: 598), as it did not set out circumstances in which it would be empirically refuted. In general, the use of theory within European integration studies is often carried out “in a rather loose sense of abstract reflection” (Diez and Wiener, 2009: 3).

⁵⁴ It has to be noted that within European integration studies the term *intergovernmentalism* is used rather than intergovernmental relations. This concept refers to a theory (-ism) that explains regional integration where national governments are the main actors. The only major difference between intergovernmentalism and intergovernmental relations lies in the emphasis of horizontal v. vertical relations, however, this thesis argues that a closer look at and a better understanding of horizontal relations helps us explain vertical relations better as well. The Canadian term intergovernmental relations is embedded within federal theory, it naturally involves vertical relations between the provinces and the federal government, however, as it will be demonstrated empirical reality suggests that the horizontal inter-provincial relations gain more relevance as well in understanding federal-provincial-(territorial) relations. In the EU, intergovernmentalism stresses the importance of horizontal relations among member-states and often neglects the consideration of supranational (i.e. federal) institutions and their impact on intergovernmental exchanges. As a matter of fact, the federalism literature on Canada can benefit greatly from the horizontal approach widely used in EU integration studies to understand the changing character of intergovernmental relations whereas the EU literature can benefit from the Canadian

theory. First of all, surprisingly federalist approaches generally lack any consideration of the topic. As the European Union started its journey as an experiment in regional integration, for long, it has been studied from an international relations (IR) perspective. This has led to a traditional dichotomy of intergovernmentalism v. supranationalism / functionalism (see e.g. Diez and Wiener, 2009: 8-9). The former group argued that European integration could be understood from the perspective of national preferences: supranational institutions only existed because they had been created by the “*Herren der Verträge*” (or masters of the treaties, i.e. the member states) in order to advance their pre-established interests. Functionalists, on the other hand, argued that supranational institution-building emerged due to societal and market patterns. In return, functional interconnectedness of policy areas often led to unexpected spill-over effects which deepened integration. They emphasized that the supranational institutions that were created often established their own interests in relation to specific policy questions. As argued before, this dichotomy rendered the study of intergovernmental relations to be addressed from an IR perspective. Taken that federalist approaches by that time had lost their international components (see Riley, 1973; Burgess, 2006) and turned towards analyzing federal *states*, intergovernmental relations in the EU were not studied within a federal theory. In fact, as federal theory shared many components with functionalism, its focus was mainly on supranational (i.e. federal) institution-building and left considerations of intergovernmental relations relatively under-studied. As Burgess (2009: 33) argued: “the role of EU member states as propulsive forces in helping to build a federal Europe has actually been underestimated by federalists themselves and should be much more effectively integrated into federalist theory”. Similarly to the Canadian case, most federal studies focused on the legal, constitutional aspects of the European polity (Burgess and Gagnon, 1993; Burgess, 1996, 2006, 2009), and have dedicated little attention to the dynamics of intergovernmental relations, especially in cases where they have led to non-legislative decisions that had an impact on the actual exercise of powers nevertheless. In general, even though “a shift of focus towards the study of intergovernmental relations in federations could conceivably facilitate valid comparisons” (Burgess, 2006: 138), their consideration has been surprisingly low in the literature. The striking similarities between the Canadian and the European cases further suggest the added value of a federal perspective of intergovernmental policy coordination. Consequently, instead of focusing on the federal characteristics of the constitutional framework of the EU and explain intergovernmental

knowledge on how federal principles may emerge and develop through the institutions and procedures of intergovernmental relations.

relations as a function of those factors, this study turns towards policy areas that pose a common challenge across different systems. In return, the basic values and principles of federalism emerge and develop through the processes and institutions of intergovernmental relations to settle cross-jurisdictional policy challenges.

The first relevant theory that aimed to comprehensively understand intergovernmental relations in the EU was labeled ‘liberal intergovernmentalism’ (LI) and it emerged in the early 1990s. Andrew Moravcsik (1993, 1998, with Schimmelfennig, 2009) has step-by-step fine-tuned his theoretical framework which aimed to explain “the broad evolution of regional integration” (Moravcsik and Schimmelfennig, 2009: 68). Liberal intergovernmentalism builds upon three different theories, one explaining national preferences, one explaining bargaining procedures, and one explaining the choice of institutions. According to this comprehensive framework, the essential character of intergovernmentalism does not change over time: states remain the major actors in the context of anarchy. If there is institutional change, it occurs due to changed national preferences driven by domestic procedures which may manifest themselves through changed negotiation and bargaining procedures and institutions. Bargaining is understood as coordination for mutual benefit, the outcome of which is dependent on relative bargaining powers (e.g. threats of withdrawal, more knowledge on working methods, etc.). In sum, liberal intergovernmentalism is “a theory of intergovernmental decision-making under anarchy” (Moravcsik and Schimmelfennig, 2009: 73). However, it comes short of understanding delegated or pooled sovereignty and decision-making among the individual actors. It “neither describes nor explains the context within which intergovernmental bargaining takes place” (Sbragia, 1993: 26), therefore, there is no consideration of the emergence and development of federal principles in the conduct of intergovernmental relations. Furthermore, similar to Simeon’s work in the Canadian context, liberal intergovernmentalism does not pay enough attention to norms and principles beyond the domestic context, and thus hypothesizes that the main actors do not have any impact on one another in the intergovernmental context. Consequently, his take on intergovernmental bargaining is limited to cases where national preferences are in fact pre-existing and easily grasped. However, as more and more sensitive areas (e.g. fiscal, energy, social, and employment policies) require coordination among constituent units, the complexity of policy challenges is more likely to limit their preference-building capacity (see also Wincott, 1995).

As the integration process began to impact on areas closely connected to national sovereignty (e.g. fiscal policy matters, and labor market issues) new approaches were required

to fill the gap in the theoretical framework of liberal intergovernmentalism. As opposed to a comprehensive theoretical framework understanding the overall dynamics of European integration, less comprehensive and more policy-oriented approaches emerged that concerned themselves with governance questions (see later). As the tension intensified between an increased need to coordinate policies under member-state jurisdictions and a reluctance to formally transfer further competences over to the European level of governance (see “integration paradox” by Puetter, 2012), a new insight was necessary to understand intergovernmental dynamics. Building upon the deliberative turn (Neyer, 2006) and the ‘new governance’ approaches the analytical concept of deliberative intergovernmentalism (DI) was advanced by Puetter (2012) which featured policy deliberation as essential for policy coordination and something to be expected to “spread to the highest levels of decision-making” (Puetter, 2012: 166), while transforming the institutions and procedures of intergovernmentalism accordingly. Cross-jurisdictional or even constituent unit areas of competence were the focus of deliberative intergovernmentalism, and it described how intergovernmental relations become dependent upon deliberative processes of policy formation and under which conditions policy deliberation should flourish in the intergovernmental context (Puetter, 2012: 163). However, DI lacked an in-depth consideration of the actual process which resulted in a changed character of intergovernmental relations and an analysis of its impact on the allocation of powers. This is also due to the fact that DI focuses on intergovernmental relations from the perspective of policy solutions and decision-making techniques which is also a reflection of the ‘governance turn’ (see later). Even though it emphasized the role of deliberation, it did not reflect on the values and principles that emerged and developed through deliberation, which could have affected intergovernmental relations as well⁵⁵. Since Puetter’s ‘integration paradox’ resonates with the *federal* idea of ‘self-rule and shared rule’ (see Elazar, 1979) or ‘unity in diversity’ (see Jachtenfuchs and Kraft-Kasack, 2013), it is argued that the incorporation of the emergence and development of federal principles within a federalist theoretical framework could enrich our understanding of how intergovernmental relations come to substitute collective, centralized, legislative decision-making to deal with cross-jurisdictional policy challenges. As Puetter focuses mainly on the changed practice of policy-making, the consideration of its impact on the exercise of ‘constitutional’ powers from a federal perspective remains rather limited. Nevertheless, DI is a productive analytical tool that could

⁵⁵ Consequently, it lacks a contextual element such as LI did.

be used to analyze the diverging outcomes of executive federalism in Canada. Surprisingly enough, the ‘deliberative turn’ has never been applied to a federalist, let alone to a Canadian federalist approach, but a comparative study between the EU and Canada could also have an added value to the literature on EU governance.

As the institutional structure of the EU matured, its empirical reality began to stretch the boundaries of theories aiming to understand its essence based on an IR perspective. Scholars started to look at the integration process from a different point of view, focusing more on its internal functioning. Soon, governance approaches started to enrich the field (e.g. Bulmer, 1994) which created a particular cleavage between IR and comparative politics theories (see Hix, 1994; Hurrell and Menon, 1996; Pollack, 2001; Jachtenfuchs, 2001). Governance approaches in general analyzed the European integration process from the point of view of effective and legitimate governance capacities (Peters and Pierre, 2009). It was argued that this capacity to govern has a major influence on the direction and speed of economic and political integration (see Painter and Pierre, 2005). The added value of such approaches was to inquire how complex policy decisions required creative institutional design to ensure capacity and legitimacy of the governing systems. At its core, governance approaches are essentially functionalist. The identification of common problems, the decisions upon goals and then the design and implementation procedures are all parts of the governance framework. Governance approaches extend the circle of actors beyond that of the government and involve other “potential participants in the broader processes of governance” (Peters and Pierre, 2009: 92), however, they lacked a specific focus on intergovernmental relations.

During the last decade, the focus of governance approaches shifted slightly as European integration faced more complex and sensitive policy challenges. Consequently, the ‘new governance’ literature⁵⁶ emphasized the increased role of “alternative approaches to governance that are more accepting of diversity and encourage voluntary forms of co-ordination” (Mosher and Trubek, 2003: 63). It featured “a shift in emphasis away from command-and-control in favour of ‘regulatory’ approaches which are less rigid, less prescriptive, less committed to uniform outcomes, and less hierarchical in nature” (de Búrca and Scott, 2006: 2). It was argued that there was a growing discrepancy between what was expected of the EU and the level of legitimacy it enjoyed, which led to a growing reluctance to transfer further powers to the European level (Eberlein and Kerwer, 2004: 122). In general,

⁵⁶ See also the White Paper on European Governance, COM(2001) 428, (2001/C 287/01). <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001DC0428&rid=2>

new governance approaches turned the center of analysis away from legislation through regulations and directives to a more open-ended procedure of policy coordination. The Open Method of Coordination (OMC) serves as a centre for ‘new governance’ studies. The concept of ‘soft law’ is advanced within new governance literature to describe arrangements “that operate in place of or along with (...) ‘hard law’” (Trubek et al., 2006: 65). The most relevant difference between soft and hard law is the lack of obligation, uniformity, sanctions and enforcement in the former as opposed to the latter. However, instrumental hybridity within the new governance approach describes an interaction where new governance tools are used to elaborate and continually transform the traditional legal, constitutional modes of governance. Soft law describes “rules of conduct which in principle have no legally binding force but which nevertheless may have practical effects” (Trubek et al., 2006: 65). This feature of ‘soft law’ gives new governance approaches the potential that can be incorporated within a federal theory to understand policy coordination across jurisdictions through intergovernmental relations. From a rationalist point of view, ‘soft law’ helps lower contracting and sovereignty costs, cope with diversity, and ensure flexibility, simplicity (see Trubek et al., 2006: 73-74). However, from a constructivist perspective ‘soft law’ tends to be better equipped to achieve norm diffusion and policy learning through deliberation under uncertainty. In other words, new governance approaches argue that the emergence of ‘soft law’ is better understood from a rationalist perspective whereas a constructivist one proves to be more adequate in understanding the mechanisms through which they bring about change (Trubek et al., 2006: 91).

However, ‘new governance’ approaches analyzed these developments under the traditional Community method (see Mosher and Trubek, 2003) and did not consider the impacts of soft mechanisms on intergovernmental institutions and processes. As DI, the ‘new governance’ literature also assumes that member states adopt certain norms during processes of coordination, yet they fail to specify which norms come to matter and how they actually emerge over time. It is argued here that new governance approaches can help us understand how federal principles emerge and develop through the processes and institutions of intergovernmental relations to make up for the lack of centralized legislative decision-making. Even though these approaches focus on policy learning, and sharing of best practices, there is lack of a systematic consideration of their impact on intergovernmental relations and the actual allocation of competences more specifically. Instead, they focus more on supranational dynamics (see ‘deliberative supranationalism’ by Joerges and Neyer, 1997, Joerges, 2002)

and see how deliberation is built in the procedures of comitology⁵⁷ (see also Eberlein and Kerwer, 2004: 124). This thesis actually challenges the claim that “analysis from federal states shows that if decision-making is interdependent and based on horizontal negotiation between these arenas, without the option of hierarchical co-ordination, there is a high probability of decision-making deadlock” (Eberlein and Kerwer, 2004: 128). Instead, it will be shown how a change in the attitude underlying intergovernmental relations allows for the emergence of effective horizontal policy coordination. The thesis aims to fill the gap in the literature that still lacks “an in-depth understanding of the procedural mechanisms of new governance” (Eberlein and Kerwer, 2004: 131). On the other hand, it will be argued here that new practices of intergovernmental relations do not emerge simply because of governance effectiveness reasons, but rather as a way of dealing with cross-jurisdictional policy challenges deliberately in a non-constitutional, non-legal way. This also challenges the new governance approach that argues that these new measures “are almost always introduced after legislative deadlocks (...) [they] are important whenever central legislative policies are not feasible” (Eberlein and Kerwer, 2004: 125). Furthermore, the influence of new governance techniques is usually grasped through the policy learning process and little consideration is given to how the exercise of power may be changed due to more informal policy coordination.

In a broader sense, intergovernmental relations and the changes thereof have been analyzed through different branches of new institutionalism in EU integration theory. As it was highlighted before, the character of intergovernmental relations does not change within a rationalist framework: if there is any change in the overall conduct of intergovernmentalism it is induced by domestic changes that have an impact on the instrumental cost-benefit analyses of the individual actors. In short, any change in the character of intergovernmental relations could be traced back to the idea of lowering the transaction-costs of policy-making. In a wider sense, and as argued before in relation to Simeon’s framework, it would mean that either the social, cultural dimension or the constitutional, institutional environment changes. As neither of these has actually taken place, quite the contrary, both remained surprisingly stable, one has to consider other factors as well. In order to understand the role of ideas, norms and perceptions, one has to analyze the interaction level where the individual actors meet and influence one another.

⁵⁷ It is also argued that “although the OMC should be a combination of bottom-up participation and top-down guidance, in reality it is often dominated by the centre. The Commission plays a major role” (Eberlein and Kerwer, 2004: 126).

Sociological institutionalism emphasizes the importance of norms, yet it still fails to understand how specific norms, ideas and perceptions come to matter, and under which conditions they do so? Consequently, even though they argue that change only occurs when there is a change in the underlying norms, as it fails to account for the emergence of new norms, ideas in a systematic way, it needs further fine-tuning. Historical institutionalism on the other hand argues that institutions are rather ‘sticky’, and “resistant to change” (Pollack, 2009: 127) due to path-dependency. From the point of view of the ‘new institutionalist’ literature the changing character of intergovernmental relations requires a rather mixed approach, as neither approach can fully account for the underlying dynamics highlighted in the puzzle.

In sum, this thesis advances a framework that will take valuable elements of the different approaches of European integration studies to enrich existing theories of Canadian federalism and intergovernmental relations. Applying the ‘normative turn’ and ‘new governance’ approaches to the theory of federalism will help turn the focus of analysis away from the legal, constitutional division of powers and concentrate more on the underlying principles and their manifestation in intergovernmental procedures and institutions. What federal values and principles emerge and how and under which conditions do they develop? How can we trace the adoption of these new norms, values and principles, and what institutional and procedural manifestations suggest such changes? To what extent will those principles get formalized? The added value of the incorporation of some of the theories advanced in EU studies could contribute to not only the Canadian literature on federalism by applying some of the ‘new governance’ approaches, but also to EU integration literature in highlighting how federal values and principles can be manifested through intergovernmental policy coordination that leaves formal changes to competence allocation untouched.

2.2.) Conceptual framework – a prelude to theory building

2.2.1.) Intergovernmental relations and the federal principles

As it was argued before, the thesis aims to understand how intergovernmental relations come to substitute formal transfers of constitutional powers and subsequent centralized, collective legislative decisions to settle cross-jurisdictional policy problems. The proposition put forward here argues that complexity and sensitivity of cross-jurisdictional policy challenges

encourages constituent governments to adopt federal principles in areas under their own jurisdiction yet they also create skepticism among these governments towards centralized legislative decisions, which would push them towards more informal intergovernmental arrangements. Consequently, instead of analyzing how federal principles are represented in the constitutional distribution of powers one needs to examine more closely how those principles manifest themselves in the procedures and institutions of intergovernmental relations. To that end the most relevant concepts have to be defined. The following paragraphs serve a double purpose: first, they will highlight further gaps within the literature concerning the most relevant concepts, such as intergovernmental relations, federalism, policy coordination, legislative decision-making, etc. Secondly, these concepts will be revised for the theory advanced later in the chapter.

The literature generally takes three different approaches to intergovernmental relations depending on the research question and analysis used (see overview by Bolleyer, 2009: 18-21). Intergovernmental relations taken as *exchanges*, is the broadest understanding which refers mainly to quantitative elements, such as the intensity of communication, density of meetings, etc. Exchanges can range from communication through e-mails or phone to meetings among public officials, ministers or first ministers. Within this approach the existence or lack of existence of intergovernmental relations is the most relevant question, but their qualitative nature is of minor importance.

A more focused idea considers intergovernmental relations as different *patterns of interaction* between governments that implies a higher level of regularity and therefore emphasizes more qualitative elements, such as dominant modes of interaction, policy areas and the level of political authority involved, etc. As far as patterns of interaction are concerned, from the point of view of policy cooperation, Bolleyer (2009: 19) distinguishes among four different types: (1) unilateral adaptation, (2) ad hoc coordination, (3) co-decision, (4) supragovernmental mode. Bolleyer and Börzel (2010: 169-173) further extend this categorization and argue that beyond (1) hierarchical or centralized coordination, we can talk about (2) interstate decision-making, (3) intergovernmental cooperation, (4) intergovernmental coordination, and (5) unilateral policy emulation. The first refers to what we have described as ‘legislative federalism’ where “lower level governments decide to delegate the power to make *collective* policies to the central level, be it to *regulatory* agencies

or the national *legislature*⁵⁸ (Bolleyer and Börzel, 2010: 169). The second category involves legally binding and enforceable measures reached by unanimity of participating governments. This pattern of interaction is still strongly connected to federal law-making. However, it is reached through intergovernmental bargains outside the legislative procedures. This category would be closest to “executive federalism” cases described by Simeon (1973) highlighted in the previous part where extensive negotiations among the executives outside the legislative procedures leads to national legislation at the end⁵⁹.

The line between law-making and policy coordination is drawn between the concepts of intergovernmental *cooperation* and intergovernmental *coordination*. While the first describes interactions which are legally binding, the second one is of non-binding nature. What connects them is the fact that neither one results in enforceable measures. However, as it will be shown the Agreement on Internal Trade (AIT) is a legally non-binding document (despite federal jurisdiction provided by the constitution), yet, it is increasingly equipped with enforcement mechanisms, which then falls into a grey zone based on this categorization. As one of the internal trade representatives explained: “the AIT is a political agreement (...) [however] it helped create a better understanding of obligations...greater awareness of obligations and rights”⁶⁰. In a similar manner Labor Market Development Agreements (LMDA) are legally non-binding, although their implied reference (Part II, Art. 57 (2-3)) in the Employment Insurance Act (1996) guarantees some enforceability. As one former provincial official argued: “the LMDAs emanate from a legislative act [the Employment Insurance Act], but there is no enabling legislation concerning the substance of the LMDAs”⁶¹. Nevertheless, the enforceability of the agreements has been indicated by another former provincial official who participated in the negotiations on the LMDA and argued that after the agreement was signed “there was no clear understanding of what you can and cannot do”⁶². In both cases, however, dispute resolution mechanisms have been introduced as enforcement procedures.

Last, but not least, unilateral adaptation is based on individual, independent decisions that do not involve any interaction among governments, but implies legislative decisions, inasmuch as it means “voluntary and unilateral adoption of measures observed in other jurisdictions” (Bolleyer and Börzel, 2010: 173). This pattern would correspond with the dual /

⁵⁸ Emphases added by the author.

⁵⁹ In this sense, this thesis challenges Bolleyer and Börzel (2010) on the point that Canada had no such intergovernmental dynamics.

⁶⁰ Anonymous interview conducted in Toronto, 29 January, 2013. (PROV_LD02)

⁶¹ Anonymous over-the-phone interview conducted in Brussels, 24 March, 2013. (PROV_LD09)

⁶² Anonymous interview conducted in Ottawa, 15 November, 2012. (PROV_LD07)

competitive federal model where legislative division of powers is guaranteed by the constitution and preserved by the different orders of government.

The conceptual and theoretical framework advanced by Bolleyer (2009) and Bolleyer and Börzel (2010) only partly addresses the problems around ‘executive federalism’ underlined in the previous part. Even though these five categories provide a more sophisticated understanding of the role of the executive in federal systems, it fails to address the actual change in the patterns of intergovernmental interactions. Bolleyer (2009) simply argues that the *existence* and *type* of power-sharing mechanisms within the constituent unit level governments determines the pattern of intergovernmental interactions. However, the different features of power-sharing remains rather constant over time, yet Canada witnessed relevant changes within the overall conduct of intergovernmental relations. How can we explain the emergence of intergovernmental relations in jurisdictions previously managed separately such as inter-provincial trade or labor market developments? To understand these dynamics, therefore, a revised theoretical framework needs to be developed that makes inquiry into the underlying principles and their emergence and development in intergovernmental relations. As it will be argued horizontal relations are not simply determined by the characteristics of the individual actors as Bolleyer (2009) argues but also by the sensitivity and complexity of policy areas involved, and the actual exchanges between governments at the interaction level. In fact, “critically examining transformatory processes of integration” (Christiansen et al., 1999: 537) is essential to understand changes in the procedures and institutions of intergovernmental relations. Once again, Bolleyer (2009) explains variation of intergovernmental institutions *across* federal political systems but fails to account for variation *within* particular federal systems, and the procedures that would lead from one particular pattern to another.

The third approach argues that intergovernmental relations are *structures* voluntarily set up by the individual actors (e.g. institutions, decision-making rules, outputs, etc.). Structure is used as “the organizational infrastructure in which rules become manifest” (Bolleyer, 2009: 20) and they mainly correspond with the different interaction modes described previously. This approach represents the narrowest understanding as it only considers institutionalized forms of interactions as intergovernmental relations.

This study uses a concept ‘*intergovernmental relations*’ based on the second and third approaches outlined by Bolleyer (2009) and Bolleyer and Börzel (2010). As both Canada and the EU are increasingly confronted with the federal dilemma of ‘unity and diversity’ in areas under constituent unit jurisdiction, this thesis argues that the character of intergovernmental

relations and the changes thereof is best understood through a closer examination of federal principles. As macro-structural (i.e. accommodation of regional interests in federal institutions) and micro-structural (i.e. existence and type of power sharing at the constituent level) elements cannot account for the divergent intergovernmental outcomes (i.e. legislative decisions or more informal policy coordination), the introduction of a *cultural dimension* seems appropriate to complement the procedural and structural ones. The cultural dimension refers to the shared knowledge of the basic values, norms, principles and role perceptions that would inform intergovernmental relations. It is argued here that different principles would lead to different patterns of interactions that would be manifested in different institutional settings. These three components combined together make up the overall *character* of intergovernmental relations.

Despite their important role in federal political systems, intergovernmental relations have been surprisingly understudied from the point of view of federal principles. Burgess underlined the relevance of federal principles in that “they inform the working practices of each polity” (Burgess, 2013: 27). However, this thesis turns the focus of analysis away from their manifestation formalized in a written constitution and rather analyzes the procedures and institutions of intergovernmental relations from that perspective. These principles refer to “unwritten provisions (...) [and] served as an important guide to constitutional and political behavior” (Burgess, 2013: 20) that would also “define the legal and political duties and obligations of federal and constituent state governments” (Burgess, 2013: 22). It is argued here that these principles can emerge and then be internalized by the different orders of government even in separate areas of jurisdiction⁶³. Depending on the extent to which the different principles are adopted they would inform patterns and institutions of intergovernmental interactions and therefore determine whether intergovernmental policy coordination can substitute federal legislative decisions. Consequently, the analysis of the cultural dimension will entail an assessment of the emergence and development of basic federal values and principles and their internalization within intergovernmental relations in connection to specific policy areas. In a more general tone, this thesis aims to understand how federal principles may be manifested through the political procedures and institutions of

⁶³ It is important to emphasize that these principles emerge within the context of a given policy area as the developments of intergovernmental relations are also connected to specific policy areas. This underlines the importance of a policy approach when dealing with cross-jurisdictional issues and also questions a more formal, legal understanding of the federal idea that does not necessarily manifest itself in constitutional distribution of powers but rather in other forms of decision-making procedures. The most relevant feature of federalism lies in the unique combination of specific federal principles as opposed to a combination of specific institutions.

intergovernmental relations as opposed to a legal one manifested in the constitutional distribution of powers.

The federal principles used within this thesis build upon Burgess (2013: 22). However, as argued before, these principles have not been analyzed from the point of view of intergovernmental relations. The following principles alone do not constitute a *federal* polity, however, their unique combination as manifested in the procedures of intergovernmental relations, as opposed to their formalization in a written constitution stressed by Burgess (2013: 27)⁶⁴, suggests the emergence of a federal political system that is essentially about the allocation of competences across the different orders of government. It is the aim of this thesis to study and demonstrate how these principles inform the practice of intergovernmental relations and the changes thereof in complex, interdependent policy areas. The federal principles used here are the following:

- 1.) *Self-determination and autonomy* refers to the assumption that ‘national interests’ in relation to specific policy questions can be achieved by self-defined communities which accommodate distinct identities with regard to common pursuits⁶⁵,
- 2.) *Partnership* which is based on the value of equality among the different actors⁶⁶, means voluntary relationship that is of non-hegemonic nature which implies both openness and consensus-orientation
- 3.) *Loyalty* refers to an expectation that constituent units commit themselves to the overall needs of the federal system
- 4.) *Comity* implies fair play among the different actors to be ready for compromise and to be pragmatic on cross-jurisdictional matters,
- 5.) *Unity in diversity* refers to the idea of “unity without uniformity and diversity without anarchy” (Chrysoschoou, 2001: 43), or the indestructible union of indestructible parts⁶⁷ which also speaks to the idea of non-centralization
- 6.) *Proportionality and mutuality* are based on the values of toleration, recognition and respect for the others. While proportionality is “the operational core of subsidiarity” (Nicolaidis, 2001: 453), and it means the acceptance of the other’s exercise of power

⁶⁴ However, Burgess admits that “formal written constitutional recognition is by itself insufficient in theory” (Burgess, 2013: 27).

⁶⁵ Therefore self-determination is not equal to independence rather it shall be understood as a move towards interdependence.

⁶⁶ Equality here refers to treating others in a same manner that is expected from yourself.

⁶⁷ Texas v. White, 74 U.S. 700 (1868) Supreme Court decision, <http://supreme.justia.com/cases/federal/us/74/700/case.html>

in one's separate area of jurisdiction, mutuality refers to an "obligation (...) in joint decision-making to foster the legitimacy and capacity of the other" (Nicolaidis, 2001: 462).

7.) *Flexibility and open-endedness* are essential in maintaining a federal polity which requires the ability to respond quickly to changing policy challenges. It also implies being susceptible to influence or persuasion, therefore it emphasizes the role of iterations that foster deliberations.

As it was argued, this thesis aims to understand under which conditions these basic principles emerge and affect the overall conduct of intergovernmental relations (its procedural and structural dimensions) so they would substitute formal power transfers and subsequent collective, legislative decision-making procedures. Consequently, it is stressed here that depending on the extent to which these principles emerge and develop among intergovernmental actors in connection to specific public policy areas we can expect three different types of intergovernmental interactions: competition, collaboration, and cooperation. The thesis aims to understand not how these interactions come to be but rather how one develops into another, more specifically how competition evolves into collaboration.

Competition is predisposed when it comes to intergovernmental relations in federal systems (see Hueglin and Fenna, 2006: 215), especially in cases falling under the jurisdiction of constituent units. Naturally, governments want to protect their own jurisdictions vis-à-vis one another, and look at others with suspicion. Competitive interactions imply that the principle of *self-determination* is dominant as 'national interests' prevail. Autonomy here refers to the independence of policy-making authority. The *partnership* principle does not develop as the equality of actors is not guaranteed due to a hegemonic approach taken by the individual actors with regard to separate jurisdictions. There is no sense of *loyalty* as the policy area under question is considered to be separate and independently regulated from others. Since partnership and loyalty are both missing, there is no room and need for *comity* either. *Diversity* is emphasized over *unity*, and consequently, there is little consideration of either *proportionality* or *mutuality*. Usually, exchanges are limited to defending the interests of the individual governments, thus little consideration is given to the interests of others (therefore there is a general lack of reciprocity and mutuality). Constituent units aim for *flexibility*. However, it lacks a cooperative component inasmuch as it is guaranteed by single actors. There is no need and willingness to legitimize a coordinated legal or political action across jurisdictions within the area under question. Consequently, the modes of interaction are

generally characterized by cost-benefit analysis and institutions remain informal with no clear established patterns or rules. Competitive interactions do not exclude the possibility of a positive outcome in the form of unilateral adaptation as outlined by Bolleyer (2009). However, unilateral action does not require the adoption of new principles in intergovernmental interactions.

Collaboration means joint work with others in order to achieve or do something together. Collaboration is a “process of shared creation (...) [it] involves the creation of a new value by doing something new or different” (Thomson and Perry, 2006: 20). One of the aims of collaboration is “to transform adversarial relationships into more cooperative ones” (Ansell and Gash, 2008: 547). Consequently, it refers to an ongoing process through which a certain transformation of the actors takes place. Collaboration implies that governments acknowledge a certain level of interdependence within a specific policy area, therefore, self-determination and autonomy changes as they are increasingly complemented with the principle of partnership. What is relevant here is the nature of non-hegemonic relations that would characterize intergovernmental relations which derives from federal legislative acts. Instead of a hierarchical relationship, collaboration corresponds with a heterarchical one. As *Angus MacLean*, one of the previous premiers of Prince Edward Island put it: “Canada is not a monolith. It is not simply a larger version of pre-Confederation Canada, but a *partnership* of neighbors”⁶⁸. It is this sentiment that characterizes collaboration. Beyond the crucial role of partnership, there is a growing sense of responsibility among the constituent units to respect the needs of the overall federal system, and a commitment to compromise is expected from the individual actors. However that compromise comes in a non-hegemonic way, therefore instead of a command-and-control type of solution, constituent units move towards ‘softer’ mechanisms which would be institutionalized through intergovernmental procedures that serve as a guarantee to preserve partnership based on equality. Furthermore, partnership implies consensus-orientation based on the equality of the actors. The principle of unity in diversity is also adopted to maintain specific diversities in policy coordination which is best traced in experimentalist modes of governance. Collaboration implies a high level of flexibility and open-endedness. Proportionality and mutuality play an essential role in the delivery processes of policy coordination that would result in a shared exercise over a given jurisdiction. Proportionality here underlines the important move away from the subsidiarity principle which speaks directly to the sharing of a given competence, whereas proportionality

⁶⁸ Country ‘a partnership of free neighbors’, in *The Globe and Mail*, 18 April, 1981. Emphasis added by the author.

rather refers to the sharing of the exercise over a given competence, even in separate jurisdictions (see Nicolaidis, 2001: 450). As it is argued, intergovernmental agreements can shape the exercise of powers, although not the formal distribution of legislative powers, in this sense they are not “constitutionally neutral” (Poirier, 2001: 13). Mutuality may present itself in many forms from tolerance (e.g. to interact without converging) through recognition (of the accepted norms, rules and standards) to inclusiveness (e.g. increased levels of monitoring one another) (see Nicolaidis, 2001).

Exchanges under collaboration go beyond ‘ad hoc’ get-togethers. There is considerable institutional and procedural development that corresponds with the adoption of the principles highlighted in the previous paragraph. Since there are no road-maps to deal with the policy challenges at hand, deliberative procedures tend to dominate intergovernmental exchanges. Characteristic of the collaborative pattern of intergovernmental interaction is the involvement of the highest political level in policy coordination and the gradual development of the institutions and procedures. It is argued here that intergovernmental institutions and procedures develop and get formalized not because of the type of power-sharing at the constituent unit level as Bolleyer (2009) would argue, or in order to compensate for federal constitutional inflexibility as Hueglin and Fenna (2006) stressed, but rather because of a deliberate decision on the side of constituent units to substitute constitutional power transfers and subsequent collective legislative decisions with more informal policy coordination mechanisms. This deliberate decision is manifested in the adoption of the federal principles outlined before in the different procedures and institutions of intergovernmental relations that were developed in the process.

Last, but not least, cooperation means joint operation or action that also implies the *willingness to assist* in order to achieve a common purpose or benefit. What distinguishes cooperation from collaboration is the existence or lack of this attitude of assistance. In the cooperative scheme, self-determination and autonomy as a principle correspond with the accommodation of national interests in the pursuit of common goals. However, as collective, legislative decisions are to guarantee the coordination of cross-jurisdictional areas, the partnership principle is partially violated. Instead of non-hegemonic and heterarchical relations, cooperation implies some hierarchy among the different orders of government. Consequently, under cooperation, vertical relations are more dominant than horizontal ones. Loyalty and comity are both relevant principles of cooperation, the former referring to a common understanding that a given policy challenge is considered as a federal issue, while the latter is assured through the participation of the constituent units in procedures leading to

legislative decisions. Unity in diversity is generally reflected in the legislative framework. While federal law assures unity, constituent unit implementation guarantees diversity. Since cooperative federalism is based on the constitutional distribution of legislative powers, there is very little room for flexibility and open-endedness, which also has a great impact on the proportionality and mutuality principles (if one is to police ‘where’ a power is exercised instead of ‘how’ it is exercised, there is little need for these principles). Under cooperation, proportionality gives way to subsidiarity concerns, which also implies the move away from informal to rather formal mechanisms.

As far as the institutional development is concerned, cooperation requires less formalized institutions at the highest level as constituent units aim for federal legislative action at the end of the process. Consequently, there is no need for supporting institutions on the long run, as the role of the executive shifts from daily policy coordination with the highest degree of flexibility and openness, to the accommodation of constituent unit interests leading up to legislative and constitutional decisions that formally change the distribution of powers among the different orders of government.

In sum, the thesis uses the concept of intergovernmental relations with reference to three different dimensions. The cultural dimension, or culture of intergovernmental relations, refers to the norms, principles, and perceptions that the different actors internalize. It is argued here that this cultural dimension is changing over time with the adoption of new principles that in turn have a great impact on the procedural and structural dimensions, which would also explain the diverging outcomes of intergovernmental relations. The procedural dimension refers to the different patterns of interaction intergovernmental relations may manifest themselves, which also corresponds with the internalization of the different federal principles sketched out in the cultural dimension. This thesis aims to understand not how these different patterns evolve in different contexts, but rather how the change from one particular pattern to another becomes possible and what role the adoption of federal principles plays in this process and how it can be traced. Last, but not least, the structural dimension of intergovernmental relations refers to the institutional environment that is built around these different patterns which are informed by the different levels of internalized federal principles highlighted under the cultural dimension. Consequently, it is argued that the character of intergovernmental relations cannot be traced back to a specific logic, but it has multiple layers that correspond to one another. Furthermore, taking a policy-centered approach to intergovernmental relations (see Bolleyer, 2009), this thesis argues that cross-jurisdictional

policy coordination channeled increasingly through intergovernmental relations has a major impact on the actual allocation of powers among different orders of government. Consequently, the changing character of intergovernmental relations has to be incorporated within a federalist theoretical framework. The importance of intergovernmental relations within federalism derives from the fact that “self-rule can be formally introduced in a government’s arrangement but cannot be maintained without the working connections that tie central governments to those constituent units that enjoy measures of independent and interdependent political power” (Agranoff, 2004: 26)⁶⁹.

2.2.2.) Federalism and the relevance of ‘shared rule’

Once we have settled the concept of intergovernmental relations and what constitutes those relations, we still have to address the concept of federalism. As for federalism⁷⁰, it is not only “one of the most important historical innovations in modern government and politics” (Burgess, 2006: 9), but also one of the most contested concepts in political science. Its origins lie within the study of international relations; yet, the American (i.e. US) experience unilaterally ‘hijacked’⁷¹ the train of federalism⁷² (Burgess, 2006) and gave it a ‘national’ (i.e. statist) direction⁷³. However, “it is essential (...) to study the development of national and international federal ideas together because national federalism is essentially an *internalization* of a form of external relations (a union of “sovereign states”) while international federalism is essentially an *externalization* (world “government”) of a political form characteristic of the internal structure of a single state”⁷⁴ (Riley, 1973: 89). This study

⁶⁹ In general, it is important to establish the relationship between the two concepts despite the fact that “IGR and federalism are so closely intertwined that at first sight the attempt to locate research on IGR within federalism research seems quite futile” (Bolleyer, 2009: 12).

⁷⁰ It should be noted that the literature on federalism dates back to philosophers such as Althusius, Hugo, Montesquieu, Hume, Rousseau, Kant, etc. Nevertheless, this study shall only focus on the modern, Anglo-Saxon and post-war conceptualizations of the term (which have been collected nicely by Burgess (2006)), though references to the classical, traditional ideas shall not be neglected by it.

⁷¹ See also reference made by Schütze (2009: 23).

⁷² „In order to link the federal principle with that of the modern state, the framers and proponents of the American constitution of 1787 had to perform a sleight of hand, to transform the term “federal” as it was known up to that time - what we today term confederation, or the relatively loose linkage of polities that retain their sovereignty within a permanent league - into something else, an entity whose overarching government could be considered national and would have as much or more original authority as the constituent entities” (Elazar, 1979: 18).

⁷³ It is important to remember that the United States of America is not a clearly federal system, but rather one that possesses a mixture of federal and national features as argued by James Madison in the Federalist Papers (no. 39).

⁷⁴ See also Schütze (2009: 3). Within this context “The creation of a federal union of states (...) [is] a remarkable and momentous transformation which is quite radical and interesting enough in itself to warrant, at

aims to do just that as contested cases of multi-national, multi-lingual federal political systems and their internal intergovernmental dynamics can be better understood through these bifocal lenses⁷⁵. It will stress the equal importance of both federal and confederal components of federal theory⁷⁶. The harsh treatment of confederations due to a retrospective disdain in historical approaches to the American Confederacy, the German Bund or the Swiss Confederation shall not keep us from federal theorizing that builds on these traditions as well. After all, “confederations appear in a different light when viewed (...) prospectively, as movements beyond the normal restricted circle of interstate relations” (Forsyth, 1981: 4).

To remain in the footsteps of this classical approach this study uses Daniel J. Elazar’s seminal definition of federalism as “a combination of self-rule and shared rule” (Elazar, 1979: 2). This conceptualization has a range of methodological advantages that are essential to the phenomenon studied here. It implies that federalism is first and foremost a principle (see also Schütze, 2009: 4), a normative concept (Watts, 2008) which can be embodied in a wide variety of structures. Consequently, a federation (i.e. a federal state) is only one species in the genus of federalism⁷⁷. This understanding would also allow for the accommodation of numerous forms of intergovernmental relations⁷⁸, thus questioning the age-old dichotomy between intergovernmentalists and supranationalists within the study of European integration⁷⁹. After all, as Sbragia (2004) argued: “for federalist scholarship, the co-existence of supranationalism and intergovernmentalism is to be expected and in fact provides a “marker” which identifies the EU as a subject suitable for study through the lens of federalism”⁸⁰. This perception of federalism handles the necessary flexibility within the

all stages in its growth, the closest attention and investigation” (Forsyth, 1981: xi). Emphasis added by the author.

⁷⁵ “The study of federalism as a mode of government for a single state requires to be supplemented by the study of federation as a mode of linking states together in a bond that takes them to the brink of being transformed into one state has something in common with the arguments” (Forsyth, 1981: 6). In fact, it is this in-betweenness that makes federal theory capable of understanding the dynamics to be explained.

⁷⁶ Consequently, the difference between a federation and a confederation shall not be found in the extent to which the central government enters into direct relations with the citizens.

⁷⁷ See similar understanding put forward by King (1982), and used later by De Villiers (1994), Burgess (2006), and Watts (2008).

⁷⁸ “EU scholars have tended to equate “confederal” with “intergovernmental”—the two however are quite different. Although the difference between a confederal model of governance and a strictly intergovernmental one is important, it has been under-studied” (Sbragia, 2004). In fact, analyzing, how federal principles may emerge and develop among constituent units through intergovernmental exchanges could enrich our knowledge on this difference and thus this thesis could provide with an added value to the literature on EU integration as well.

⁷⁹ Even though federalism has been one of the earliest reference points of the EU (see e.g. Coudenhove-Kalergi’s seminal work on Pan-Europa, or Altiero Spinelli and Ernesto Rossi’s Ventotene Manifesto), it has been in constant debate with the (rationalist) intergovernmentalist approach (e.g. Moravcsik, 1993).

⁸⁰ See also Nicolaidis (2001: 454): „it seems misguided (...) to oppose European ‘intergovernmentalism’ to the ‘federal’ aspirations of the Union when the former is an inherent part of a genuine federal vision”. A similar

political system quite comfortably (see Bakvis et al., 2009), and highlights the double characteristics of federalism combining both structure (i.e. self-rule manifested in legislative decision-making) *and* process⁸¹ (i.e. shared rule manifested in supranational institutions or intergovernmental arrangements). That, indeed, is what creates a federal system. Where a federal structure exists without a correspondingly federal process, there is evidence to indicate that it may have some impact on processes of governance, even if the latter are not ultimately federal” (Elazar, 1979: 30-31). Put differently, “federalism should be understood not [simply] as a particular structure of government but as a ‘process’, ‘continuum’ or ‘spectrum’” (Forsyth, 1981: 6). After all, federalism is “perhaps primarily the process of federalizing a political community, that is to say, the process by which a number of separate political communities enter into arrangements for working out solutions, adopting joint policies, and making joint decisions on joint problems” (Friedrich, 1968: 7). According to Friedrich, federalism was “a firm determination to maintain both diversity and unity by way of continuous process of mutual adaptation” (Burgess, 2013: 14). Friedrich’s focus on process put a special emphasis on ideas, such as federal loyalty and federal comity and emphasized the need for deeper and more comprehensive studies into the genesis and operation of these ideas and their effects on the overall federal system. This thesis aims to fill this gap in the literature.

Bringing this classical understanding of federalism back (Forsyth, 1996; Schütze, 2009: 14) allows us to differentiate our focus between legislative decision-making and the political procedures of ‘self-rule’ and ‘shared rule’⁸². Instead of emphasizing the former⁸³ and build a framework thereupon explaining a development from dual to cooperative federalism (see Schütze, 2009), this thesis will make the case for the latter and inquire into the role of intergovernmental relations and the changes thereof as, in many ways, they complement⁸⁴ the

suggestion made by Michael Burgess (2006: 33): „the role of EU member states as propulsive forces in helping to build a federal Europe has actually been underestimated by federalists themselves and should be much more effectively integrated into a federalist theory”.

⁸¹ See Elazar (1987).

⁸² Herman Bakvis defined federalism as a balancing act between „flexibility and formality” (Bakvis et al., 2009: xiii) that reflects the equal importance of the political and legal dimensions of federalism.

⁸³ This choice is supported by the fact that “looking at the wide array of definitions of federalism put forward in the literature, formal-legal definitions tend to be the most prominent” (Bolleyer, 2009: 12), and thus a complementary understanding is much needed. The explicit focus on political procedures rather than formal legislative decision-making allows us to avoid such highly contested cases as Spain which has been *de facto* federalized yet, *formally*, *de iure*, it is rather an example for devolution or decentralization (see Bolleyer, 2009: 13).

⁸⁴ It is important to stress that this is a complementary theory that shall by no means suggest that legislative decision-making based on the constitutional distribution of powers shall become obsolete. Rather, the aim is to understand the latest dynamics of federal political systems that do not fall into the categories of ‘legal /

legislative decision-making procedures based on the constitutional distribution of powers⁸⁵. To that end the thesis advances a revised version of the analytical concept of collaborative federalism. This concept serves two different, yet inter-related purposes. First, it indicates a special emphasis on ‘collaboration’, or ‘working together to achieve the same, common goals’ in policy delivery, as opposed to mere ‘cooperation’ or ‘doing what they ask you to do’ in a legal manner. It implies a change in the federal principles underlying intergovernmental relations as compared to both the competitive and cooperative models. Furthermore, it suggests a move away from law-making to policy coordination across jurisdictions. With this, the concept distinguishes between a more formal, legal understanding of shared rule channeled through ‘cooperation’ in federal legislative decision-making and a rather informal, political one conducted through ‘collaboration’ in intergovernmental policy-making. This thesis aims to understand how collaboration emerges and the development of which federal principles in intergovernmental relations are indicative of such a change? Secondly, it is always important to understand not only how federal principles emerge, but also how robust these principles prove to be and which elements actually foster and stabilize them?

In general, it will be argued that shared-rule does not have to necessarily manifest itself through supranational institutions and centralized legislative decision-making procedures but can be arranged through intergovernmental practices as well. This study gives a more detailed account of self-rule and shared rule as manifested through the different cultures and practices of intergovernmental relations. In fact, Toonen (2010) rightly argues that the different types of federalism are reflected in the different character of intergovernmental relations. Consequently, if one is to understand the changing patterns of intergovernmental interactions, it would also mean a shift in the dynamics of federalism. The theoretical framework advanced in the next sub-chapter will describe *a development from competitive to collaborative federalism based on the changing character of intergovernmental relations*. Accordingly, competitive federalism will refer to a system where intergovernmental relations are characterized by competitive interactions where self-rule dominates the system and the development of shared rule cannot be traced back to a change in the character of intergovernmental relations (i.e. new principles are not internalized by the different actors). Collaborative federalism will refer to a federal model where collaborative intergovernmental

legislative federalization’, a. k. a. the formal transfer of competences. Also, this study does not exclude the possibility of a development from collaborative to cooperative federalism, thus formalizing the changes.

⁸⁵ This makes it also possible to understand how constitutionally different intergovernmental structures may develop in similar directions. After all, it is not the legal framework of self-rule and shared rule that changes, but rather the intergovernmental procedures shift from self-rule (i.e. ad hoc, almost non-existent) to shared rule without formal competence transfers.

interactions are informed by the adoption of new federal principles, most importantly, the principles of partnership, loyalty, comity, proportionality and flexibility. It is the deliberate internalization of these principles in intergovernmental procedures and institutions that leads to shared-rule, which allows intergovernmental relations to substitute centralized legislative decision-making in cross-jurisdictional policy areas. Last, but not least, cooperative federalism will refer to a system where intergovernmental relations are of a cooperative nature. As argued before, certain federal principles are violated (e.g. partnership, flexibility), and consequently shared rule is guaranteed through the passing of federal legislative acts or even constitutional amendments that re-shuffle the distribution of power among the different orders of government.

2.2.3.) Policy coordination as opposed to centralized, collective, legislative decision-making

As the thesis aims to understand how intergovernmental relations may lead to policy coordination instead of collective, legislative decision-making, it is necessary to clarify what is meant under these concepts within this thesis.

As it was indicated before policy coordination refers to a rather informal process that aims to manage interdependencies among different actors. Coordination implies an on-going management and instead of command-and-control type decisions, it leads to soft-law mechanisms and outcomes. Consequently, coordination lacks central control and relies more on a common search for solutions through openness and sharing of information. Coordination is essentially a communicative action that turns policy questions under separate jurisdictions into cross-jurisdictional ones, and aims to better understand the policy problem at hand with the interest of the participating actors. Policy coordination refers to mutual adjustments that make governments “pursue different policies than they would have chosen had policy-making been unilateral” and to a practice of “aligning structures and activities to (...) facilitate the likelihood of achieving horizontal objectives” (Bakvis and Brown, 2010: 484). Within the framework advanced in this thesis policy coordination refers to mechanisms that do not involve collective, federal legislative decisions, but rather rely on soft-law mechanisms known within the ‘new governance’ literature on the EU.

Centralized, collective, legislative decision-making refers to a legislative act that was carried out by the federal legislative body. It means the passing of a federal act that aims to settle cross-jurisdictional policy matters in a command-and-control type of mechanism. Clearly, the difference between policy coordination and centralized legislative decision-

making processes derives from the different approach of the different actors involved in the process. It is argued here that this different attitude speaks directly to the different principles adopted by them that would drive intergovernmental interactions.

2.3.) From competitive to collaborative federalism – understanding the emergence and development of federal principles in intergovernmental relations

This sub-chapter advances a federal theory⁸⁶ based on the concepts described in the previous part. The typology and conceptualization outlined before helps us identify a more sophisticated development path of federal systems where formal, legal alterations do not follow the political procedures (in other words legislative federalization⁸⁷ does not follow executive federalization)⁸⁸. As it was argued before, this study aims to understand how federal principles underlying collaboration emerge and develop within intergovernmental relations so as to avoid formal competence transfers and subsequent collective, legislative decisions to settle cross-jurisdictional issues. This more sophisticated take on intergovernmental (and thus federal) development resonates with the call to study ‘interregnum’ evolution (i.e informal changes within the sharing of competences) besides ‘history-making’ ones (i.e. formal constitutional changes) (Stacey and Rittberger, 2003).

As expressed in the introduction and implied by the previous part in this chapter, the thesis first and foremost will address the following question: under which conditions and how do intergovernmental relations substitute formal transfers of competences and subsequent centralized, collective legislative decisions when faced with a cross-jurisdictional policy problem? The question suggests the need, already referred to in previous parts, to differentiate between types of ‘executive federalism’ whether they lead to federal legislative decisions or not. As both the EU and Canada face a similar dilemma of ‘unity and diversity’ in cross-jurisdictional areas, this thesis suggests that there are systemic features that are responsible for

⁸⁶ It is essential to add here that “while there is such a thing as federal theory, there is no fully fledged theory of federalism. (...) Its very flexibility and adaptability made it difficult to discuss satisfactorily on a theoretical level” (Burgess, 2006: 283). Consequently, even though the aim is to provide a systemic understanding of the changing character of intergovernmental relations within federalism, this will only constitute *one* specific federal theory.

⁸⁷ By ‘federalization’ the author means „the process of federalizing a political community; that is to say, the process by which a number of separate political communities enter into arrangements for working out solutions, adopting joint policies, and making joint decisions on joint problems” (Friedrich, 1968: 7). Depending on whether these joint decisions are orchestrated through the legislative or the executive branch we can talk about legislative or executive federalization. Federalization in other words is “a long-term *process* of building a federal political culture where none existed before” (Burgess, 2013: 315).

⁸⁸ This directly speaks to the paradox about diverging jurisdictional and policy problem boundaries identified in the introduction.

the changing character of intergovernmental relations. However, as opposed to policy oriented perspectives where intergovernmental relations are the independent variables explaining the reasons why and how policy coordination takes place, and systemic approaches where the particular organization of intergovernmental relations is explained either by micro- or macro-structural elements, this thesis argues that there is a need for a middle-ground theory where neither approach is downplayed by the other. It is argued here that policy concerns have a transforming effect on intergovernmental relations if certain structural configurations exist.

As a departure point, the competitive nature of intergovernmental relations will be established within the case studies covered by this thesis. Based on the conceptual framework established in the previous part, first, the extent to which federal principles have been adopted in these policy areas will be assessed. The study will rely on a document analysis of the ‘constitutional framework’, decisions made by the highest court and other official documents. Within the Canadian context this shall cover the Constitution Acts of 1867 and 1982, several references and decisions made by the Supreme Court of Canada (SCC), and a number of Royal Commission reports which provide with relevant information on the major characteristics of the federal system of Canada. As for the European Union, the different treaties will be complemented with Council conclusions which shall indicate the nature of intergovernmental relations. In both cases, the narrative on the competitive character of intergovernmental interactions will be further supported by personal interviews and news clippings. Interviewees have been identified based on their general knowledge concerning a particular issue with regard to intergovernmental relations. Consequently, in the Canadian context officials from the intergovernmental ministries at the provincial and federal levels were selected, whereas in the European case, officials from COREPER and the different Directorate Generals of the Commission were interviewed. For a complete list of interviews see *Tables 1* and *2*. News sources were picked based on their availability and relevance. In Canada, national papers such as the *Globe and Mail*, and the *National Post* were complemented with provincial news sources (e.g. *Toronto Star*, *Montreal Gazette*, *Calgary Herald*). As for the EU articles from EU level online sources (e.g. euobserver.com; euractiv.com) were further supported by mainly English-language newspapers such as the *Financial Times*. These sources were only used to support the narrative framed by the official documents and further established by the personal interviews.

	Intergovernmental ministry	Line departments
Ontario	1	2
Quebec	2	2
Alberta	1	2
British Columbia	1	2
New Brunswick	0	2
Federal government	2	2
Additional interviews	6	

Table 1. Summary of the interviews conducted in Canada

Germany	2
UK	1
Belgium	2
Finland	1
Luxembourg	3
Portugal	2
Sweden	2
Poland	2
European Commission	8

Table 2. Summary of the interviews conducted in relation with the EU

Based on the conceptual framework established in the previous part, the thesis aims to understand how the character of intergovernmental relations changes and how this informs the development from competitive to collaborative federalism. The theoretical framework put forward within this chapter aims to understand this process. The main proposition with regard to the emergence of collaborative federalism reads as follows:

Main Proposition. Cross-jurisdictional policy challenges may drive constituent unit governments to adopt federal principles in areas falling under their own jurisdiction which can also create skepticism towards collective, centralized legislative decision-making that pushes them towards intergovernmental arrangements.

The proposition begins with the assumption that there *is* a cross-jurisdictional policy problem that affects separate jurisdictions of the different orders of government. The main aim is to find out what features of this cross-jurisdictional challenge are responsible for pushing constituent units towards coordinated actions in their area of jurisdiction and for turning towards intergovernmental relations as opposed to formal legislative decision-making. What is most relevant here is to establish a clear reference to this perceived need for collective

action and to the will of the actors not to pursue intergovernmental negotiations that would lead to constitutional or legislative changes to the existing framework. Consequently, the thesis will depart from the simplistic concept of “executive federalism” which considers intergovernmental relations as a tool outside the legislative framework to represent regional interests in federal law-making, and rather it will analyze the nature of the policy challenge and its impact on intergovernmental relations from the beginning. The thesis also distances itself from the hypotheses that intergovernmental relations can only be considered as a result of either constitutional inflexibility (Hueglin and Fenna, 2006) or the type of power-sharing mechanisms at the constituent unit level (Bolleyer, 2009). Consequently, the study proposes a rather pro-active approach to intergovernmental relations as opposed to a reactive one where openness to intergovernmental relations depends either on constitutional arrangements or micro-structural elements. In general, it is suggested here that certain cross-jurisdictional policy problems are more likely to lead to the adoption of federal principles underlying collaborative patterns of interaction as opposed to cooperative ones. Therefore, it is important to theorize which policy problems under which conditions lead to the adoption of which federal principles and how one can trace the development within intergovernmental exchanges. To that end, the thesis advances the following interconnected sub-propositions:

Sub-Proposition (1) Where preferences are difficult to assess due to the complexity of the policy challenge, constituent units are likely to enter into deliberative interactions which ensure greater openness to adopt federal principles in areas of separate jurisdictions.

Sub-Proposition (2) Where separate jurisdictions need to be coordinated, the sensitivity of the policy challenge is likely to increase skepticism among constituent units towards formal transfers of power and subsequent collective, legislative decisions and pushes the different orders of government towards intergovernmental arrangements.

The theory suggests that the complexity and sensitivity of a policy challenge is acknowledged gradually by the different orders of government. Complexity will be indicated by horizontal interconnectedness of a given issue with other policy areas and also by the history of conflicts that preceded the period under which changes started to take place. Sensitivity will refer to the extent to which a policy matter is considered by the different actors as relevant from the point

of view of sovereignty. Similar methods will be used to identify the process through which constituent units acknowledged the complexity and sensitivity of a policy matter. Once again, official documents, such as Royal Commission reports or Council Conclusions will set the stage which will be further buttressed by interview materials that aimed to understand how such an acknowledgement has come about. To further enhance the narrative on the emergence of collaborative interactions, newspaper articles and debates in different legislative assemblies (e.g. Hansard resources in the Canadian context) both at the federal and provincial levels were also used.

In a second step, the adoption of federal principles will be analyzed. It will be shown that complexity and sensitivity of a policy matter often makes pre-negotiation preference formation extremely difficult which then creates openness among the different actors to deliberate on different positions. This openness then allows for the adoption of new, federal principles within areas of constituent unit jurisdiction during the deliberations that come to characterize intergovernmental procedures to a greater extent. The adoption of these federal principles will be assessed through the same methods highlighted before. The emphasis within this part will be put on personal interviews. Interviews have been conducted with intergovernmental personnel who have been involved with the intergovernmental changes in connection to the policy areas studied within this research. These include mainly line department officials who have been actively engaged with intergovernmental negotiations that led to the changes identified above. The government rank of the interviewees range from the ministerial to the lower, more administrative levels, depending on the policy areas concerned. It has to be noted here, that additional insights were gained through interviews with politicians involved more with the legislative decision-making procedures (i.e. members of Parliament and the Senate in Canada, and MEPs in the EU). The purpose of these latter interviews was generally to assist the overall picture that one can draw from the line department interviews, and often helped uncover further details about the policy problems and the challenges constituent units faced in their attempts to deal with them. What is new about the interviews is not their scope but rather their substance and the alternative stories they construct as opposed to the ones used in previous studies. In addition, selected news clippings will be added which have been picked based on their relevance federally and sub-federally, however their use is generally confined to map out the positions of the different orders of government through interview excerpts with the most relevant actors involved. From practical reasons the thesis limited the scope of these document analyses to a manageable number of cases, as indicated before.

As argued before, the thesis uses the aforesaid methods to establish the emergence of federal principles within intergovernmental relations. The principle of self-determination will be traced through changed conceptions with regard to constituent unit preferences and the common good. References to common goals while stressing the importance of sub-federal positions will be a clear indication of a change of the autonomy principle. The emergence of partnership will be determined through an increased emphasis on equality between the different actors. References to non-hegemonic relations or questioning hierarchical relations and consensus-based decisions will also be indicative of partnership. The emergence of loyalty will be demonstrated through a clear commitment of the constituent units to address common policy concern that nevertheless fall under their own jurisdiction, while comity will be analyzed from the point of view of openness to compromises among the actors and fairness from the federal order of government with regard to its actions. Unity in diversity will be represented by the push for system-wide decisions that also ensure decision-making authority at the constituent unit level. Indicative of the development and internalization of the principle of proportionality and mutuality will be the move away from discussions on the distribution of powers over a given jurisdiction towards deliberations on the sharing of the exercise of power even in areas of separate jurisdictions. In fact, deliberations, as it was argued, have an essential role in the diffusion of the different federal principles that would in turn dominate intergovernmental relations. The more deliberative the processes are (i.e. the more they are built upon open discussions) the more effectively they will allow for the adoption of federal principles that are essential for collaborative interactions to flourish. In that, the level of trust among the different actors (e.g. personal ties, closeness of individual actors), the level of insulation (e.g. informal settings, in-camera meetings), the level of technical knowledge required, and the type of leadership (e.g. neutral chair, strict deadlines ensured by the highest political levels) are of great importance. It will be shown that ‘small wins’ during the deliberative procedures will strengthen commitment to the process (increasing the feeling of ownership of the project), deepen trust, ensure the open-endedness of the process, and also establish shared understandings, which all support the internalization of the different federal principles. Flexibility and open-endedness will be analyzed through the will of the different actors to keep procedures as informal as possible with options of revisions. Furthermore, the acknowledgement of essential indeterminacy of jurisdictions is indicative of the preference for flexibility.

While the first two sub-propositions try to understand what features of a policy challenge and through which mechanisms makes constituent units adopt federal principles in

separate constitutional jurisdictions that would lead to collaborative intergovernmental interactions, it is also essential to understand under which conditions those interactions are likely to prevail and lead to policy coordination instead of legislative decisions. Contrary to Kelemen (2003) who argued that an increased level of exchanges between the actors increases the likelihood of formal power transfers to the federal level, the second sub-proposition reads as follows:

Sub-Proposition (3) The more the different orders of government formalize the federal principles underlying collaboration in intergovernmental institutions and procedures the more likely they will avoid centralized legislative decision-making and thus formal transfers of competences.

At this point, it will be analyzed to what extent the formalized intergovernmental institutions and procedures reflect the federal principles underlying collaboration, most importantly the principles of partnership, proportionality, mutuality, and flexibility. As the first two sub-propositions aimed to understand under which conditions collaboration is more likely to emerge, here the focus turns towards its robustness. It is argued that the more effectively the intergovernmental institutions reflect collaborative dynamics, the less likely the different orders of government become interested in changing the formal, constitutional or legal framework as the legitimacy of these institutions and processes increases over time. The analysis will focus on the different intergovernmental institutions from the highest to the lower levels and their internal procedures to assess the major developments. Methodologically at this point our attention will also be turned towards the actual output of intergovernmental relations, namely the intergovernmental agreements that are meant to formalize the federal principles adopted in the deliberative procedures of intergovernmental relations. The analysis of these agreements also shed some light on their actual impact on the allocation of competences. Consequently, document analysis prevails at this stage. However, interview materials will be used to support the general picture. Important to the process from a federalist perspective will be the analysis of power checking mechanisms. As power sharing is conducted through the rather informal mechanisms of intergovernmental relations alternative mechanisms of control (e.g. dispute resolution over judicial decisions) will be established, which would also indicate the existence of collaborative dynamics in the first place. This would correspond with a request within the federalist literature to shift the focus of attention

“from examining change simply in the locus of power to assessing how such various modes of control may themselves be the markers and measures of change” (Nicolaidis, 2001: 454).

In sum, this thesis argues that while complexity of a policy issue encourages open deliberations among constituent units, sensitivity of the topic increases skepticism among them towards formal power transfers and subsequent collective legislative decisions. As deliberations evolve new federal principles are adopted in intergovernmental interactions. The more these newly internalized principles are institutionalized in formal intergovernmental exchanges and outputs, the greater its legitimacy will be over time which lessens the interest of the different orders of government to change the formal constitutional, legal framework. On the other hand the more these interactions get formalized, the greater their effect will be on the actual allocation of competence between the different orders of government.

2.4.) Why a comparison between Canada and the EU?

Before moving on to the empirical case studies, it is important to explain the feasibility, relevance and added value of a comparative federalist study between Canada and the EU. As it was highlighted in the introduction of this chapter, the similarity of the real-world puzzle in Canada and the EU naturally calls for a comparative study between the two cases. The added value of such a comparison has been argued for before. In fact, “Canada and the EU can better manage mutual challenges by learning from each other” (DeBardeeben and Leblond, 2010: 2). As it was demonstrated in this chapter, the theoretical framework advanced in this thesis has an added value not only within the literature on Canadian federalism, but also brings new insights into the studies of the European integration. Theoretically it becomes highly relevant to study common challenges (see also Jachtenfuchs and Kraft-Kasack, 2013) and their effect on different political systems to better understand the relations between policy- and structure-centered approaches to federalism and intergovernmental relations. This goal will be addressed through a comparative case study based on analogy between the EU and Canada.

However, it has to be noted that this study will use comparison not simply as a method but also as a strategy to assist theory-building that could help us better understand the direction of transformation that both the EU and Canada go through. This approach would go beyond the five-prism-based comparative approach outlined by Burgess (2006: 135-136) which has focused essentially on the static elements of federal political systems and would not consider a procedural understanding of federalism where the actual processes of change (see

Nicolaidis, 2001) are measured against one another. As argued before, the thesis attempts to go beyond a descriptive comparison and to come up with a systemic understanding of intergovernmental change within federal systems.

The added value of a comparative focus on intergovernmental relations within federal systems has been highlighted by numerous scholars already. At this point we only refer to Burgess (2006: 138) who argued that “a shift of focus towards the study of 'intergovernmental relations' in federations could conceivably facilitate valid comparisons”. The most widely used comparison in relation to the EU is the US (e.g. Nicolaidis and Howse, 2001; Menon and Schain, 2006). Yet, as it will be shown, Canada has a lot more in common with the European polity: “Europeans might usefully set up Canada as a mirror of themselves, as Canada is the state that comes closest to the EU in several critical aspects” (Fossum, 2009: 498)⁸⁹. This study will only list the most important arguments which could also contribute to a better awareness and knowledge of Canada. First and foremost, even though Canada is generally characterized as a federal state, its character is considered to be as contested as the EU (see Bakvis et al., 2009), and neither has reached its *finalité politique*. Both entities cover noticeable regional, geographic, economic, cultural and even historical diversities. While the different nation-states within the European context require no further explanation, it is noteworthy that differences in historical traditions, economic capacities, and culture do exist among the provinces of Ontario, Quebec, the Maritimes and Western Provinces. While “Canada's ten provinces are vigorous, activist units, jealous of their powers and anxious to use them” (Simeon, 1973: 10), the same could be applied to the member states of the European Union. Considerable economic differences persist among the individual regions setting the stage for a framework with colorful interests. Also, the relationship between a given constituent unit and the federal 'capital' is characterized in a similar manner: both Ottawa and Brussels are taken to be distant from the actual local problems a province or member state is facing (see Simeon, 1973).

Both entities are essentially multi-national, multi-lingual that is officially recognized and corresponds to a great extent to territorial division as well. For this reason, the Canadian understanding of federalism was created to accommodate different national identities within one single political structure. “Clearly, the EU must grapple with a challenge that is quite similar to that facing Canada, namely to create a sense of community, without eradicating

⁸⁹ It is important to note here that Jean Monnet, one of the most prominent figures around the establishment of the European Union (Community back then) has spent some of his most formative years in Canada, and his ideas about European integration have been greatly influenced by his experience overseas (see Ugland, 2011).

multiple national identities” (Fossum, 2004: 13). At this point it is important to remember that Canada never got rid of its European roots and traditions, thus its ideological, political, social thinking is a lot closer to the member states of the EU. As a result, in ideological stands, both the EU and Canada tends to be more socially sensitive and aware of the importance of solidarity. This can also be traced in their approach to international relations and official foreign policy where peaceful conflict resolution, multilateralism, deliberation, etc. play a central role.

As for their constitutional legitimacy, both Canada and the EU seem to have reached a constitutional plateau. In Canada after the repatriation of the Constitution in 1982 two attempts have been made to revise the constitutional framework, however both the Meech Lake (1987) and the Charlottetown (1992) accords have been voted down. In the EU, after the referenda in France and the Netherlands turned the Constitutional Treaty down, the Lisbon Treaty seems to have reached an institutional peak. The Netherlands and the UK recently both signaled a wish to do a revision on the competence allocation between the European level and its member states⁹⁰. It becomes quite clear then, that both political structures face an internal tension as their formal constitutional framework has reached their peaks yet internal and external challenges require certain revisions and amendments.

In terms of the institutional settlement, due to an essentially parliamentary form of government both in Canada and the EU, the executive seems to dominate the system, despite the difference in the level of formality. The relation among the heads of governments is described as diplomatic in both the EU (Fossum, 2004) and Canada (Simeon, 1973). Regional representation in central legislative decisions is ensured through the Council of the European Union (i.e. ordinary legislative procedures) and the Senate respectively, neither of them ensuring equal number of votes to the individual constituent units. As far as the federal levels of governance are concerned, traditionally, the government of Canada plays a role in the accommodation of regional interests by appointing politicians from different provinces as ministers in the cabinet, whereas the European Commission consists of one member from each member state, even though a Commissioner cannot represent the interests of the member state he or she is from.

In terms of political parties, the relationship between federal and constituent unit parties remains quite fragmented. In the EU, even though most parties in national legislatures are represented in party groupings within the European Parliament, however, great differences

⁹⁰ See *Review of the balance of competences*, <https://www.gov.uk/review-of-the-balance-of-competences> .

among leftist and rightist parties from East and West still remain, and European elections are still based on campaigns within the national contexts based on the parties within a member state. In Canada, similarly, federal and provincial parties do not share much in common, and often a party with a given ideology does not share anything in common with its federal or other regional counterparts. The only possible exception today seems to be the official opposition, the New Democratic Party (NDP) which attempts to build a national platform incorporating its sister parties in the provinces.

As for the individual case studies regarding the policy areas chosen, the selection was based on common challenges. Even though, the cases do not match in each instance, it has to be stressed that each represents an essential part in the creation of 'economic union', a central theme to be addressed in both entities. Each case reflects great involvement of constituent unit jurisdictions taken the nature of a comprehensive economic policy file. In general, as the aim of the thesis is to assess a systemic, yet policy-centered approach to intergovernmental relations, it is the general characteristics of a policy field and the challenge it poses that matters rather than substantive elements within.

3.) INTER-PROVINCIAL TRADE BARRIERS AND INTERGOVERNMENTAL RELATIONS IN CANADA

The theoretical framework established in the previous chapter aims to understand how intergovernmental relations substitute for a formal transfer of competences and the subsequent collective, legislative decisions to deal with cross-jurisdictional policy challenges. As it was argued, the adoption of certain federal principles is responsible for the changing character of intergovernmental relations as manifested in the patterns of interaction and institutions. Consequently, turning from the theory to the empirical case studies, this chapter will analyze the different factors within the policy area of inter-provincial trade that facilitated the adoption of those principles in order not only to better understand the processes leading up to the signing of the Agreement on Internal Trade (AIT) but also to provide with an alternative narrative that highlights the pro-active character of intergovernmental relations.

Instead of arguing that external factors such as the negotiations on the NAFTA and internal conflicts such as the failed negotiations on the revision of constitutional competences had a major impact on this process leading to the rather informal intergovernmental agreement, as most of the literature would argue, an alternative reading of the events will be provided based on document analyses and interview materials which would suggest that the character of the policy challenge pushed intergovernmental actors towards informal solutions right from the beginning. This study will examine which principles under which conditions and how came to inform intergovernmental relations which eventually led to the substitution of formal competence transfers and subsequent centralized, legislative decisions.

The chapter shall unfold as follows. First, the constitutional framework around the issue of internal trade will be introduced which also evaluates the most relevant features of the policy area in a historical context. This will cover the period before a major discussion on the economic situation of Canada has been put forward by a royal commission report in the 1980s. It will be demonstrated how little the inter-provincial trade profile was considered as a complex and sensitive policy area, and consequently how little will there was among the

different actors to address the issue, which resulted in rather competitive, even chaotic, intergovernmental relations. In a subsequent subchapter, the role of the Macdonald Commission and its report will be assessed in terms of the discourse it generated with regard to the issue of internal trade. The commission report called attention to the complexity and sensitivity of the topic which initiated major changes in the perceptions of the different orders of governments. Based on an analysis covering governmental documents, newspaper articles and interviews in the period between 1982 and 1987, it will be shown how the actors involved started to deliberate more openly about the topic which made the adoption of different federal principles possible. It is in this period when Prime Minister *Brian Mulroney* spoke of the “desirability of beginning the process of eliminating inter-provincial trade barriers”⁹¹, and the first considerations have been given to the subject in the individual provinces as well (e.g. see Alberta Hansard from 1986). This in turn set the stage for a specific change in the pattern of intergovernmental interactions and institutions within the area of internal trade. The number of references to partnership, flexibility and other federal principles has increased which suggests their internalization among the participating actors and thus a gradual move from competition to collaboration took place. It will be demonstrated how the processes of ‘executive federalism’ in inter-provincial trade rid themselves from legal and constitutional considerations at a rather early point in time which eventually led to the signing of the Agreement on Internal Trade (AIT) in 1994.

Last, but not least the institutionalization of the emerging federal principles will be addressed in light of the AIT. Once again, official documents, newspaper articles and personal interviews are the main sources used to test the different propositions of our theoretical framework and establish a claim thereupon. The chapter finishes with concluding remarks that will assess the main findings and highlight the most relevant points of the alternative narrative based on the theoretical framework advanced here.

3.1.) Inter-provincial trade barriers in Canada – constitutional ambiguity and competitive intergovernmental relations

Before attending to the analysis of the constitutional framework surrounding the issue of internal trade in Canada, it is essential to note that trade, in general, was always a central part of the discourse on economic union in Canada⁹². It comes of little surprise, as in many

⁹¹ House of Commons Hansard – Commons Debates, 17 June, 1986, p. 14534.

⁹² In fact, the question of trade played an essential role in the establishment of Canada. Changes initiated by the

instances “the rationale for creating a federal political structure was centred, in part, on establishing an internal common market or economic union” (Doern and MacDonald, 1999: 3). However, the balance between economic union (i.e. integration and harmonization in this sense) and federalism (i.e. ensuring diversity within unity) (see also MacDonald, 2002) has been a contested issue in Canada ever since the birth of the country. Through the establishment of Canada with the British North America Act in 1867, the initial aim was to avoid the pitfalls of the American union, and thus, the founding fathers of the Canadian constitution created a rather centralized form of a federal system. Within this framework competences over trade were rendered under the jurisdiction of the federal government. According to Section 91(2), the Parliament has the authority to regulate trade and commerce, both international and inter-provincial. However, the federal government did not use this section to establish general rules and a regime, per se, for managing inter-provincial trade and commerce. As a consequence, there was quite an uncertainty about whether the federal government could do this without the consent of its provincial counterparts, and therefore also without a constitutional change. What followed was a number of Supreme Court decisions which tried to address different aspects of this broad constitutional power. In the *Citizens’ Insurance Company of Canada and The Queen Insurance Company v. Parsons* case (1881)⁹³, the Judicial Committee of the Privy Council (the predecessor of the Supreme Court of Canada or SCC) established that the trade and commerce clause be read and understood narrowly⁹⁴. However, the JCPC abstained “from any attempt to define the limits of the authority of the dominion parliament in this direction” (p. 12). By the 1930s, the *Fish Canneries* (1928)⁹⁵ and the *Aeronautics References* (1931)⁹⁶ further elaborated on the general division of responsibilities between the federal and the provincial jurisdictions. They established that the

United States to the Reciprocity Treaty (1854) between them and the Canadian provinces were to introduce non-tariff barriers, which initially led to Confederation and the will to establish free trade among the provinces to counterbalance the negative effects of the altered Reciprocity Treaty. The very first government of Canada in the late 1860s under John A. Macdonald had a government policy entitled the National Policy within which trade played a central role. The issue has been on the political agenda ever since.

⁹³ http://www.bailii.org/uk/cases/UKPC/1881/1881_49.html

⁹⁴ „The words “regulation of trade and commerce,” in their unlimited sense are sufficiently wide, if uncontrolled by the context and other parts of the Act, to include every regulation of trade ranging from political arrangements in regard to trade with foreign governments, requiring the sanction of parliament, down to minute rules for regulating particular trades. But a consideration of the Act shows that the words were not used in this unlimited sense. In the first place the collocation of No. 2 with classes of subjects of national and general concern affords an indication that regulations relating to general trade and commerce were in the mind of the legislature, when conferring this power on the dominion parliament. If the words had been intended to have the full scope of which in their literal meaning they are susceptible, the specific mention of several of the other classes of subjects enumerated in sect. 91 would have been unnecessary; as, 15, banking; 17, weights and measures; 18, bills of exchange and promissory notes; 19, interest; and even 21, bankruptcy and insolvency” (pp. 10-11).

⁹⁵ <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/9055/index.do>

⁹⁶ <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/8947/index.do>

enumerated powers of the federal Parliament “must be strictly confined to such matters as are unquestionably of national interest and importance” (p. 716 of *Aeronautics Reference*). How a matter becomes of national importance is governed by the principles stated in the *R. v. Crown Zellerbach Canada Ltd* case (1988)⁹⁷. In 1957, the court ruled that Section 91(2) applied not just to trade but also to the flow of goods (see *Reference Re Farm Products Marketing Act*⁹⁸). Later on, in the *Carnation Co. Ltd. v. Quebec Agricultural Marketing Board* case (1968)⁹⁹, the Supreme Court held that incidental overlap of provincial laws into federal trade and commerce matters does not necessarily invalidate the law¹⁰⁰. However, the *Manitoba Egg Reference*¹⁰¹ three years later was seemingly contradictory to the *Carnation* ruling. In this case, Ontario and Quebec enacted protectionist legislation for the egg and poultry industry preventing Manitoba from selling their products in these provinces. The Court held that even though there was no direct evidence showing that there was extra-provincial effect of the provincial law, the potential effect was sufficient to find the law beyond the powers of the legislation. What was different in the two cases was that while in the *Carnation* case only effects on the regulation of inter-provincial trade has been established, whereas in the latter an explicit regulation on inter-provincial trade was attempted. As for the latest developments in regard to the trade and commerce power, in the *General Motors of Canada Ltd. v. City National Leasing* case (1989)¹⁰², the judges listed certain criteria under which the Parliament could legislate with regards to Section 91(2). This ruling essentially established that Parliament was *intra vires* if provinces jointly or severally would be constitutionally incapable of enacting legislation.

In general, it could be argued that the constitution provides with a rather vague power description of the Parliament concerning internal trade. Throughout the years, the Supreme Court has tried to fine-tune and further elaborate on this power, but it remains quite contested, nevertheless. Even nowadays, important decisions are taken concerning the trade and commerce power: in its *Reference Re Securities Act*¹⁰³ in 2011, the Supreme Court ruled that establishing a single Canadian securities regulator does not fall under the general branch of

⁹⁷ Matters which are new and did not exist at the time the constitution was written, and those which became matters of national concern over time. It must have “singleness, distinctiveness and indivisibility and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution” (p. 432) <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/306/index.do>.

⁹⁸ <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2747/index.do>

⁹⁹ <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/4767/index.do>

¹⁰⁰ It also referred to the “pith and substance” doctrine in Canadian constitutional interpretation which is often used to determine under which head of power a given piece of legislation falls.

¹⁰¹ <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/6240/index.do>

¹⁰² <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/433/index.do>

¹⁰³ <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7984/index.do>

the federal power to regulate trade and commerce under Section 91(2) as it “reflects an attempt that goes well beyond these matters of undoubted national interest and concern” (p. 890). For the purposes of our study, it is essential to see how fluid the constitutional framework has been before the issue of internal trade became one of the central issues on the agendas of the different orders of government. It is also important to stress how complex it was as the different Supreme Court decisions and references suggest. As Doern and MacDonald (1999) argued ‘policy communities’ emerged which covered areas from regional and industry policy through trade to federal-provincial and even inter-provincial relations.

Before turning to the turbulent decade starting from the mid-80s, that transformed the intergovernmental arena, we have to address another section of the Constitution Act (1982) which deals with the question of trade as well. Section 121 establishes that the free movement of goods (“articles of the growth, produce or manufacture”) shall be guaranteed among the provinces. Yet, jurisprudence on this section shows similar ambiguity to the one analyzed previously in this chapter. In the *Gold Seal Ltd. v. Alberta (Attorney-General)* case (1921)¹⁰⁴ it was established that this section “protected the movement of Canadian goods against interprovincial “customs duties” or “charges”, but not from any other trade barriers” (Blue, 2010: 163). The court decision explicitly argued that “the object of section 121 was not to decree that all articles of the growth, produce or manufacture of any of the provinces should be admitted into the others, but merely to secure that they should be admitted “free,” that is to say without any tax or duty imposed as a condition of their admission” (p. 470). This governing interpretation has been sustained in numerous subsequent cases¹⁰⁵ and led to the extensive use of non-tariff barriers which provincial governments instituted vis-à-vis one another. In *Lawson v. Interior Tree Fruit and Vegetables Committee of Direction* (1931)¹⁰⁶, the Supreme Court of Canada struck down the provincial legislation requiring agricultural producers to pay a levy to allow for shipments of their products in Canada stating that it was “an attempt to impose by indirect taxation and regulations an obstacle to one of the main purposes of Confederation, which was, ultimately, to form an economic unit of all the provinces in British North America with absolute freedom of trade between its constituent parts” (p. 373). In the *Murphy v. C. P. R.* case (1958)¹⁰⁷ it has been established that grain produced in one province and then transported to another first had to be purchased by the

¹⁰⁴ <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/8125/index.do>

¹⁰⁵ E.g. *Atlantic Smoke Shops* (1943), *Murphy v. C. P. R.* (1958), *APMA* (1978) (see Blue, 2010: 182).

¹⁰⁶ <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2769/index.do>

¹⁰⁷ <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2750/index.do>

Wheat Board, thus the Canadian Pacific Rail Company justly denied the transportation of the one bags of each wheat, oats and barley. It was argued that Section 121

“aimed against trade regulation which is designed to place fetters upon or raise impediments to or otherwise restrict or limit the free flow of commerce across the Dominion as if provincial boundaries did not exist. That it does not create a level of trade activity divested of all regulation I have no doubt; what is preserved is a free flow of trade regulated in subsidiary features which are or have come to be looked upon as incidents of trade. What is forbidden is a trade regulation that in its essence and purpose is related to a provincial boundary (...) Section 121 does not extend to each producer in a province an individual right to ship freely regardless of his place in that order. Its object, as the opening language indicates, is to prohibit restraints on the movement of products. With no restriction on that movement, a scheme concerned with internal relations of producers, which, while benefiting them, maintains a price level burdened with no other than production and marketing charges, does not clash with the section.” (p. 642).

All things considered, the issue of inter-provincial trade and non-tariff barriers remained rather vague and thus highly contested within the Canadian constitutional framework. One of the former internal trade representatives argued that “there was an uneasy truce between the provinces and the federal government (...) there has never been a Supreme Court reference that clearly laid out where the federal government’s powers end and provincial powers begin (...) the approach has always been ‘let’s resolve this among ourselves instead of the courts’”¹⁰⁸.

The topic of internal trade was addressed shortly by the Rowell-Sirois Royal Commission on Dominion-Provincial Relations (1938-1940). The commission argued that even though sections 91(2) and 121 “discountenanced barriers to inter-provincial trade they did not preclude them altogether” (Book II., Ch. 4., p. 62). The report gave a short summary of provincial protectionism techniques, and stressed that “local protectionism does tend to hamper national economic life and thus reduce the income of the people of Canada” (Book II., Ch. 4., p. 64). The commission identified inter-provincial trade barriers as a potentially serious issue, and offered certain remedial actions for consideration. One among those methods consisted “in direct agreement between provinces (...) [in] the form of an interprovincial conference behind closed doors” (Book II., Ch. 4., p. 66). However, these recommendations have not been taken up by the different orders of government up until the mid-80s. In 1978, the Pepin-Robarts Report also stressed the growing restrictions in inter-

¹⁰⁸ Anonymous interview conducted in Toronto, 29 January, 2013. (PROV_LD02)

provincial trade and the concern it has raised among business and labor leaders. Besides a handful of those individual cases we've referred to in the previous paragraphs concerning the issue of internal trade, there was only one serious initiative coming from the federal government in 1980 to address the question in a more detailed and systematic view. Its bid to rephrase Section 121, however has been rejected by nine of the ten provinces, because "it placed unacceptable constraints on provincial powers and extended federal authority" (Knox, 1997: 5). In institutional terms, there was no clear jurisdiction for the Parliament to act unilaterally, and as the failed amendment bid shows, provinces did not want to give that power to the federal legislator. As one former federal official put it: "[s]imply put, the federal parliament did not have the capacity to overrun established jurisdictions"¹⁰⁹. Also, as it was expressed in one of the national papers: "It is fine for Ottawa to declare war on interprovincial trade barriers. But the federal government has little constitutional power to force provinces to change most practices that currently impede domestic trade flows. To create a single internal market, we will need a renewed spirit of federalism - well, economic federalism, anyway"¹¹⁰. Without such a new spirit, however, intergovernmental practice within this area remained rather competitive which is shown by the cases in jurisprudence where individual provinces attempted to defend their home turfs highlighting the importance of the principle of self-determination and autonomy. It is also indicated by the numerous non-tariff barriers they have introduced against one another from 1867 onwards. Before the Macdonald Commission started its work, inter-provincial barriers reached an almost unacceptable level. The situation was described in one of the many articles addressing the issue as follows:

"[P]rovincial tariff barriers existed in all provinces to some degree (...) Newfoundland gives local manufacturers a preference of 10 percent over bidders from all other provinces; Nova Scotia, New Brunswick and Prince Edward Island set up a pecking order in 1980 - province first, Maritimes region second and Canada third. [In] Quebec (...) [o]utsiders just don't get a crack at Government construction contracts, and manufacturers from beyond the Quebec borders are at a 10-per-cent disadvantage (assuming no Quebec content). Ontario, while it has no inter-provincial barriers in place, was nevertheless capable of awarding a streetcar contract to Hawker Siddley of Thunder Bay despite the lower bid by M.L.W. Bombardier of Montreal. Manitoba and Saskatchewan favor the local supplier only if all other factors are equal. Alberta has no tariff barrier as such, but "it does operate a licencing or permit system that is designed to maximize Alberta content in all major resource projects." British

¹⁰⁹ Anonymous interview conducted in Toronto, 9 January, 2013. (FED_LD01)

¹¹⁰ Barrier-free provinces, in *Financial Post*, 16 May, 1991.

Columbia gives local manufacturers a 5-per-cent advantage over provincial competitors and a 10-per-cent advantage over foreign suppliers”¹¹¹.

All in all, from 1867 up until the early 1980s “without imposing a single tariff, Canadians have created a bewildering maze of barriers”¹¹². All these point toward a specific role attribution that emerged from within the Canadian federal system. It seemed as if the individual provinces were single contenders against one another. There was no coordination of trade policies across jurisdictions, rather a competition thereof. The most important principle of the day to be followed was to defend their provincial interests and economies which limited the possibilities of open discussions and consequently did not allow for the emergence of federal principles pointing towards collaboration. As one former senior federal official put it:

“All governments, the federal as well as provincial, tended to see the problem in “zero sum” terms – any reduction in provincial authority would increase the federal government’s jurisdiction and any formal cooperative agreement for managing domestic market would allow the national government to intervene in provincial affairs”¹¹³.

As it was argued, “discriminatory policies [in internal trade] are systematic, wide-ranging and deeply-rooted”¹¹⁴. John Manley, the federal industry minister during the time of the intergovernmental negotiations described the original situation as follows: “the context of what we are starting from (...) is a state of essential *anarchy* when it comes to interprovincial trade barriers”¹¹⁵. A former trade representative from the Western provinces argued that at the beginning “it was a matter of perception whether provinces looked at trade barriers as a matter of competition or as barriers (...) which is essentially a cultural issue”¹¹⁶. Within this context, there was clearly an unwillingness of either amending the legislative or constitutional framework or dealing with the issue through the channels of ‘executive federalism’ which was best manifested by the fact that the 1982 Constitution Act did not change either Section 91(2) or Section 121 of the British North America Act. In fact, the only impact on these sections of the constitution came from the Charter of Rights and Freedoms which allowed for greater mobility across Canada. Most of the debates focused on inter-provincial transportation

¹¹¹ Divide and damage, in *The Globe and Mail*, 10 December, 1983.

¹¹² From sea to sea, internal trade’s not free, in *The Globe and Mail*, 2 November, 1987.

¹¹³ See Knox (1997: 5).

¹¹⁴ Provincial hurdles are high, in *The Globe and Mail*, 3 May, 1978.

¹¹⁵ Trade: July deadline to dismantle provincial barriers, in *Calgary Herald*, 28 June, 1994.

¹¹⁶ Anonymous interview conducted in Toronto, 24 October, 2012. (PROV_LD01)

and inter-provincial trade of agricultural products and were limited to the Commons without much attention given to the topic by provincial governments or legislatures.

In sum, intergovernmental relations within this early period from 1867 to the mid 1980s can be characterized as extremely competitive. Despite the constitutional ambiguity of inter-provincial trade, Supreme Court decisions and the number of trade barriers erected suggest that provinces did not consider the topic complex and sensitive so that it would call for system-wide solutions. Autonomy was the dominant principle and it was understood as the independence of decision-making authority. The prevalence of the principle of self-determination is indicated also by the fact that trade barriers were created despite the federal government's constitutional responsibility over trade and commerce. As *Peter Lougheed*, the former Premier of Alberta argued: "we feel pretty strongly that the jurisdiction (...) is divided"¹¹⁷. However, the individual provinces did not look at the issue as something of a national concern, as it was argued by an official, and therefore no traces of the principles of loyalty and partnership can be found in intergovernmental relations. At this point the complexity of the matter was handled through individual decisions while sensitivity did not play a role. In return, there was no open discussion on the topic that did not allow for the adoption of federal principles that would have impacted on intergovernmental relations.

3.2.) From the Macdonald Commission to the Meech Lake Accord – the recognition of the sensitivity and complexity of the internal trade issue

Slowly but surely, however, it became clear that regional development in Canada was only feasible if the provinces got rid of their trade barriers and discriminatory commercial practices and there was greater integration in the area of internal trade. By the 1980s considerations of internal trade integration intensified as the existing framework did not seem to serve the interests of the people and the businesses any more. "Worldwide trends toward increased economic integration (...) clearly had an important impact on the political and economic climate facing the framers of [an internal trade agreement]" (MacDonald, 2002: 141). As one former senior federal official put it, there was a national consensus emerging that regarded "the value of markets and freer trade as an essential ingredient of economic growth" (Knox, 1997: 3). At this time, "public contempt for barriers to internal trade [was already] out of proportion (...) Canadians [were] offended, as Canadians, at internal barriers to trade and

¹¹⁷ Alberta Hansard, 6 April, 1976, p. 576.

mobility (...) it [has become] as much an emotional as an economic issue”¹¹⁸. Both complexity and sensitivity of the inter-provincial trade file became visible. Consequently, in 1982, Prime Minister Pierre Trudeau appointed the Royal Commission on the Economic Union and Development Prospects for Canada to inquire further into the “unfinished subject of the economic union” (Macdonald, 2005: 6) in Canada, and the issue of internal trade within. The Macdonald Commission, as it was labeled in short, took three years to complete its analysis and presented its report to the Mulroney government in 1985. During its work, it held numerous public hearings, visited public administration at the different levels, invited and received an abundance of briefs from all over the country, commissioned many specialized studies, and accumulated a lot of data concerning the economic situation of the country. However, “the impact of such commissions is not to be judged solely by the number of recommendations adopted (...) [they] also shape Canadian political agenda and the conceptions Canadians hold of their federal system (...) the major contribution of the Macdonald Commission (...) [was] its impact on the never ending Canadian task of collective self-education” (Watts, 1986: 177). In the commission’s own words: “the contribution (...) [was] largely educational: to step back from the political process and take a long view which can contribute a different perspective” (vol 1., p. 24).

The Macdonald Commission “was billed as an opportunity for Canadians to put forward, in the broadest terms, their views on the economic future of their country, to put aside narrow sectoral and factional priorities and focus on a wider national goal”¹¹⁹. It served as a deliberative forum through which the complicated elements of the economic union, among them internal trade could and should be addressed. The relevance of the Macdonald Commission can be grasped through its impact on the political agenda and public discourse. As Donald Macdonald, the head of the commission put it: „Our analysis will structure the political debate in this country for at least another three decades”¹²⁰. Indeed, the commission and its report influenced the thinking on inter-provincial trade barriers and the issue of internal trade even if it was disguised under the discussion on the planned free-trade agreement with the United States. Consequently, while it “made extensive recommendations for an ambitious set of mechanisms to reduce internal trade”¹²¹, its more prominent recommendations dealt with the need for a free trade agreement with the United States” (Knox, 1997: 5-6). Yet, due to the workings of the commission, the issue of internal trade

¹¹⁸ Our trade barriers, in *The Globe and Mail*, 28 October, 1985.

¹¹⁹ All sound and fury seeking significance, in *The Globe and Mail*, 12 December, 1983.

¹²⁰ Flood of briefs breaks no new ground, in *The Globe and Mail*, 9 December, 1983.

¹²¹ Vol. III., p. 135-140.

barriers slowly but surely became a part of an ongoing political discourse. During its many hearings, the president of the Canadian Construction Association said “barriers are totally unacceptable (...) the practice of preferential trade reache[d] ridiculous extremes (...) Politicians at all levels of government must realize the urgency of breaking down these barriers (...) as a means of reaping economic benefits”¹²². As one former senior federal official argued “internal trade was really not an issue in and of itself until 1985 (...) the Macdonald Commission made trade negotiations ‘popular’ among the provinces and the federal government”¹²³.

According to the commission there was a clear political rationale beyond the economic one to build down these barriers, and therefore it proposed the development of a ‘Code of Economic Conduct’ as a resolution to tackle the issue:

“The principal vehicle for initiating the development of a Code of Economic Conduct and for implementing it should be a federal-provincial Council of Ministers for Economic Development, established under the umbrella of the First Ministers’ Conference. This ministerial council would be assisted by a Federal-Provincial Commission on the Canadian Economic Union consisting of a group of experts appointed by the Council” (Vol. III., p. 138).

After the report was delivered in 1985, there was considerably more openness from each order of government to address the issue once again. In fact, a 1985 intergovernmental paper, *On the Principles and Framework for Regional Economic Development*, suggested that “governments should explore opportunities for increasing interregional trade and eliminating barriers between provinces” (p. 13). The most relevant feature of this development was the fact that it was “the first time that all Canadian governments had given serious attention to internal trade as a significant policy issue” (Doern and MacDonald, 1999: 41). In Alberta, for instance the first explicit reference to the reduction of inter-provincial trade barriers in the provincial legislature was made on 19 June, 1986 when one member of the Assembly raised the following question: “When the first ministers from across Canada get together, is discussion as to how interprovincial trade barriers are being eliminated between the provinces in this country *ever on the agenda?* (...) Do they sit down and ask each other how we can remove some of these barriers between provincial governments?”¹²⁴

¹²² Barriers to Builders, in *The Globe and Mail*, 4 November, 1985.

¹²³ Anonymous interview conducted in Toronto, 29 September, 2012. (FED_LD02)

¹²⁴ Alberta Hansard, 19 June, 1986, p. 121. Emphasis added by the author.

As a response, the 1986 Annual Premiers' Conference agreed to a set of steps that should help reduce inter-provincial barriers. The aim was to create a permanent mechanism and to set guiding principles to reduce barriers. It "represented a strong statement from the premiers about internal trade, and (...) it was this political impetus that truly started the internal-trade ball rolling" (Doern and MacDonald, 1999: 42).

It could be argued that during the period of 1982-1987 the issue of internal trade has become a central part of the political agenda. Before the Macdonald Commission, inter-provincial trade barriers have been considered as the necessary wrong within intergovernmental relations based on the strong dominance of the principle of self-determination and autonomy as manifested in the defense of provincial sovereignty and interests and in the extreme lack of interest in discussions among provinces. By the mid-1980s, nevertheless, the topic has become an eyesore among the most relevant actors. "Increasing pressure from pan-Canadian business associations, such as the Canadian Manufacturers' Association and the Canadian Chamber of Commerce, gave a political impetus (...) for a common understanding in all jurisdictions about the need for greater efficiency in domestic trade" (MacDonald, 2002: 141). It was also about this time when further studies were provided by the C. D. Howe Institute and the Canada West Foundation that contributed to the 'national' framing of the internal trade problem highlighting its complexity and sensitivity to the different orders of government. As one official explained:

"Interest groups have defined it [i.e. the inter-provincial trade barriers] as a national issue across the country...Yet, we have regions, we have all kinds of subsidy issues, we have all kinds of economic disparity issues, we have regional issues that are different in the East than to the West"¹²⁵.

In general, national papers (The Globe and Mail, The Financial Post) of the time started to write on the topic on a more regular basis. In sum, the awareness of the issue and its complexity, and sensitivity has created an atmosphere where the different orders of government started to open up to deliberations. The complexity of the matter was demonstrated through the abundance of topics the negotiations were supposed to settle, whereas the impact of sensitivity could be traced through the involvement of the highest political levels. As one provincial official argued: "I clearly remember the Premiers saying: 'Let's do this!' Then they established the focus of negotiations (...) However, there was an extreme lack of sophistication amongst provinces about what trade negotiations were

¹²⁵ Anonymous interview conducted in Ottawa, 7 December, 2012. (PROV_LD03)

about”¹²⁶. This remark not only stresses the novelty of the situation but also indicates the difficulty of the provincial governments to set their preferences in this new environment. In fact, as a former trade representative argued “not all were that well-informed”¹²⁷. There was very little *à priori* knowledge among the provinces that would relate to a comprehensive take of the inter-provincial trade problematique. There were issue-by-issue negotiations between provinces which also reinforced the separate positions of the individual governments and with it the principle of autonomy.

As argued before, the sensitivity of the issue pushed the topic to the highest political level, while the complexity of it and the novelty of the context within which it occurred made pre-negotiation preference formation extremely difficult while it also created incentives for open deliberations. The Annual Premiers’ Conference in 1986 resulted in the endorsement of four different initiatives to reduce trade barriers among the provinces. This was the first time the topic was explicitly addressed by the Premiers¹²⁸. Governments started to dedicate more attention to the topic and “in 1986, the Prime Minister and premiers set up two committees to address the problem. One was to deal with government procurement, the other with internal trade generally”¹²⁹.

The Canada West Foundation later argued that “the world-class economic research now being done all points to trade liberalization, including internal trade liberalization (within a country), as the best way to moving forward with economic development and job creation. This is a *major mindset change* which is yet to be fully understood by provincial governments”¹³⁰. The fact that the change was to be perceived more in the ideational structure rather than influenced by instrumental cost-benefit analysis is due to the low scale of the inter-provincial trade barriers. It was reported that

“only 27 per cent of Canadian trade moves interprovincially, and “barriers directly affect little of that portion; most products move quite freely.” The same generalization applies to capital and labor. Perhaps one per cent of Canada's Gross National Product is lost to internal barriers, not a small number, but not an outrage either. Indeed (...) “There are many justifications for barriers and distortions” in a diverse federal state, and it is only “outright discrimination” that merits much concern”¹³¹.

¹²⁶ Anonymous interview conducted in Toronto, 12 November, 2012. (PROV_LD04)

¹²⁷ Anonymous interview conducted in Toronto, 29 January, 2013. (PROV_LD02)

¹²⁸ Before 1986, the topic was indirectly addressed through regional development (1970, 1973), overall economy considerations (1976, 1978, 1979, 1980, 1981, 1982, 1983, 1984) or inter-provincial relations (1978, 1981, 1982, 1984).

¹²⁹ Why not free trade at home?, in *Financial Post*, 20 June, 1989.

¹³⁰ Provinces’ trade rules cause grief, in *Calgary Herald*, 2 June, 1994.

¹³¹ The state of our union, in *The Globe and Mail*, 10 September, 1985.

A former senior official also expressed similar sentiments when he argued that “after all, it [the trade barriers] did not cost that much¹³², but there was an anecdotal feature to the issue that was more powerful and thus it has become a political issue that carried the day”¹³³. Yet, one has to note that inter-provincial trade amounted to \$146 billion in 1989 which almost equaled to the amount of trade with the rest of the world (\$160 billion)¹³⁴. Still, it is interesting to learn how an essentially economic issue transformed the mindset of the political elite and thus had an impact on their perception of the topic which then resulted in a different approach to intergovernmental relations. It could be argued, that after the Macdonald Commission delivered its report, discourse has changed considerably about the topic of inter-provincial trade barriers. It has transformed the role conceptions of the individual actors in a way that transcended the previous anarchical or rather chaotic approach as one official put it, and made it possible to construct new grounds for intergovernmental collaboration. It is important to note that the issue was not dominated by one individual actor (i.e. the federal government or a particular provincial one). As one retired official put it “...sort of everyone thought of it at the same time...cross-fertilization was all over the place”¹³⁵. This, in return, facilitated a different approach among the participating actors. In sum, with the growing acknowledgement of the complexity and sensitivity of the inter-provincial trade file, provincial governments proved to lead more open discussions that allowed for the adoption of federal principles in areas under their own jurisdiction.

3.3.) From the Meech Lake Accord to the Agreement on Internal Trade – the adoption of federal principles

As it was argued, the horizontal complexity and the sensitivity of the inter-provincial trade file created an incentive among the highest level of political actors to open deliberations. In return, as it is argued in this thesis, this leads to the adoption of federal principles in areas of provincial jurisdiction and consequently changes the character of intergovernmental relations. The first sign of change came in 1986 when premiers decided to address the issue of inter-provincial trade in a comprehensive manner. However, as discussions about a constitutional reform were also on the agenda, the problem of internal trade barriers was a bit eclipsed with

¹³² Estimates run from \$700 million to \$6.5 billion depending on the studies.

¹³³ Anonymous over-the-phone interview conducted in Brussels, 5 July, 2013. (PROV_IGR01)

¹³⁴ See e.g. Bring internal barriers down, in *Financial Post*, 4 March, 1994.

¹³⁵ Anonymous interview conducted in Toronto, 9 January, 2013. (FED_LD01)

the aim to bring Quebec back into the constitutional framework¹³⁶. Nevertheless, it is noteworthy that discussion on trade barrier reduction preceded constitutional reform movements, which suggests a great degree of independence between the two processes. This claim was endorsed by one of the chief negotiators to the AIT who argued that “both the Meech Lake and the Charlottetown Accords failed, but they didn’t fail because of the trade issue”¹³⁷.

The Meech Lake Accord (1987) included a reference to a Conference on the Economy¹³⁸ which was to be convened by the Prime Minister every year and all other First Ministers should have been part of it “to discuss the state of the Canadian economy” (proposed Section 148). This reform attempt indicates two things: first, it shows that there was an explicit aim to keep consultations as informal as possible through maintaining an intergovernmental format even if it was guaranteed by the constitution. Secondly, it highlighted the need for the involvement of the highest political level as premiers and the prime minister were expected to discuss issues concerning the economy once a year. Even though this conference on the economy was not explicitly addressing the issues of inter-provincial trade as it could deal with other matters as well (see proposed Section 148), it was a reflection on and an acknowledgement of the complexity and sensitivity of the topic. This proposal indicates that even though provincial interests still prevailed there was a growing sense of partnership among provinces as they wanted to enter into non-hegemonic relations to discuss common issues based on equality and consensus.

This was further buttressed in 1987, when Premiers established the Committee of Ministers on Internal Trade (CMIT). Its main responsibility was to identify existing and potential barriers to trade and reduce and remove these barriers through “consultation and appropriate negotiation and mediation processes” (Doern and MacDonald, 1999: 43) with businesses, industry associations, governments and individuals. From time to time it also had to report to the First Ministers’ Conference. Its importance lied in the fact that for the first time “a dedicated intergovernmental ministerial committee, armed with a clear mandate and resources for its accomplishment, was working in the internal-trade policy field (...) it also established a lasting forum for governments” (Doern and MacDonald, 1999: 43). From the beginning the CMIT was responsible for directing sector-specific negotiations from alcoholic beverages through professional mobility to public procurement. It proved to be a rather

¹³⁶ Quebec did not ratify the 1982 Constitution Act.

¹³⁷ Anonymous interview conducted in Toronto, 12 November, 2012. (PROV_LD04)

¹³⁸ Or Annual Meeting of First Ministers on the Economy, in First Ministers’ Conference on the Constitution, 3 June, 1987 (p. 19) <http://originaldocuments.ca/api/pdf/1stMinConfVerbTr1987Jun3.pdf>.

successful intergovernmental body that relied heavily on open deliberations. As ministers argued during the negotiations over public procurement in June, 1988: “barriers to inter-provincial trade that have evolved over 60 years are complex and will take considerable effort and good will among governments to resolve (...) [already] there was some movement among provincial ministers”¹³⁹. By 1992, the CMIT managed to deliver on two sector-specific issues, beer marketing and public procurement¹⁴⁰. It happened despite the fact that Quebec and Nova Scotia first rejected the public procurement deal¹⁴¹, while only six provinces approved the beer deal at the beginning.

Intergovernmental policy coordination in areas of exclusive provincial jurisdiction began to take shape between 1987 and 1992. The CMIT was the ideal place for policy deliberation: talks were generally conducted “in a black hole of secrecy”¹⁴², ‘small wins’, such as agreement on procurement created a positive atmosphere and increased trust among provinces. In general, “a signal was sent by the CMIT that intergovernmental negotiations were possible and that the institution that had been developed for this process was capable of facilitating agreements” (Doern and MacDonald, 1999: 44). As a former chief negotiator argued in relation to the procurement file: “at first there was a strong sense that procurement was a strong regional economic development tool, but then coming to an agreement about certain thresholds they would open up to other providers (...) and then it got subsequently extended twice (...) there was a clear evolution of willingness to open up your [provincial] market”¹⁴³.

Due to the deliberations mainly conducted through the CMIT, provincial governments started to adopt federal principles in areas under their own jurisdiction, which had a great impact on the character of intergovernmental relations. As argued before, the principle of partnership slowly developed which pushed the understanding of autonomy from independence to interdependence. Due to the partnership principle, the role of the federal government was quite constrained, and provincial governments acted rather skeptical towards any activism coming from the federal level. In 1991, a new document entitled *Shaping Canada’s Future Together*¹⁴⁴ came out that addressed the topic of inter-provincial trade barriers in an indirect yet very explicit manner. It argued that

¹³⁹ Ottawa, provinces closer on procurement package, in *The Globe and Mail*, 17, June, 1988.

¹⁴⁰ See Barrier-free provinces, in *Financial Post*, 16 May, 1991.

¹⁴¹ Quebec actually signed an agreement in principle and bilateral agreements with the other provinces.

¹⁴² Let our people trade (1), in *The Globe and Mail*, 5 April, 1994.

¹⁴³ Anonymous interview conducted in Toronto, 29 January, 2013. (PROV_LD02)

¹⁴⁴ <http://www.solon.org/Constitutions/Canada/English/Proposals/Proposal.english.txt>

“A strong and well-functioning domestic market is essential to the well-being of all Canadians. Existing barriers to the mobility of people, goods, services and capital within Canada impede trade among the provinces and limit the mobility of individual Canadians. The inability of Canadians to benefit fully from the advantages of an internal market weakens their ability to compete effectively in the global economy” (Part 3.1. under Enhancing Trade and Mobility in Canada).

The proposal made by the federal government called for a revision of Section 121 of the constitution so as to “enhance the mobility of persons, capital, services and goods within Canada by prohibiting any laws, programs or practices of the federal or provincial governments that constitute barriers or restrictions to such mobility” (Part 3.1. under Enhancing Trade and Mobility in Canada). A continued and common effort from the different orders of government was also called for to dismantle inter-provincial barriers to trade. In terms of the economic union, the accord aimed at shared responsibility where responses to challenges come from “intergovernmental collaboration and consultation” (Part 3.1. under Strengthening the Economic Union). These proposals were expected to serve as the basis to the Charlottetown Accord that was negotiated in 1992. However, due to a great level of skepticism coming from the provinces to alter the constitutional framework even with the insurance of prevailing intergovernmental procedures, these proposals found deaf ears. The federal government’s initiative actually went against the already established principle of partnership that required equality of the different orders of government in negotiations and consensus when it came to decisions. Unilateral action was simply not acceptable by the provinces already deeply involved in deliberative processes. As Jim Horsman, the Minister of Federal and Intergovernmental Affairs in Alberta argued in the provincial legislative assembly: “From our perspective at this stage, while we have endorsed in principle and have supported enthusiastically the real removal of inter-provincial trade barriers we are not prepared to accept handing over to the federal government the enormous club they are asking for in section 121 expansion”¹⁴⁵.

Even though the Consensus Report on the Constitution, and the draft legal text of the Charlottetown Accord set out “the free movement of persons, goods, services and capital”¹⁴⁶ as major policy objectives of the Social and Economic Union, it was to be achieved without altering the authority of any government or legislature in the process. Furthermore, as was the case with the Meech Lake Accord, this policy objective was supposed to be monitored in a

¹⁴⁵ Alberta Hansard, 26 June, 1992. p. 1675.

¹⁴⁶ Consensus Report on the Constitution, Charlottetown, 28 August, 1992, p. 2, <http://originaldocuments.ca/api/pdf/ConsensusReportOnTheConst1992Aug28.pdf>.

way that was decided by the First Ministers' Conference. It was also stressed that "Section 121 of the Constitution Act, 1867 would remain unchanged"¹⁴⁷. It became clear that any proposal that lacked the involvement of the provincial governments would result in a failure. Based on the aforesaid, it could be argued that neither attempt of formal revision of the constitutional framework aimed to change the arrangement around inter-provincial trade. Instead, as the complexity and sensitivity of the policy file pushed provincial governments to have open deliberations federal principles were adopted in areas under their own jurisdiction which altered the character of intergovernmental relations as well. The emergence of the partnership principle and its impact on autonomy has already been highlighted. Loyalty was gradually adopted which was detectable in the growing provincial commitment to build down inter-provincial trade barriers and the specific institutions that supported this aim. The principle of comity manifested itself in the working methods which aimed to reach agreement on the different matters through compromises. As the details of an intergovernmental agreement did not take shape yet, considerations of proportionality and mutuality were rather scarce at this point. However, flexibility and open-endedness as principles were increasingly internalized by the provincial governments. Therefore, instead of arguing that the failed attempts to revise the constitutional distribution of powers have led to an alternative in the form of intergovernmental agreement, it should be argued that provincial governments turned towards informal policy coordination deliberately, which attitude was further strengthened over time. Consequently, instead of arguing that "the intellectual and political impetus for the reduction of intergovernmental trade barriers in Canada transcended the constitutional arena" (Doern and MacDonald, 1999: 39), it is rather questionable whether the issue had ever entered it. This has been further buttressed by the fact that even though both the Meech Lake and the Charlottetown Accords failed to gain support from the provinces, intergovernmental deliberations on inter-provincial trade barriers continued (see also quote before).

After the defeat of the Charlottetown Accord in October, 1992, the CMIT announced an agreement on a comprehensive framework to internal trade negotiations which it had been working on since 1987. The idea was first to deliberate on the principles upon which the comprehensive trade negotiations could start. To help the process a special task force was called into life based on equal representation. In less than six years, the participants "institutionalized a federal-provincial policy process for trade-barrier reduction, established a set of principles and applications for internal trade, and made explicit the rules for the

¹⁴⁷ Ibid. p. 3.

negotiations of an agreement” (Doern and MacDonald, 1999: 43). In March, 1993, during a meeting in Montréal, the CMIT announced that it would start the comprehensive negotiations by 1 July, 1993 which shall be concluded by 30 June, 1994. Trade Minister Michael Wilson described this action as “an important step (...) toward the elimination of interprovincial trade barriers”¹⁴⁸.

“Unlike many previous intergovernmental policy efforts, the internal trade process was also supported by a new set of institutions designed specifically to deal with policy making through negotiation between jurisdictions” (Doern and MacDonald, 1999: 45). They have introduced a neutral chair to the process, the role of which proved to be extremely relevant at the end. As one government document put it: “negotiations would not have been successful using co-chairs from the federal government and a province”¹⁴⁹. Furthermore there was a Secretariat which reported to this Chair, and was responsible to “provide analytical resources (...) [which] was valuable in terms of establishing a common level of understanding” (Doern and MacDonald, 1999: 55). Even though it was staffed and paid for mainly by the federal government, it was separate from the Federal Chief Negotiator. In fact, based on interview materials it became clear that there was often a conflict between these two actors, as the Secretariat often challenged the position of the federal government. The substantial issues were negotiated through ‘tables’ of sector specialists from all jurisdictions where one jurisdiction was always the Chair. This setup ensured that responsibility was distributed and “provinces, functioning as the lead on an issue, had to mediate among various positions, including their own”¹⁵⁰, as a government review paper summed it up. Issues that could not be settled at the tables were sent back to the neutral Chair. This not only created a sense of ownership among the participating actors, but also reflected the heterarchical nature of the procedures, which also indicates that provinces adopted the principle of partnership in their intergovernmental interactions. Despite the strong sense of regionalism in Canada, a former federal official argued that provinces “managed to create a strong sense of a group that was national and complete”¹⁵¹.

As for the main principles, right at the beginning, a pragmatic view of federalism was adopted. According to a former official, “there was a strong commitment to go through the

¹⁴⁸ Trade barrier talks set for July, in *Financial Post*, 19 March, 1993.

¹⁴⁹ A Government Review Paper: Case Study on Federal-Provincial Collaboration - Internal Trade. 14 February, 1995.

¹⁵⁰ A Government Review Paper: Case Study on Federal-Provincial Collaboration - Internal Trade. 14 February, 1995.

¹⁵¹ Anonymous interview conducted in Toronto, 9 January, 2013. (FED_LD01)

negotiation process”¹⁵². One federal official during the negotiations stressed that “I think there really is a serious desire to get an agreement”¹⁵³. This accepted aim is further buttressed by a government review paper which stated that the constant political leadership of the Ministers was a huge factor in the success of the negotiations as it “led their officials in terms of commitment to the process and willingness to change”¹⁵⁴. This commitment was explained by one former federal official as follows: “threats of walking away from the table wasn’t really considered by anyone...we entered into negotiations so you’d better have a d--n good reason to walk away from it”¹⁵⁵. Furthermore, as one federal official highlighted it:

“There was a general understanding that a political instead of a constitutional agreement was negotiated. [It was important to stress] as constitutional negotiations create a rather all or nothing scenario, whereas intergovernmental relations provide with a lot of room to accommodate negotiations”¹⁵⁶.

This has been supported by another public servant who argued that:

“One of the most important norms throughout the negotiations was to deal with the practical problems created by the federation without disturbing it (...) You simply did not want to constitutionalize...rather we were aiming at a mutually acceptable undertaking that was definitely not legal in nature, as it did not change the constitution”¹⁵⁷.

As for the institutions, one of the formal trade representatives to the AIT argued that “Ministers first met every two months, then monthly, and at the end of the negotiation process, every two weeks (...) while the chief negotiator came from the trade ministry, the alternate chief negotiator resided in the Premier’s office, which indicates that there was a lot of political involvement”¹⁵⁸. The general setting was that ministers had a private dinner which was then followed by a ministers’ breakfast where often the chief negotiators were present as well. This was then followed by the full day meeting where delegations would increase in number due to administrative personnel. Ministers were pre-briefed before meetings and they negotiated with the presence of the federal government as well.

¹⁵² Anonymous interview conducted in Toronto, 25 September, 2012. (PROV_LD05)

¹⁵³ Ontario cries ‘no fair’ in trade proposal, in *Calgary Herald*, 4 April, 1994.

¹⁵⁴ A Government Review Paper: Case Study on Federal-Provincial Collaboration - Internal Trade. 14 February, 1995.

¹⁵⁵ Anonymous interview conducted in Toronto, 29 September, 2012. (FED_LD02)

¹⁵⁶ Anonymous interview conducted in Toronto, 9 January, 2013. (FED_LD01)

¹⁵⁷ Anonymous over-the-phone interview conducted in Brussels, 6 April, 2012. (PROV_IGR02)

¹⁵⁸ Anonymous interview conducted in Toronto, 24 October, 2012. (PROV_LD01)

When it comes to the individual actors, their role during the negotiations shall be analyzed more in detail to uncover the internalization of principles underlying collaborative patterns of intergovernmental interactions. For feasibility reasons, this thesis only covers the positions of five provinces (British Columbia, Alberta, Ontario, Quebec and New Brunswick) and the federal government. Before we turn to the individual cases, it is important to stress that positions have varied throughout the negotiations which did not have any correlation with partisanship.

Alberta was a strong supporter of the internal trade file. Its Conservative government had a strong ideological position for liberalization. The Klein government was willing to give up Alberta's own remaining barriers, even though "it did know that internal free trade could mean giving up some of its resource-related instruments, that had in the past contributed to the building of the Alberta oil-and-gas and petrochemical industry" (Doern and MacDonald, 1999: 60). This already indicates a willingness to give up a purely instrumental cost-benefit analysis-based behavior, and rather adopt a more other-regarding one. There was a strong commitment on behalf of the Alberta government for provincial consultations, and even though it "defended the position that constitutional powers could not be changed by the agreement, but it tended (...) to seek (...) 'policy flexibility'" (Doern and MacDonald, 1999: 62). Flexibility, indeed, was a crucial factor, as one federal official put it: "if there is no flexibility, you could start to see people reserving their right to walk"¹⁵⁹. As for commitment, Jim Horsman put it during the negotiations: "[w]e have to have free trade within Canada if we are going to have it with the U.S. and Mexico"¹⁶⁰. During the negotiations, Alberta showed a certain sensitivity towards Quebec when it tempered its push for a retaliation clause. The deliberative procedures of the negotiations have been highlighted by Jim Horsman in an article where he stated that "we have examined our practices and policies and legislation and regulations that could create barriers, [and] we have also identified the sins and transgressions of our neighbors"¹⁶¹.

British Columbia was as skeptical about the whole internal trade project as much Alberta was a strong supporter to it. The BC government was quite hostile and suspicious during the negotiations and considered the whole process an instrument of the federal government to weaken provincial powers¹⁶². Yet, BC participated fully in the discussions, and

¹⁵⁹ Ontario cries 'no fair' in trade proposal, in *Calgary Herald*, 4 April, 1994.

¹⁶⁰ Rules drafted to eliminate provincial trade barriers, in *Calgary Herald*, 5 November, 1993.

¹⁶¹ Trade barriers tumbling, in *Calgary Herald*, 19 February, 1994.

¹⁶² See e.g. „Mr Clark [minister of employment and investment at the time] said B.C. would prefer to reach sector-by-sector deals with other provinces and not an all-encompassing free trade panel approach, a

surprisingly, “its negotiators were knowledgeable and experienced, but it was felt by other negotiating teams that they also tended to go beyond what their political masters would, in the end, tolerate” (Doern and MacDonald, 1999: 70). This indicates the flexibility of preferences, as they have been formed through the negotiating processes. What is interesting also, is the fact that BC, even though uninterested and skeptical about the process, did not walk away from the talks and the signing of the agreement at the end. Also, it has to be noted, that similarly to the Ontario government, BC attempted to push for an incremental sector-by-sector approach during the negotiations, however, this position has been abandoned during the process. In other words, a purely instrumental approach cannot describe the behavior of the BC government. Rather it could be argued that ideational factors played an equally important role which informed the role conceptions and the basic norms driving the procedures.

As for Quebec, the Bourassa government showed a desire for federal-provincial progress on the issue, thus, it approached the negotiations “in an extremely serious but low-profile manner” (Doern and MacDonald, 1999: 64). For Quebec, the timing and the topic was extremely delicate. On the one hand, the provincial government had to prove that accommodation of the provincial interests was still possible within the federation after the constitutional failures of Meech Lake and Charlottetown. It was determined to show that progress was possible within the federation without having to cede further powers to the federal government.

In Ontario, the government led by the NDP Premier Bob Rae approached the internal trade portfolio in a rather cautious and reluctant manner. As mentioned before, the Ontario government shared the basic idea of taking a sector-specific look at the negotiations instead of establishing general rules for the future which could bind the hands of provincial governments. Failing that, “in the resulting agreement [it] sought to maximize the exceptions and legitimate objectives and to minimize general rules and dispute settlement” (Doern and MacDonald, 1999: 81-82). However, similarly to all other provinces it remained open to discussions, yet, opposed any legalistic accord that would “hamstring [the government] around areas of public policy at the provincial level”¹⁶³. Furthermore, Ontario also insisted that disputes would not be referred to the courts, yet remained open to the idea of some form of arbitration.

bureaucratic approach”, in Ottawa, provinces agree to end some trade barriers, in *The Globe and Mail*, 29 June, 1994.

¹⁶³ Consensus on trade barriers elusive, in *The Toronto Star*, 19 January, 1994.

Last, but not least, New Brunswick, the province that traditionally had an open trading history, was a great promoter of inter-provincial trade deals before the idea of a pan-Canadian issue came up. Premier Frank McKenna often pushed the participants in a rather aggressive way, as during the time when he threatened to resign from the trade-barrier committee, because “he [was] running out of patience with the lack of progress on knocking down barriers to commerce between the provinces”¹⁶⁴. Even though he turned to a radical tool that might be considered among those used to achieve self-interest among actors, yet, it has to be noted, that the threat of resignation was not used to avoid certain decision and action, but on the contrary, it was initiated to move things forward. In a sense, it was a coercive action to make other actors adopt the norm to go through with the process in a comprehensive manner.

In general, participants seem to have been quite open during the discussions. Consequently, as an official from the Western provinces expressed it in relation to the negotiations: “people changed their minds and positions”¹⁶⁵. A government review paper suggests the flexibility of preferences as well and highlights the importance of deliberative procedures by stating that “the preference was to identify issues through discussion”¹⁶⁶. Furthermore, “At the start, most governments probably did not appreciate the implications of their commitments. They were generally reluctant to take any substantive action”¹⁶⁷. However, they “gradually accepted the need for a comprehensive undertaking when other options were demonstrated to be ineffective”¹⁶⁸. This was supported by the fact that mandates for provincial officials given by ministers were somewhat obscure which gave the necessary flexibility to the negotiations and made it a negotiation where positions could change. Furthermore, one of the most helpful institutional settings that helped achieve the goal of flexible preferences was “(...) the private meetings that give Premiers face-time together where they could get away from officials and they are not directed which helps build closer trust ties among themselves”¹⁶⁹. Furthermore, as a retired public servant highlighted it: “Throughout the negotiations, ministers met to resolve contested issues on a regular basis based on the reports they received”¹⁷⁰. It is important to stress that neither order of

¹⁶⁴ Provincial barriers must drop, in *Financial Post*, 24 August, 1989.

¹⁶⁵ Anonymous interview conducted in Toronto, 10 January, 2013. (PROV_LD06)

¹⁶⁶ A Government Review Paper: Case Study on Federal-Provincial Collaboration - Internal Trade. 14 February, 1995.

¹⁶⁷ A Government Review Paper: Case Study on Federal-Provincial Collaboration - Internal Trade. 14 February, 1995.

¹⁶⁸ A Government Review Paper: Case Study on Federal-Provincial Collaboration - Internal Trade. 14 February, 1995.

¹⁶⁹ Anonymous interview conducted in Toronto, 7 December, 2012. (PROV_IGR03)

¹⁷⁰ Anonymous interview conducted in Toronto, 6 January, 2013. (PROV_IGR04)

government could reach its interests without the other. Therefore, there was no hierarchical relationship involved in the negotiations, but rather heterarchy dominated the decisions. John Manley, the federal industry minister at the time, argued that

“Our governments have achieved this voluntarily, not through an arbitrary and contentious attempt to use federal powers or other forms of coercion. I believe this agreement demonstrates that, even with significant regional and partisan differences among the federal, provincial and territorial governments, there is common ground on a major issue. It is an important win for Canada”¹⁷¹.

As one former senior official put it:

“Canada is a federation of equals. Consequently, the federal government never thought of itself as the official leader of the negotiations. Its role was rather to ensure that the national, Canadian interests were protected and no regional interest would distort the process”¹⁷².

In a sense, the federal order of government became the guarantor of policy coherence without taking the whole issue over from the provinces: “the federal government took the reigns of the constitution but kept it loose” – as one former official explained¹⁷³. This has been facilitated by the fact, as a review paper suggests it, that “provincial ownership of the issue allowed the federal government to act as an honest broker leaving most of the responsibility to the provinces”¹⁷⁴.

The period from the Meech Lake Agreement in 1987 to the signing of the Agreement on Internal Trade in 1994 was a highly interesting period from the point of view of intergovernmental relations. As it was demonstrated, the growing complexity of the inter-provincial trade file encouraged provincial governments to enter into open discussions while the sensitivity of the topic pushed them towards intergovernmental arrangements. This led to a gradual adoption of federal principles in intergovernmental relations. As one provincial official explained it, “the only way that was feasible was intergovernmental to do some kind of quasi-legal agreement that would show good faith to the Canadian people”¹⁷⁵. As it was demonstrated, provinces adopted the partnership principle to ensure equality and a non-

¹⁷¹ To demolish the trade walls between provinces, in *The Globe and Mail*, 5 July, 1994.

¹⁷² Anonymous interview conducted in Toronto, 9 January, 2013. (FED_LD01)

¹⁷³ Anonymous interview conducted in Ottawa, 6 November, 2012. (FED_IGR01)

¹⁷⁴ A Government Review Paper: Case Study on Federal-Provincial Collaboration - Internal Trade. 14 February, 1995.

¹⁷⁵ Anonymous interview conducted in Ottawa, 7 December, 2012. (PROV_LD02)

hegemonic environment to resolve inter-provincial trade disputes. They based their decisions on consensus which manifested itself in the institutional arrangements as well. The unilateral proposition of the federal government to change the constitutional setting was rejected by the provinces both on a substantive (i.e. no need for increased federal power) and a procedural account (i.e. lack of collaboration). The fact that deliberations on the removal of trade barriers continued without any disturbance caused by the failure of the Charlottetown Accord suggests that provincial governments deliberately did not want to address the issue in a formal legislative manner. Loyalty was reflected in the commitment of provincial governments to look at the question of inter-provincial trade as a common issue whereas comity represented itself in the actions of the provinces which were based on compromise, a gradual evolution of positions in relation to specific topics, and fair play (e.g. no threats used). Unity was expressed in the comprehensive framework which was founded on principles of the negotiations while diversity was ensured through individual tables that addressed separate questions. It was also reflected in the institutional setting that guaranteed a non-centralized environment (e.g. neutral chair) which also signaled the gradual adoption of the proportionality and mutuality principles. Flexibility was ensured by the open-endedness of the overall process which eventually led to the signing of the AIT. In sum, the period between 1987 and 1994 saw the emergence of collaborative federalism which was based on intergovernmental relations that founded on a specific combination of federal principles.

3.4.) The Agreement on Internal Trade and the institutionalization of collaborative federalism

The intergovernmental procedure of coordinating provincial jurisdictions in the area of internal trade led to the official signature of the Agreement on Internal Trade (AIT) in 1994. The AIT is a comprehensive agreement inasmuch as it covers a wide range of trade-related policy areas (see the different chapters of the agreement). It is a political rather than a legal document and its importance lies in the fact that it covers areas of provincial jurisdiction (e.g. public procurement, energy, etc.) which need to be coordinated for a better functioning economic union (see Poirier, 2001). As an official put it, the main aim of the agreement is to build down the trade barriers between the provinces in a way that “does not interfere with the separation of powers as provided in the Canadian constitution. The AIT merely constitutes a

structure that allows collaboration amongst provincial/territorial and federal governments”¹⁷⁶. In that it is different from national regimes, such as the Medicare which is founded on federal legislation.

The AIT is an institutionalized manifestation of collaborative intergovernmental relations. First and foremost, Chapter 1 of the agreement lists the more important principles that the contracting parties agreed to. They reflect the federal principles that inform collaborative intergovernmental interactions. Article 100 acknowledges the loyalty principle, whereas Article 101 (3[a-b]) speaks to both the partnership and the comity principles. The reaffirmation of constitutional powers and responsibilities (Article 300) further indicates the adoption of the partnership principle. Despite the political nature of the document (the AIT is not legally binding) it attempts to formalize intergovernmental institutions as well (Chapter 16). The Committee on Internal Trade reflects the partnership principle inasmuch as it provides for a rotating chairperson, and a general consensus provision with regard to its decisions and recommendations. The Secretariat was established to provide administrative and operational support to the Committee and its head is appointed by the Committee. The partnership principle is ensured by its funding scheme which divides the costs between the federal government and the provinces equally. The role of Working Group on Adjustment is to provide recommendations to the contracting parties for appropriate action to assist them in their compliance with the agreement. The working group is also based on equal representation. ‘Unity in diversity’ is preserved through the freedom of policy actions while maintaining common objectives, while the established institutions also guarantee the principles of flexibility and open-endedness as the agreement itself is an on-going process.

Beyond these formalized intergovernmental institutions it is important to note that the Council of Federation (CoF), the successor of the former Annual Premiers’ Conference (APC), has a significant role in the coordination of inter-provincial trade as well. Internal trade is one of the major concerns of the council, and it is very active in terms of providing an agenda for needed revisions of the agreement. Furthermore, as one provincial official pointed it out:

“The Council of the Federation has turned into a horizontal policy coordination body where Premiers lead on issues important for Canada...the nature of the CoF is different to that of its predecessor the Annual Premiers’ Conference...it is rather a CoF 2.0 nowadays with a role in policy coordination”¹⁷⁷.

¹⁷⁶ Anonymous over-the-phone interview conducted in Brussels, 6 April, 2012. (PROV_IGR02)

¹⁷⁷ Anonymous interview conducted in Toronto, 10 January 2013. (PROV_LD06)

As the political procedures of intergovernmental policy coordination substitutes the distribution of legislative decision-making powers, it is important to look at the complementary power-checking mechanisms as well that were established within the intergovernmental process. However, instead of looking at the topic from the point of view of subsidiarity (i.e. which order of government has a right to act), one needs to look at the operational core of subsidiarity and understand to what extent a certain power can be exercised independently. As argued before, the AIT emerged from within the intergovernmental arena, as provinces proved to be skeptical towards constitutional change. Consequently, as a retired official put it “the AIT agenda is almost entirely driven by 'politics'. Constitutional matters are rarely (if ever) discussed”¹⁷⁸. Nevertheless, the impact of the AIT cannot be underestimated, as “it does indeed remove or lessen the capacities of governments, especially provincial governments, to act in ways that had been possible in the previous three decades” (Doern and MacDonald, 1999: 154). “It is the discriminatory power of the provincial governments that have been most reined in. In short, the range of available provincial policy instruments has been narrowed” (Doern and MacDonald, 1999: 162). In other words, even though the constitutional distribution of legislative decision-making power remained intact, the deliberative procedure of intergovernmental coordination did alter the actual allocation of powers by constraining the exercise of power at the provincial level. However, the agreement further strengthens the collaborative character of the coordination as “the language of the deal is as if it was between sovereign states (...) Enforcement is almost non-existent (...) you would not know that it was a document within a federal system. The role of the federal government is just not there”¹⁷⁹.

The mutuality principle is reflected in the dispute resolution procedure (chapter 17) which has been reformed recently based on the 2004 Workplan. The dispute resolution procedure is either connected to a government-government dispute or a person-government one. During the procedure different panels may be called together depending on the subject. If one party to the agreement is not complying with the decisions of the panels in a given time monetary penalties (up to \$5 million), suspension of certain rights (e. g. right to dispute resolution), or other retaliatory actions may follow as consequences. Furthermore, the decisions of the dispute resolutions are not subject to judicial review (see article 1707.4), but

¹⁷⁸ Anonymous over-the-phone interview conducted in Brussels, 6 April, 2012. (PROV_IGR02)

¹⁷⁹ Ottawa's grip on economy at issue in debate over powers, in *The Globe and Mail*, 13 November, 1995.

each party shall take measures necessary to ensure that the decisions on monetary penalties may be enforced "in the same manner as an order against the Crown in that Party's superior courts" (article 1701.4 (b) i).

Last, but not least, the AIT highlights the fact that instead of the settled, static constitutional arrangement of jurisdictions, intergovernmental policy coordination renders the allocation of power open-ended. As one official put it "there is no end-step but the next step"¹⁸⁰. Accordingly, the AIT reflected the need for "some kind of institutional structure that would ensure the continuation of negotiations"¹⁸¹.

3.5.) Conclusion

The aim of this chapter was to show how provincial governments substituted formal competence transfers and subsequent centralized legislative decisions with intergovernmental policy coordination to settle cross-jurisdictional challenges in the area of internal trade. Contrary to the argument where either micro-level (see Bolleyer, 2009) or macro-level institutional changes have an impact on the character of intergovernmental relations it was shown that the nature of the policy challenge has led to transformative exchanges at the interaction level. It was argued that the complexity and the sensitivity of the internal trade file created incentives for the different orders of government to enter into policy deliberations. These deliberations on the other hand allowed for the adoption of federal principles that had a great impact on intergovernmental relations and their outputs in the long run.

First, through an analysis of the constitutional framework around internal trade it was demonstrated how little the corresponding sections of the fundamental law of the country have facilitated intergovernmental cooperation among and within the different orders of government. To the contrary, as it was described by one senior federal official relations were anarchic when it came to internal trade barriers. This was manifested in the numerous non-tariff barriers that had been introduced by the individual jurisdictions in the shadows of Supreme Court jurisprudence. Consequently, the period from 1867 to the 1980s is thought to have operated on the basic principle of self-determination and autonomy: the independence of the jurisdictions was stressed and defended through discriminatory trade practices, there was no institutional development among the participating actors, and legislative actions dominated which could be traced through the number of court cases relating to the topic. That this role

¹⁸⁰ Anonymous over-the-phone interview conducted in Brussels, 6 April, 2012. (PROV_IGR02)

¹⁸¹ Anonymous interview conducted in Toronto, 9 January, 2013. (FED_LD01)

attribution was internalized deeply by the individual actors is demonstrated by the fact that neither the federal, nor the provincial levels of government showed willingness to deal with the topic in a comprehensive manner. It was expected and accepted that non-tariff barriers existed and there was no real discussion on changing the *status quo*. The Rowell-Sirois Commission Report and its impact are good indications on how little attention was paid to the issue beyond the ad-hoc individual cases that made it to the JCPC or the Supreme Court's table. The relative unimportance of internal trade barriers in the political agenda was further buttressed by the 1982 Constitution Act which did not alter either Section 91(2) or Section 121, the two articles regulating trade. In sum, inter-provincial trade barriers were judged as neither complex nor sensitive by the different orders of government.

The role of the Macdonald Commission in pushing the topic of internal trade barriers to the agenda of both orders of government could be summarized in the extensive pan-Canadian activity it initiated through its public hearings, accepted briefs, disseminated special studies, and accumulated data which contributed greatly to the change of intergovernmental relations. From the start of its work in 1982 through its report in 1985 and its impact up until 1987, one could sense a slow but steady shift in the behavior of the actors involved. However, this change was more transformative as one might suggest from a first quick glance. The former competitive, even anarchic character of intergovernmental relations shifted towards a rather collaborative one where individual provinces started to recognize the need to coordinate in order to be able to achieve a better functioning economic union across Canada. The growing complexity of the topic encouraged provincial governments to adopt federal principles in areas under their own jurisdiction, while the sensitivity of it pushed them towards informal intergovernmental arrangements. All of a sudden they came to realize that pan-Canadian policy decisions should and could be delivered through greater, deeper intergovernmental coordination. Public and business contempt towards internal trade barriers has grown and it gained recognition through the workings of the Macdonald Commission. The impact of the report it delivered could be traced through the intergovernmental activity it initiated right away (e.g. an intergovernmental paper on regional economic development). For the first time in history, considerable attention has been given to the problem of internal trade barriers by the different orders of government. It is as if they recognized the fact that they were all in the same boat, and suddenly there was an internal pressure to resolve the issue. In the footsteps of the Macdonald Commission political and public discourse pointed towards a resolution. Yet, the nature of this resolution was still unclear.

As it was demonstrated in the beginning of the second sub-chapter neither the Meech Lake nor the Charlottetown Accord wanted to formally change the constitutional framework around inter-provincial trade. Through the workings of the CMIT, it was demonstrated how independently internal trade was handled from the issue of constitutional reforms. It was argued that instead of the failed accords pushing provincial governments towards more informal resolutions, intergovernmental policy coordination was a gradually developing yet deliberate decision on their account to handle cross-jurisdictional challenges in inter-provincial trade. Along with a number of supporting institutions, the environment was set for further deliberative procedures to take place. Due to the complexity of the issue, and the different levels of knowledge the individual actors had concerning trade barriers, preferences were not set before the negotiations. In fact, positions often shifted during intergovernmental meetings and other-regarding actions occurred from time to time among the different actors. Whether taking Alberta's strong commitment to the cause despite its possible negative effects on its industries or its consideration of the position of Quebec on the retaliation clause, or British Columbia's participation and approval of the agreement despite its many critiques, numerous instances indicate the emergence of this sentiment which indicates a different culture of intergovernmentalism in place. Ontario and British Columbia accepted the comprehensive approach once it has been demonstrated that a sectoral one could not resolve the problems effectively. Deliberative procedures have been quite dominant throughout the negotiations and its results then have been incorporated within a concluding agreement.

The Agreement on Internal Trade is a political document, yet, it is a manifestation of the internalization of the changed culture of intergovernmental relations that occurred from 1982 to its signing, and which was informed by a changed role conception among the participating actors. Even though, the AIT does not change the constitutional arrangement within the area of trade, it does have an impact on the capabilities of governments when it comes to trade regulation. In this sense, the AIT institutionalizes the changed culture of intergovernmental relations. It demonstrates that pan-Canadian policy decisions do not necessarily come out of the legislative decision-making procedures in Ottawa, but could also emerge from within the intergovernmental procedures among the different orders of government. In terms of the overall federal system, thus, it could be argued that "the simple fact that governing the economic union is now a shared responsibility of both federal and provincial governments is a notable evolution" (MacDonald, 2002: 143). In terms of the nature of the agreement, it is in-between a clearly competitive and cooperative initiative, which is thus informed by the specific collaborative culture of intergovernmental relations.

4.) ECONOMIC GOVERNANCE AND INTERGOVERNMENTAL RELATIONS IN THE EUROPEAN UNION

Intergovernmental policy coordination is characteristic not only in Canada but also in the EU where there is a clear “growth of intergovernmentalism – the supremacy of EU member states in decision-making at the expense of more ‘European’ pan-community decision-making via the European Commission and parliament”¹⁸². In order to be able to test the propositions outlined in the theoretical chapter, and to allow for a comparative case study to deepen our understanding of federal principles and their emergence and development within intergovernmental relations, it is essential to investigate the empirics of the European Union (EU) as well. Within this part of the thesis a federalist narrative will be provided to the most recent evolution of intergovernmentalism with regard to ‘economic governance’ in the European Union. Similar to the case of inter-provincial trade in Canada, the aim is to better understand the process through which intergovernmental relations came to substitute formal transfers of competences and subsequent collective, legislative decisions at the European level to settle the cross-jurisdictional policy challenge that fiscal problems posed during the financial crisis. It will be analyzed how the different principles of federalism started to emerge among member states and how the character of intergovernmental relations shifted accordingly from competitive to collaborative patterns of interactions. By studying the different factors that have led to the adoption of these principles the aim is to better understand the process that started with the Delors Report and led to the signing of the Treaty on Stability, Coordination and Governance (TSCG).

It will be demonstrated that the decision behind intergovernmental policy coordination as opposed to the ordinary legislative procedure did not arise because of failed negotiations on the redistribution of powers concerning fiscal policy but rather it was a reflection of a deliberate choice coming from the member states. As one first secretary of the permanent representation of a member state argued “they [i.e. the heads of state and government] could

¹⁸² MEPs to set up anti-intergovernmentalism group, <http://euobserver.com/news/30789>

have achieved everything under the EU treaties, but they simply did not want to”¹⁸³. As another financial counselor argued, “there were some member states that were clearly skeptic on legal issues from the beginning...they clearly wanted to avoid legal action and rather pushed towards political decisions which also meant that they had to engage in consultations”¹⁸⁴. Consequently, one has to take a rather pro-active approach towards intergovernmental relations as opposed to a re-active one where the procedures and institutions would respond to macro-structural inflexibilities (i.e. difficulty in changing the distribution of powers among the different levels of government).

As for the outline of the chapter, first the constitutional framework of economic governance will be addressed. Similar to the case on Canada, this shall serve the double purpose of not only introducing the most relevant features of the policy area concerned but it will also put the issue within a wider, historical context. There will be a short introduction running from the earliest days of the EU up until the first consideration of fiscal policy harmonization in the Delors Report in 1989. It will be demonstrated how competitive the area of fiscal policy coordination was despite the declarations of cooperation made in the treaties.

In the subsequent part, it will be shown how the Delors Report opened up discussion among member states due to the increasingly complex and sensitive nature of fiscal policy. However, the analysis of the Maastricht Treaty will demonstrate how little the formal arrangement around economic policy has actually changed. It will be shown that even though the policy area was relatively complex, and there were certain provisions calling for coordination of economic policies member states showed little interest in cooperating in an area which was very much considered to be their separate responsibility. The debate over the excessive deficits in France and Germany in the early/mid 2000s, the insufficient flexibility of the existing framework and the problems with enforceability of the Stability and Growth Pact are all indicative of such patterns. Similarly to the Canadian case on inter-provincial trade, ‘constitutional provisions’ within this period tend to diverge from political realities of the EU in fiscal policy coordination. Even though the formal rules have changed in the Maastricht Treaty they remained very limited in terms of their legally binding nature and their transfer of power to a central decision-making body is still missing. Maastricht actually marks the unwillingness of member states to allow for a formal competence transfer in the form of a centralized, collective decision-making power in the area of fiscal policy and rather reinforces the intergovernmental nature of the coordination. In sum, it will be demonstrated that even

¹⁸³ Anonymous interview conducted in Brussels, 24 March, 2013. (MS_EFC01)

¹⁸⁴ Anonymous interview conducted in Brussels, 28 March, 2013. (MS_EFC02)

though the growing complexity of the topic (i.e. its interdependence with other areas such as the common monetary policy) encouraged member states to open up areas under their own jurisdiction, the sensitivity of the issue (i.e. fiscal policy is the ultimate power of a government) made them rather skeptical about formal competence transfers and centralized decisions. This all led to an opening of discussion among member states, however, the adoption of federal principles remained very much limited during this period.

The subsequent sub-chapter then will analyze how deliberative procedures actually led to the adoption of federal principles that underline collaborative patterns of intergovernmental relations in the wake of the financial and economic crisis. The development from the Lisbon Treaty leading to the Six-Pack, the Euro Plus Pact, the Two-Pack and the Treaty on Stability, Coordination and Governance will be assessed with a focus on the adoption of the principles of partnership, loyalty, comity, unity in diversity, proportionality and mutuality, and flexibility and open-endedness. Last, but not least, a detailed analysis of the intergovernmental procedures and institutions will be provided assessing how the newly developed federal principles got formalized.

As in the previous chapter, the study will use a combination of different methods that were outlined in the theoretical chapter. Document analyses will be complemented with extensive personal interview materials. It has to be noted, that even though this chapter builds upon existing research, its specific, federalist focus on intergovernmental relations made the interviews worthwhile and holds added value for the existing literature. Consequently, the findings of this chapter highlight the possibility of an alternative narrative to the events that other theories might have interpreted in a different manner, rather than provide a brand the reader with a brand new story.

4.1.) Fiscal policy coordination in the EU – treaty provisions and competitive intergovernmental relations

Before addressing the constitutional framework around economic governance, it is essential to define what the term ‘economic governance’ refers to. It is a complex concept which is translated differently by the individual member states across the EU. Under ‘economic governance’ “the Germans want the harmonization of budget discipline, thrift and competitiveness. The French want economic governance to mean the harmonization of taxes and labor laws across the eurozone, *dirigisme* and lots of redistribution: whether by fiscal

transfers or cheaper borrowing via common European bonds”¹⁸⁵. The phenomenon was best described as an “equivalent of fiscal federalism based on much stronger surveillance of budgetary and competitiveness policies since a truly federal system would require a treaty change”¹⁸⁶. This definition implies both the importance of coordination and the informal nature of policy-making decisions as well. In general, economic governance refers to “budget and fiscal rules that can sanction countries failing to control public finances”¹⁸⁷. This chapter will assess how intergovernmental relations came to substitute a formal competence transfer and subsequent collective legislative decisions to settle cross-jurisdictional matters in ‘economic governance’.

As in the case of inter-provincial trade in Canada where the federal power over trade and commerce needed to be reconciled with the provincial power over issues falling under a trade deal, building an economic union in the EU required the federal competence over monetary policy to be complemented by coordinated fiscal policy measures. Even though the European Union started out as a case for economic integration, references to actual integration of economic policies remained rather vague in the beginning. Within the European Community, and later the EU, monetary and fiscal issues were generally hard to separate. Therefore, consideration of the latter was often inevitably embedded within a discussion of the former. As it will be demonstrated with the progression of time this interdependence is more and more reflected in the policy papers and subsequent decisions.

The creation of an economic union was among the most relevant goals of the European integration process. The Treaty of Rome talked about the promotion of “a harmonious development of economic activities” (Article 2) and a cooperation between the member-states and the Community to “co-ordinate their respective economic policies to the extent necessary to attain the objectives of this Treaty” (Article 6). As far as the contents of economic policy were concerned, the treaty argued that “Member States shall regard their conjunctural policies as a matter of common concern” (Article 103) and called for consultation between them and the Commission to ensure it. The same provision gave decision-making power to the Council given that measures were taken unanimously¹⁸⁸. Article 104 stated that “Each Member State shall pursue the economic policy needed to ensure equilibrium of its overall balance of payments and to maintain confidence in its

¹⁸⁵ But what would economic governance mean? In *The Economist*, 21 June, 2010. http://www.economist.com/blogs/charlemagne/2010/06/euro_crisis_4

¹⁸⁶ <http://www.europarl.europa.eu/sides/getDoc.do?language=en&type=IM-PRESS&reference=20100621IPR76407> under the section: The new economic governance architecture.

¹⁸⁷ <http://lexicon.ft.com/Term?term=economic-governance>

¹⁸⁸ In comparison, directives to give effect to such measures only required qualified majority.

currency”, while Article 105 (1) urged that “Member States shall co-ordinate their economic policies” which was one of the main tasks of the Council (see Section 2, Article 145). However, more attention was given to exchange-rate mechanisms and monetary issues (e.g. provision on the establishment of a Monetary Committee) while substantive elements of economic policy concerning fiscal matters remained undefined with the exception of dealing with crises in the balance of payments.

When the *Commission Memorandum to the Council on the co-ordination of economic policies and monetary co-operation within the Community*¹⁸⁹ came out in 1969 the situation did not change considerably. Still, the paper highlighted the importance of “a need (...) to increase the co-ordination of current economic and financial policies to forestall short-term imbalances early enough (...) and to combat them as effectively as possible should the need arise” (p. 7). Beyond the medium-term economic policy considerations, the Commission proposed a regular “exchange of information on the trend of economic situation in the Member States” (p. 10), and “the introduction of a system of early warning indicators” (p. 11). However, the memorandum focused a lot more on the monetary elements of economic union as opposed to the fiscal one.

As a response to a Council meeting in The Hague in 1969, a group was called together to further elaborate on the creation of economic union in a more substantive manner. The Werner Plan¹⁹⁰ called the attention to one of the most relevant internal tensions of integration, namely that “the loss of autonomy [over economic policy] at the national level has not been compensated by the inauguration of Community policies” (p. 7). The document made it clear that nothing substantial has changed in terms of policy convergence: “In general, the consultation procedures have not yielded the results expected, either because they have been of a purely formal character or because the Member States have taken refuge in escape clauses” (p. 7). The text proposed centralization of monetary competences to the extent that was necessary, while also highlighting the relevance of a harmonized management of national budgets. Essentially, the aim was “to make possible the abolition of fiscal frontiers while safeguarding the elasticity necessary for fiscal policy to be able to exercise its functions at the various levels” (p. 11). The plan was to establish closer coordination through an itinerary based on three different stages.

¹⁸⁹ http://aei.pitt.edu/1090/1/Barr_Plan_I_COM_69_150.pdf

¹⁹⁰ Officially known as the *Report to the Council and the Commission on the realization by stages of the economic and monetary union in the Community*. Source: http://aei.pitt.edu/1002/1/monetary_werner_final.pdf

Even though Member States expressed their political will to establish an economic and monetary union in March, 1971, the economic shocks of the 1970s caused a great setback in their coordination efforts. The lost momentum was not regained until 1979 when both the European Monetary System (EMS) and the European Currency Unit (ECU) were established. Once again, these measures focused more on the monetary aspects of economic union and failed to substantively address elements of fiscal policy in a more comprehensive way. This was further buttressed by *The Single European Act*¹⁹¹ in 1986 which aimed to create a single market by 1992, and even though it provided for a separate take on economic (i.e. fiscal) and monetary policies it left the measures concerning each area basically intact.

In general, during this early period member states proved to be rather indifferent concerning macroeconomic policy coordination beyond the extremely vague provisions in the treaties. Most discussions focused on the monetary element of economic policy while fiscal matters were kept at a low. As one member state official argued “there was something specific about fiscal policy...it wasn’t necessarily more complicated than other areas but still, it proved to be rather difficult as it was considered to be the primary responsibility of the state”¹⁹². There was clearly a certain ‘constitutional ambiguity’ around the topic, yet the low level of attention devoted to the subject reflected a conviction that member states did not consider it either as a complex or a sensitive matter. Consequently, the principle of self-determination dominated the area despite the numerous references to co-ordination of economic policies. This resulted in a competitive pattern of interaction between member states. As another official explained, “during the first years we [i.e. member states] did not understand the interconnectedness of economic issues...macroeconomic considerations have not been taken seriously”¹⁹³. Member states did not consider the topic as something of a common European concern, and therefore, there were no traces of the principles of partnership, loyalty or comity in intergovernmental relations. There was a very low level of formality around fiscal policy despite the references in the treaties which was demonstrated by the fact that no legal case arose in the field of economic and monetary policy between 1957 and 1993.

¹⁹¹ http://ec.europa.eu/archives/emu_history/documents/treaties/singleeuropeanact.pdf

¹⁹² Anonymous interview conducted in Brussels, 24 March, 2013. (MS_EFC01)

¹⁹³ Anonymous interview conducted in Brussels, 14 June, 2013. (MS_EFC08)

4.2.) From the Delors Report to the Lisbon Treaty – the recognition of the sensitivity and complexity of the macroeconomic policy topic

Not until the *Delors Report*¹⁹⁴ in 1989 was there a firm and official call to coordinate fiscal policies across member states of the EU in order to deal with economic interdependencies. The special committee led by the President of the European Commission at the time came up with an assessment by the 1989 European Council in Spain. The document, similarly to the memorandum twenty years before, called for “a more effective coordination of policy between national authorities” (p. 10) with regard to economic matters. The report underscored the insufficient level of coordination in the area of fiscal policy and in general, argued for the development of “an innovative and unique approach” (p. 13) to economic competences. It called for a treaty change that would allow for the creation of a real economic and monetary union. To this end, the text proposed a transfer of decision-making powers in the area of monetary policy to the Community level while stressing that “in the economic field a wide range of decisions would remain the preserve of national and regional authorities” (see p. 14). For the first time, the Delors Report addressed the question of economic policy in a separate chapter (see under Section 3) within which macroeconomic policy coordination (point 30) as manifested in budgetary policies played an important role. As it was suggested: “apart from the system of binding rules governing the size and the financing of national budget deficits, decisions on the main components of public policy [...] would remain the preserve of Member States even at the final stage of economic and monetary union” (p. 19). The report made it rather clear that without fiscal policy coordination, the stability of a monetary union is put to danger (see pp. 19-20). In order to fulfill the aim of economic union, the text proposed binding rules in the budgetary field (i. e. limits on deficits) while allowing for discretionary coordination to ensure effective implementation (p. 24). In terms of the institutional developments these changes would require, the paper was more detailed concerning the institutions around the monetary union (e.g. the establishment of the European System of Central Banks or ESCB), whereas in relation to macroeconomic policies, it remained rather vague¹⁹⁵ and only called for consultations among the main actors.

¹⁹⁴ Officially known as *Report on economic and monetary union in the European Community*. Source: http://aei.pitt.edu/1007/1/monetary_delors.pdf

¹⁹⁵ The report argued that “the formulation and implementation of common policies in non-monetary fields and the coordination of policies remaining within the competence of national authorities would not necessarily require a new institution” (p. 21).

The Delors Report concluded with a roadmap to the establishment of economic and monetary union through three separate stages. Within the first phase, concerning economic policies, a new procedure was to be established ensuring a more effective coordination of economic policies, a task to be delivered by the Council of Economic and Finance Ministers (ECOFIN). Measures proposed included a “multilateral surveillance of economic developments and policies based on agreed indicators” (p. 30), and a new procedure to budgetary policy coordination with quantitative guidelines. In the second stage, following a treaty revision, precise, but not yet binding rules concerning budget deficits should have been established. These would have become more formal in the third stage. As for the legal basis of these changes the report argued that “under present national legislations no member country is able to transfer decision-making power to a Community body, nor is it possible for many countries to participate in arrangements for a binding *ex ante* coordination of policies” (pp. 36-37). Furthermore, it states that “there is at present no transfer of responsibility for economic and monetary policy from Member States to the Community” (p. 37). Once again, the role of the Delors report was more important from the point of view of monetary policy which was indicated by the fact that twelve out of its seventeen members of the committee were central bank governors. As it was argued by many, “the Delors report advance[d] the European Commission further than ever into (...) monetary affairs”¹⁹⁶.

One of the added values of the Delors report was its contribution to the debate leading to the treaty revision of Maastricht. The Maastricht Treaty¹⁹⁷ has, from many different angles, repeated the provisions of the earlier treaties concerning fiscal policies, though it also clarified and further specified certain elements of it. Article 2 still spoke about a harmonious and balanced development of economic policies though in a more integrated form. Interestingly enough the provision concerning “the application of procedures by which the economic policies of Member States can be co-ordinated and disequilibria in their balances of payments remedied” (Article 3[g] of the Rome Treaty) disappeared from the text.

A great achievement of the new treaty was its division of the economic and monetary policies into two chapters. Article 103 repeatedly argued that “Member States shall regard their economic policies as a matter of common concern” (Article 3 (1)), yet the role of the Council was explicitly mentioned in the text as the body where such coordination should take place. The biggest development the Maastricht Treaty initiated, however, was the establishment of ‘broad economic guidelines’ and the related monitoring and assessment

¹⁹⁶ The Delors Report; Summit hurdles loom for report, in *Financial Times*, 18 April, 1989.

¹⁹⁷ <http://www.eurotreaties.com/maastrichtec.pdf>

procedures to ensure closer coordination of economic policies among member states. However, these all came in the form recommendations based on qualified majority decisions of the Council, and therefore they meant non-binding acts, and in that they cannot be equated with legislative decisions at the federal level such as regulations, directives or decisions.

Furthermore, Article 104(c) established a procedure to resolve excessive deficit problems occurring in any given member state. This was based on the monitoring of the ratios of government deficit and government debt to gross domestic products carried out by the Commission. Once again, Council recommendations were to be used (Article 104[c]6-7) in case a member state did not comply with the rules set out in the Protocol concerning the macroeconomic figures. Even though they introduced a deficit rule in the EMU it proved to be a half-hearted measure and it remained very inconsistent and was hardly internalized by member states. In fact, when some of the bigger states faced excessive deficit problems themselves the established system and the enforcement mechanisms of the rules did not pass the ultimate test. As one financial counselor argued: “the aim of the Maastricht Treaty was to set the rules for the scene...however, it was imperfect because it was very theoretical and very political, and everything had to be done not to be politically rude on member state sovereignty in these areas (...) in the beginning the idea was to do some kind of soft coordination”¹⁹⁸. Such a tiptoeing attitude could be traced in the opposition that the new treaty had to face in countries such as Ireland¹⁹⁹, Denmark²⁰⁰, and France²⁰¹. The complexity of the situation could be traced through the following argument made by a member state official: “there was...well, I wouldn’t call it ignorance, but...let’s say, they did not measure the complete weight of what it meant to share the same currency”²⁰². The prevalence of the basic principle of self-determination was still very much an issue, as an official argued: “even though there were some leaders who were thinking of more Europe than their own interests sometimes, still they were leaders from member states representing the member states, and of course, even though there was a community method, and even though there was a European Union that was a genuine system (...) you were still between member states, and it was extremely difficult (...) and it was not imaginable that an institution would come with binding decisions and to tell

¹⁹⁸ Anonymous interview conducted in Brussels, 11 April, 2013. (MS_EFC04)

¹⁹⁹ EC refuses Irish request for abortion rewrite of Maastricht treaty, in *The Times*, 7 April, 1992.

²⁰⁰ Danish voters may scupper Maastricht deal, in *The Independent*, 26 May, 1992.

²⁰¹ Maastricht treaties under fire in France, in *The Independent*, 15 April, 1992.

²⁰² Anonymous interview conducted in Brussels, 10 April, 2013. (MS_EFC03)

you exactly what to do (...) all the reform ideas of today were not possible to imagine at that time”²⁰³.

As far as the legislative competences were concerned, the integration process seemed to have reached its peak concerning monetary and especially economic policy matters. A good indication of the plateau the EU came to is the fact that none of the following treaty revisions have substantially changed the measures regulating monetary and economic affairs. As Puetter (2012: 167) rightly argues: “neither the Amsterdam Treaty, nor the Nice Treaty touched the issue. Finally, the negotiations about the Constitutional Treaty and the Lisbon Treaty clearly revealed that there would be no scope for further transfers of formal decision-making competences in the foreseeable future”. Council Regulation No. 3605/93 was put out in relation to fiscal policy to assist the excessive deficit procedure that the Maastricht Treaty established, however it simply regulated the reporting obligation of the member states, yet it did not require any real cooperation among member states to actually coordinate their actions.

Beyond the simple consolidation of the already existing framework, the only added value in the field before the financial and economic crisis came from the Stability and Growth Pact (SGP) in 1997. The legal basis for the SGP was to be found in Article 99(3) of the Amsterdam Treaty which called for multilateral surveillance, in Article 104 which dealt with the excessive deficit procedure (see also Protocol 20), and in Article 211 which gave the Commission power to policy advice. According to the European Council Resolution (97/C 236/01), which created the SGP, “member states remain[ed] responsible for their national budgetary policies” (point II), yet they were expected to commit themselves to the objective of a balanced or positive budget in normal times and to take corrective actions if necessary to ensure that objective (point 1 under Member States). There are two Council Regulations connected to the Stability and Growth Pact. Regulation No. 1466/97 aims to strengthen the surveillance on budgetary positions and coordination of economic policies, and commits member states to come up with stability programs “which provides an essential basis for price stability and for strong sustainable growth” (Section 2, Article 3). Similar to the previous regulation on the excessive deficit procedure the Council only has the power to “invite the Member State concerned to adjust its program” (Section 2, Article 5[2]) in case it is needed. Its surveillance powers also only involve recommendations sent to member states. Regulation No. 1467/97 was to assist the speeding up of the implementation of the excessive deficit procedures. This regulation allowed for sanctions in case of non-compliance however such a

²⁰³ Anonymous interview conducted in Brussels, 11 April, 2013. (MS_EFC04)

decision remained dependent upon the will of the Council. Even though these regulations have a legally binding nature, they have not been internalized by the member states. This reluctance has been highlighted by one of the member state officials who argued that “the Stability and Growth Pact was a clear and good step in the right direction, but it was clearly something imposed by the Germans because they wanted these [measures] to be enforced in regulations (...) but clearly, I think, it was too weak in the potential application because the means were not there (...) because member states were not ready to transfer the prerogatives to the central institutions”²⁰⁴. Furthermore, despite the adoption of those regulations, the European Council still emphasized the need “to both deepen and strengthen economic policy coordination”²⁰⁵ in 1998. It was clear that sensitive areas of national sovereignty have been reached by the integration process and member states have become rather reluctant towards legislative decisions coming from the central level, and rather aimed to keep policy coordination as informal as possible. As another small member state official put it “there was clearly no sufficient power given to the center to apply the rules in a consistent way (...) the political will has not moved with the rules”²⁰⁶.

This ambiguity was also manifested in the 2003-2004 ‘deficit crisis’ where France and Germany did not comply with the deficit rules set out in the Maastricht Treaty, yet the sanctions based on the SGP were voted down, effectively “destroying the pact in the process”²⁰⁷. This created a puzzling legal situation²⁰⁸ and called for a revision of the existing framework by pointing out the low level of internalization of the pact by member states. The European Court of Justice ruled partly in favor of the Commission²⁰⁹ in July, 2004, arguing that finance ministers in the ECOFIN council acted illegally in suspending the sanction mechanism of the pact. However, it was clearly stated that “responsibility for making the member states observe budgetary discipline lie[d] essentially with the council”²¹⁰. This decision eventually led to a revision of the SGP framework. Council Regulation (EC) 1055/2005 created the preventive arm of the SGP while Council Regulation (EC) 1057/2005 equipped the pact with a corrective arm. The preventive arm aimed to ensure that medium-

²⁰⁴ Anonymous interview conducted in Brussels, 11 April, 2013. (MS_EFC04)

²⁰⁵ Point 19 of the European Council Conclusions, 11-12 December, 1998, Vienna. http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00300-R1.EN8.htm

²⁰⁶ Anonymous interview conducted in Brussels, 28 March, 2013. (MS_EFC02)

²⁰⁷ Flexible rules for Europe, strictly enforced, in *Financial Times*, 19 January, 2004.

²⁰⁸ See e.g. Let’s sue Europe’s finance ministers: The Commission should take legal action over the pact, in *Financial Times*, 8 January, 2004.

²⁰⁹ See Case C-27/04.

<http://curia.europa.eu/juris/showPdf.jsf?text=&docid=49386&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=856615>

²¹⁰ Point 76 of the Case C-27/04.

term budgetary objectives were met by the individual member states and also required compliance with the deficit and public debt limitations, while the corrective / dissuasive arm was there to ensure that member states adopted appropriate policy measures to correct excessive deficits.

The period between 1989 and 2005 could be characterized as a rather ambiguous time from the point of view of intergovernmental relations. The complexity of the economic policy field was partially acknowledged by the member states, as they began to examine fiscal policy matters in relation to monetary ones. However, as budgetary affairs were still regarded as the most important responsibilities of the state, the topic was not considered in details from a community perspective. As one financial counselor argued, “national politics weren’t ready for a full transfer of sovereignty...European politics wasn’t ready for more EU”²¹¹. As a member state official argued, “there was an expectation that for the single currency to work it would require a quite high level of fiscal union, and actually, Maastricht already kind of marks a failure to achieve that in any meaningful sense...it replaced a unified fiscal government structure with the Maastricht Treaty fiscal requirements which were pretty blunt (...) the concept behind that was that it was sufficient for member states to adopt to the prudent fiscal policies”²¹². The French finance minister at the time, Dominique Strauss-Kahn argued that “the need to match increased monetary interdependence with closer economic and budgetary co-operation was recognized in the Maastricht treaty. But subsequent developments – notably in the Stability and Growth Pact – have put more emphasis on co-ordinating national policies through rules and disciplinary provisions than through common diagnosis and joint action”²¹³. As both complexity and sensitivity of the fiscal issue was only partially recognized by the member states, self-determination and autonomy still dominated intergovernmental interactions, while other federal principles could only partially develop. Even though member states voluntarily began to coordinate their economic policies, as autonomy was equated with independence, the partnership principle remained rather limited in intergovernmental relations. As a member state official argued, “national interests prevailed over community interests (...) [and] procedures did not help to change that either”²¹⁴. Loyalty was emerging as the treaties referred to economic policy as a common concern of member states, and later a European Council conclusion argued that there were “firm commitments of the Member States, the Commission, and the Council regarding the implementation of the

²¹¹ Anonymous interview conducted in Brussels, 24 March, 2013. (MS_EFC01)

²¹² Anonymous interview conducted in Brussels, 23 July, 2013. (MS_EFC01)

²¹³ We’re in this together, in *Financial Times*, 27 November 1997.

²¹⁴ Anonymous interview conducted in Brussels, 24 March, 2013. (MS_EFC01)

Stability and Growth Pact”²¹⁵. However, the ‘deficit crisis’ demonstrated how fragile this commitment to the implementation of the agreed upon fiscal rules was. As loyalty was only partly developed, the comity principle emerged in a restrained manner as well. Although unity was guaranteed by the fixed deficit and debt rules, diversity prevailed due to the dominance of the autonomy principle. Flexibility and open-endedness were adopted as principles in intergovernmental relations, although the role of deliberations was constrained since ‘national interests’ prevailed.

The Delors Report simply highlighted the complexity and sensitivity of the fiscal policy file and opened up a long deliberation process among member states which eventually led to the adoption of federal principles underlying a collaborative pattern of intergovernmental interactions. This period, nevertheless was still dominated by the principle of self-determination, despite the adoption of different regulations and resolutions. Consequently, fiscal policy became something of an ‘Achilles heel’ of the economic and monetary union, as the latter was much more centralized than the former²¹⁶. While member states that joined the Euro zone transferred their monetary competences to the ECB, fiscal matters remained under the jurisdictions of the individual member states. In general, “apart from providing a deficit rule, the Treaty d[id] not give further policy prescriptions” (Puetter, 2012: 168) which was also buttressed by the ECJ ruling referred to above. All in all, this period demonstrates that even though member states started to realize the need for a common effort in the area of fiscal policy they wanted to keep the decision-making as informal as possible through intergovernmental methods. Despite their slow adoption of the federal principles of loyalty, partnership, unity in diversity, etc., there was still a great reluctance towards centralized decision-making, as it was manifested in the 2003-2004 ‘deficit crisis’. Similar to the case of inter-provincial trade in Canada, it was not that member states could not resolve the issue in a ‘constitutional’ amendment, but rather that they did not want to. It was demonstrated by the fact that neither treaties subsequent to Maastricht touched upon the matter in a comprehensive way, and rather they pushed towards a complex intergovernmental coordination scheme. Even though there were changes to the legal framework, there was no real transfer of powers in the sense of creating collective legislative decision-making at the center. As the ECJ ruling argued, member states withheld the responsibility for observing budgetary discipline.

²¹⁵ European Council Conclusions, 16-17 June, 1997, Amsterdam, second paragraph under section Economic and Monetary Union. http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/032a0006.htm

²¹⁶ See e.g. Fiscal policy under the EMU, in *Financial Times*, 6 February, 1998.

Between 1989 and 2005 fiscal policy was increasingly framed as a common European matter. The complexity and sensitivity of the topic pushed member states to adopt new federal principles to deal with fiscal policy coordination more effectively. However, this created a rather imbalanced system where fiscal matters were not on equal footing with monetary ones. Even though there was a discussion on policy coordination, self-determination and autonomy remained the most dominant principles in the field which was highlighted in numerous occasions where national interests prevailed. Also, one has to note that during this period the Council of the European Union and with that the ministers of the member states were in the limelight²¹⁷ as opposed to the highest political level which shows the relative limitedness of possible deliberations among the most relevant actors.

However, the more difficult it became to establish national preferences, the more open member states (i.e. national executives) became to adopt and internalize further federal principles such as mutuality, comity, etc. As it will be shown in the next part, the financial crisis put the existing, rather decentralized framework of economic policy-making under extreme stress. Yet, as it was argued before, a formal transfer of existing decision-making competences was rendered to be unwanted by the member states. Consequently, there was a continued reinforcement of informal, intergovernmental procedures that eventually led to the signing of the Treaty on Stability, Coordination and Governance (TSCG).

4.3.) From the Lisbon Treaty through the Euro Plus Pact to the TSCG – the internalization of federal principles

As it was argued before, the ‘constitutional framework’ manifested in the treaties of the European Union did not change substantially in the area of economic policy coordination after the Maastricht Treaty had been signed and ratified by the member states. In fact, Maastricht itself proved to be a sign of member state reluctance towards centralizing decision-making in this policy field. However, with the establishment of the eurozone new passages were added to the existing system in the Lisbon Treaty. Article 136 of the Treaty on the Functioning of the European Union (TFEU) described special elements concerning the relations among member states which shared the same currency, the euro. Interestingly enough, this did not go further than stating the need “to strengthen the coordination and surveillance of their [i.e. member states] budgetary discipline” (Article 136[1a]). Furthermore, there was an extra protocol added which established the Euro Group (Article 137), which

²¹⁷ E.g. think of the court case where the Council (i.e. the ministers) positioned itself against the Commission.

allowed for deliberative procedures to flourish (see Puetter, 2012). As demonstrated before, there was a serious efficiency gap between the relatively centralized monetary policy field and the highly decentralized fiscal policy area. Despite the resolution on the SGP and its corresponding regulations, member states remained reluctant to transfer decision-making powers to a central, collective body. As one official rightly claimed, “the rules were not the problem, but authority was really weak...it needed to be reinforced by someone else...a referee with authority to apply the rules”²¹⁸. With the growing complexity and sensitivity of the issue they moved towards more deliberative solutions through which they adopted and further internalized federal principles that would inform collaborative patterns of intergovernmental relations as a substitute for more formal centralized decision-making schemes.

The financial crisis showed how fragile the framework established in Maastricht was. As one official argued, “the crisis has clearly highlighted the weaknesses of the Maastricht Treaty and later on what has been implemented from the Maastricht Treaty so the whole fiscal and economic framework has been hit by an instable situation where clearly the institutions were not ready, the member states were not ready, the union was not ready to deal with it, because they realized it was too soft of a system”²¹⁹. The complexity of the fiscal policy area was finally fully acknowledged by the member states, and it reached the point where “no one really knew what was going on and there were no real guiding principles, there was no real structure”²²⁰. Under such circumstances, member states opted for a day-to-day management of the situation and pushed towards informal coordination processes. As a financial counselor argued

“it was something new compared to the situation before, I remember clearly a session of the Economic and Financial Committee [EFC] in March [2010] after the first European Council of Van Rompuy, where the chair clearly said to members ‘so guys...what do we do?’ (...) there was a kind of open discussion which rarely happens in this kind of format because everything is driven by an agenda (...) this is where the idea of the European Semester was first put forward by Luxembourg, two months before the communication by the Commission”²²¹.

This move towards more intensive intergovernmental relations was also demonstrated by the overnight negotiations on the European Financial Stability Facility (EFSF) on 9 May, 2010

²¹⁸ Anonymous interview conducted in Brussels, 11 April, 2013. (MS_EFC04)

²¹⁹ Anonymous interview conducted in Brussels, 10 April, 2013. (MS_EFC03)

²²⁰ Anonymous interview conducted in Brussels, 28 March, 2013. (MS_EFC02)

²²¹ Anonymous interview conducted in Brussels, 24 March, 2013. (MS_EFC01)

where “there was no possibility for community law solutions, it was a completely *sui generis* situation”²²² as one official argued. In fact, as a member state official, closely related to ECOFIN issues explained in relation to the creation of the EFSF, “the Special Purpose Vehicle (SPV) that was used to be able to act outside the treaties has been agreed to at 1:30 in the morning once the German representative received the green light from Chancellor Merkel over the phone”²²³. In sum, “the whole process was definitely driven by the fact that big member states especially were really pushing towards this kind of informal process and not the formal one that we’ve always foreseen before (...) informal procedures gained relevance over time”²²⁴. It actually reversed the community method, and established a framework where the European Council invited the Commission to make proposals in relation to the problems that needed to be addressed. The Commission actually tried to reserve the right of initiative by coming out with a package of proposals²²⁵ (Six Pack) before the Van Rompuy Task Force finished its report²²⁶. However, it was more of a takeover of proposals previously drafted by the European Council (see quote above on European Semester). It actually created a great conflict between certain member states and the Commission based on the different procedures they favored in resolving the situation²²⁷. As a first secretary of the permanent representation of a member state summed it up “they [i.e. the heads of state and government] could have achieved everything under the EU treaties, but they simply did not want to”²²⁸. As one Commission official argued in relation to the economic governance agenda:

“The Commission seems to have lacked the political initiative as it faced more and more political constraints (...) it has become more of a follower than a leader (...) the Commission does not seem to have been strong enough to influence the procedures, and major decisions were mainly left to the cabinets of member-states”²²⁹.

This has been buttressed by the fact of the crisis itself as well. As one senior Commission official argued:

²²² Anonymous interview conducted in Brussels, 28 March, 2013. (MS_EFC02)

²²³ Anonymous interview conducted in Brussels, 6 June, 2013. (MS_EFC07)

²²⁴ Anonymous interview conducted in Brussels, 28 March, 2013. (MS_EFC02)

²²⁵ COM(2010) 522-527.

²²⁶ http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/117236.pdf

²²⁷ This is also represented by the parallel mechanisms of intergovernmentalism as manifested in the Euro Plus Pact in March 2011 and the adoption of the Six Pack, a proposal of the Commission in the same month.

²²⁸ Anonymous interview conducted in Brussels, 24 March, 2013. (MS_EFC01)

²²⁹ Anonymous interview conducted in Brussels, 28 June, 2012. (DG_ECFIN01)

“The financial crisis, but any crisis for that matter, puts the national executive in a better position when it comes to coordination and intervention (...) we have seen a shift of attitude within the Council: they thought of the Commission as an institution that is slow, convoluted and quite dangerous to get involved with on these matters”²³⁰.

This view has been shared by many other officials as well, at this point it is only sufficient to quote one last one serving in the Commission as well who argued that: “The ‘community method has been questioned and there is an evident will from policy makers to take the initiative in their hands”²³¹. It is of little wonder then that “the success of any initiative around economic governance originating from the Commission depend[ed] on whether [they] have received the green light from the Council or not”²³².

In sum, the financial crisis created a situation where open deliberations among the member states started to prevail in the most relevant intergovernmental institutions. In return, this made a deeper internalization of the federal principles possible among member states. The strengthening of partnership was represented by the fact that member states voluntarily entered into a non-hegemonic relationship where they aimed for consensus and tried to resolve the crisis through horizontal means as opposed to relying on proposals made by the Commission. As it was demonstrated, the Commission usually followed up on the intergovernmental agenda. As one member state official argued, “the more you went into the negotiations, the more you moved towards partnership”²³³. The reforms initiated on the SGP by the Six Pack also reinforced the commitment of member states towards reaching resolutions. As one official argued, “there was a clear sense of respect for the rules as the governance structure was reinforced (...) the commitment was there, but the application of it was still questionable”²³⁴. With the reform attempts to the SGP, clearly there was more pragmatism injected into the system, and member states were generally ready to compromise as most officials argued.

By 2011, the situation was ripe for a new set of measures. First, the President of the European Council showed leadership again by putting forward the proposal of the Euro Plus Pact. It was created under his personal guidance, and was endorsed by the Euro area countries and later by some of the non-euro zone countries as well. The Pact is based on the Open Method of Coordination that allows for a group of member state countries to deepen policy

²³⁰ Anonymous interview conducted in Brussels, 9 July, 2012. (DG_ECFIN02)

²³¹ Anonymous interview conducted in Brussels, 25 July, 2013. (CAB_REHN01)

²³² Anonymous interview conducted in Brussels, 12 April, 2012. (SEC_GEN01)

²³³ Anonymous interview conducted in Brussels, 28 March, 2013. (MS_EFC02)

²³⁴ Anonymous interview conducted in Brussels, 28 March, 2013. (MS_EFC02)

coordination in specific areas, thus essentially reinforces the intergovernmental features of economic policy coordination. Its main objectives were to foster competitiveness and employment, contribute to the sustainability of public finances, and to reinforce financial stability. Each year, participating member states are supposed to meet at the “highest level” and agree on a set of concrete actions they want to achieve within a 12 month period. Also, it commits its members to consult one another before any major economic reform that has potential spill-over effects. The Euro Plus Pact marks the first important manifestation of collaborative patterns of interaction. It came out at the same time the Six Pack was passed. It was clearly an intergovernmental agreement that aimed to further coordinate economic policies among member states without creating a central, collective decision-making scheme.

The Six Pack reform proposals, which were passed in March, 2011 and came into force on 13 December, 2011, actually did not change any of the conditions already imposed by the SGP, they simply aimed to enforce greater budgetary discipline by stipulating that sanctions come into force earlier and more consistently than before. The principles of unity and diversity have been complemented with flexibility. However, the importance of flexibility was balanced with “a need for a more independent, apolitical advice (...) is it really right to put all the power inside DG ECFIN and the Commissioner, or wouldn’t it be more credible and feasible to have an independent authority with an opinion?”²³⁵, as one member state official argued. Open-endedness, and informality was present from the very beginning at it was highlighted in the introduction of this chapter (see quote on the bottom of page 1) which would eventually lead to the adoption of the TSCG.

In November, 2011, the Commission proposed two further regulations (known as the Two Pack) which were also passed and came into force on 30 May, 2013. It introduced further surveillance and monitoring procedures for euro area member states. Its biggest achievement was the establishment of European assessment of budgetary plans for Euro area member states while also improving national budgetary frameworks by requiring them to set up independent monitoring bodies overlooking fiscal rules. The Two Pack in many ways was a result of the coordination initiated by the Euro Plus Pact.

As “European politics was not ready for more EU in the economic policy field”²³⁶, “EU institutions [have become] weaker while member states have become stronger”²³⁷. Consequently, there was a major shift from the supranational to the intergovernmental

²³⁵ Anonymous interview conducted in Brussels, 28 March, 2013. (MS_EFC02)

²³⁶ Anonymous interview conducted in Brussels, 24 March, 2013. (MS_EFC01)

²³⁷ Anonymous interview conducted in Brussels, 25 July, 2013. (CAB_REHN01)

institutions, and with that “a clear shift of emphasis from integration to modes of governance”²³⁸. Consequently, both the European Council and the Council have gone through certain changes that would allow them to live up to this new role (see also Puetter, 2012). It was a natural response, as “the European Council was the only institution of the European Union that could act outside its constitutional framework”²³⁹. As another EU official put it: “a new level was created above the EP...the European Council is taking decisions that impact greatly on EC proposals and the working of the Council itself”²⁴⁰. This has been interpreted by European Council President, Herman Van Rompuy as follows:

“Until recently, it seemed natural to imagine that Europe would become more centralized. Instead we are seeing member states and national leaders take centre stage in particular in dealing with the public debt crisis. In my view this is not contradictory. Unlike some, I do not see the return of the ghosts of the past and the ‘renationalization of European politics’. No, in my view, what is in fact happening is the ‘Europeanization of national politics’”²⁴¹.

As one Commission official put it, “significant changes are done at the higher level [i.e. heads of state and government] now”²⁴². In fact, as Puetter (2012: 169) called our attention to it, not only has there been new, rather informal institutions and procedures established (see later), but “the European Council has reserved one of its annual meetings entirely for this policy field”. In fact, during multiple interviews, officials argued independently from one another that one of the biggest changes the European Council went through was the fact that “meetings have become very issue-specific [...] there was a clear change in the nature of preparation”²⁴³. On multiple occasions, ad hoc meetings were called together to deal with specific topics, and economic governance started to occupy a very important position in the agenda of the European Council. Whereas, between 1993 and 2008, there were an average of four meetings per year (with the exception of 2003) and only five extraordinary and eleven informal meetings have been called for, between 2008 and 2013 these numbers increased considerable. There were around 6-7 European Council meetings annually with additional Euro summits. In general, the most important actors of the coordination procedure have been

²³⁸ Anonymous interview conducted in Brussels, 9 July, 2012. (DG_ECFIN02)

²³⁹ A remark made by Piotr Maciej Kaczynski, from the Centre for European Policy Studies, during the ECSA-C conference in Ottawa, Canada, 26-28 April, 2012.

²⁴⁰ Anonymous interview conducted in Brussels, 25 July, 2013. (CAB_REHN01)

²⁴¹ Beyond the institutions: Why Europe today?, a speech delivered by Herman Van Rompuy, President of the European Council at the Europe Conference in Copenhagen, 11 May, 2012.

²⁴² Anonymous interview conducted in Brussels, 25 July, 2013. (CAB_REHN01)

²⁴³ Anonymous interview conducted in Brussels, 28 March, 2013. (MS_EFC02)

the heads of state and government, as they thought that too much was at stake to leave the negotiations / discussion for other members within their cabinets. Furthermore, deliberative capacity-building became crucial as the financial crisis created an environment where the preferences of the member-states were rather fluid due to the high level of uncertainty (see Puetter, 2012) and sensitivity of the matter. However, this has been new territory for them. As Herman Van Rompuy suggested:

“(...)in times of crisis, we reach the limits of institutions built on rules and competences set in the past. The European Council (27 country leaders, the President of the Commission and myself), is well placed to play its part when we enter uncharted territory when new rules have to be set”²⁴⁴.

Similarly to the Canadian context, informal meetings of the heads of government became crucial as orientation debates to further the positions in specific questions. As a new development, bilateral discussions over the phone and in person have become rather regular between Van Rompuy and individual heads of member state governments, having the purpose of “pre-baking the pie”²⁴⁵ as one British official put it. In general, strong interaction and real discussions prevailed which have been actively supported by the ECOFIN and the Euro Group meetings as well which contributed greatly to the deliberations. In fact, the President of the European Council, Herman Van Rompuy initiated multiple changes that all pointed towards more policy deliberation (see Puetter, 2012: 174).

The changes in the Euro Group have also been important in furthering the deliberative mechanisms of the existing institutions in order to be able to deal with policy coordination responsibilities. The Lisbon Treaty merely formalized what was already a practice before among the finance ministers of the eurozone countries. Yet, the crisis had a huge impact on the Euro Group itself. As one European official from the Commission noted, “in the wake of the crisis, the Euro Group has been acting like a firefighters’ meeting lately, [...] it has become a better functioning institution with a Secretariat and a permanent chair”²⁴⁶. In general, as one official from Luxembourg claimed, “Euro Group meetings have become more important than ECOFIN meetings”²⁴⁷.

In terms of the Council (ECOFIN), its importance shall not be downplayed nevertheless. In fact, its relevance increased as far as policy coordination and deliberation is

²⁴⁴ Beyond the institutions: Why Europe today?, a speech delivered by Herman Van Rompuy, President of the European Council at the Europe Conference in Copenhagen, 11 May, 2012.

²⁴⁵ Anonymous interview conducted in Brussels, 23 July, 2013. (MS_EFC01)

²⁴⁶ Anonymous interview conducted in Brussels, 25 July, 2013. (CAB_REHN01)

²⁴⁷ Anonymous interview conducted in Brussels, 2 July, 2013. (MS_EFC02)

concerned. However, as one official argued, “informal meetings of ECOFIN are more essential now...formal settings are rather useless as there are too many people and very seldom debates on substantive issues”²⁴⁸. The turn towards more informal measures has been stressed by another official who claimed that “the Council is freer to see itself coming up with dossiers without a legislative angle”²⁴⁹. In general, most officials agreed that formal ECOFIN meetings “were not so interesting, despite its importance from the European media point of view”²⁵⁰. Yet, its role in horizontal issues through the introduction of the European Semester became more and more relevant. Informal breakfast meetings have become more relevant in sorting complicated, unsettled issues out, and gave the opportunity for participants to “reach common understandings” (Puetter, 2012: 173) concerning policy decisions. As a member state official argued, “ECOFIN changed ways how things work, and fundamentally it became responsible for a supervisory policy”²⁵¹. In a similar manner, DG ECFIN within the Commission took up the role of “surveillance police”²⁵². As another indication of increased reliance on informal institutions and procedures, one has to mention the *sherpa meetings*. Their importance cannot be emphasized enough. As an official from a member state explained, sherpas are one of the members of the delegations during COREPER meetings, however “sherpas meet on a regular basis as well, and there are important discrete side meetings before each Council meeting”²⁵³. As a member state official claimed “sherpa meetings could be rather powerful...sometimes it feels almost like important decisions are taken there”²⁵⁴.

The working methods, in general, have shifted towards more discussion whether in a formal or an informal setting, whether in the European Council, the Council, the Euro Group or COREPER meetings. It has become an important norm, similar to the Canadian context, that there should be a clear result at the end of each discussion. Member-states recognized the need to go through with the process, and changed the institutional settings accordingly. As Herman Van Rompuy stressed it:

“All the members of the European Council were willing to take more responsibility for these economic issues. Such personal involvement is indispensable. I was glad to find a high level of ambition around the table. The first result is that the European Council becomes something like ‘the gouvernement

²⁴⁸ Anonymous interview conducted in Brussels, 31 May, 2013 (MS_EFC05).

²⁴⁹ Anonymous interview conducted in Brussels, 31 May, 2013 (MS_EFC06).

²⁵⁰ Anonymous interview conducted in Brussels, 2 July, 2013. (MS_EFC02)

²⁵¹ Anonymous interview conducted in Brussels, 23 July, 2013. (MS_EFC01)

²⁵² Anonymous interview conducted in Brussels, 23 July, 2013. (MS_EFC01)

²⁵³ Anonymous interview conducted in Brussels, 6 June, 2013. (MS_EFC07)

²⁵⁴ Anonymous interview conducted in Brussels, 14 June, 2013. (MS_EFC08)

économique' of the Union, as some would call it. (...) The financial and economic crisis obliges us to take steps on this road (...) To help find consensus among Member States, new institutions and new offices were created (...) However, it does not suffice to create a new institution to solve a problem, certainly, not immediately. This requires consultation between Member States and time"²⁵⁵.

This sense of collectivity was further buttressed by the fact that "even though member states' national interests prevail during the discussions, they are more and more conscious of the collective as well"²⁵⁶. Also, as another official stressed it: "there is a strengthened willingness to move forward with issues...clearly coordination has improved"²⁵⁷. What is different in the EU case as compared to the Canadian in the same phase is the fact that in Canada there were simply no institutional framework within which deliberative procedures could take place, whereas in the EU institutions were already existing, yet, their nature, as manifested in the basic norms, role perceptions and procedures, had to change in order to be able to make up for the lack of formal institutions and procedures that were intended to deal with the cross-jurisdictional issue of creating an economic union on the equal footings of monetary and fiscal policies.

The period analyzed within this sub-chapter covers a very vivid era from the point of view of intergovernmental relations in the area of fiscal policy coordination. As it was demonstrated, deliberative interactions started to dominate the intergovernmental arena which started before, and eventually led to the gradual adoption of different federal principles. However, the complexity and sensitivity of the policy area also created a sense of skepticism among member states to leave the right of initiative with a central decision-making body, in this case, with the Commission. It was demonstrated that practically every single proposal made by the Commission was preceded by some sort of a Council or European Council decision (e.g. EFC meeting on European Semester before Six Pack, Euro Plus Pact before the Two Pack) and intergovernmental coordination was running parallel with the Commission's aim to retain its right to initiative (e.g. Van Rompuy Task Force and the Six Pack Communication). As the interview material suggests there was a deliberate aim among member states not to rely too much on the existing institutional and procedural framework and rather they opted for a more informal arrangement that would substitute collective legislative decisions. Even though

²⁵⁵ The challenges for Europe in a changing world, a speech delivered by Herman Van Rompuy, President of the European Council at College d'Europe, Bruges, 25 February, 2010.

²⁵⁶ Anonymous interview conducted in Brussels, 2 July, 2013. (MS_EFC02)

²⁵⁷ Anonymous interview conducted in Brussels, 31 May, 2013. (MS_EFC06)

regulations were passed through the Six Pack and the Two Pack, they simply strengthened the existing framework of the SGP to ensure a seamless continuity of policy monitoring. Throughout the process, intergovernmental relations adapted to the new circumstances and allowed for the further internalization of the principles of partnership, loyalty, comity, proportionality and flexibility. Partnership manifested itself in the mechanism that ‘reversed’ the community method and stressed a non-hegemonic nature between the Commission and the member states through the increased reliance on more informal intergovernmental methods as the interview material and the timing of proposals and decisions suggested. Nevertheless, there was a growing sense of loyalty that required member states to coordinate in their separate jurisdictions in a more efficient way to ensure commitment to the overall needs of the European economic union. Deliberations also allowed for an increased level of openness to compromises and pushed member states to act in a more pragmatic way, therefore ensuring the adoption of the federal principle of comity. In order to ensure the move away from competitive patterns of intergovernmental relations towards a collaborative one, it was important to strengthen the principle of unity in diversity which manifested itself in numerous different ways (e.g. OMC in the Euro Plus Pact, more sophisticated monitoring and assessment of the deficit rules, etc.). Covenanting was also crucial as member states got deeper and deeper into the negotiations as interview material suggested. Flexibility was ensured through the open-endedness of the process in its manifestation of intergovernmental agreements. Proportionality was guaranteed by the different measures passed, as the formal division of powers among the different levels of government did not change (i.e. the Lisbon Treaty did not change), yet the roles and responsibilities have altered.

4.4.) The TSCG and the institutionalization of collaborative federalism

The Treaty on Stability, Coordination and Governance (TSCG)²⁵⁸ was signed by 25 of the 27 (now 28) member-states of the EU on 2 March, 2012 as an important step concluding intergovernmental procedures. It has entered into force on 1 January, 2013, and as an intergovernmental agreement (therefore not part of EU law) it does not change the formal distribution of competences between the EU and its member-states. As Article 2.2 states, it merely aims to help member-states coordinate their fiscal policies to be able to ensure the stability of the euro. Yet, the Fiscal Compact has important implications as far as measures relating to fiscal policies are concerned. It requires member states to enshrine into national

²⁵⁸ http://www.consilium.europa.eu/media/1478399/07_tscg.en12.pdf

law²⁵⁹ a balanced budget rule with a lower limit of a structural deficit of 0,5% of the GDP, and is centered on the concept of the country-specific medium-term objective as defined in the SGP. It was a clear result of “institutional fatigue”²⁶⁰ as one Commission official expressed it. The TSCG was a clear indication that “member states had to start coordinating in areas where the Union had no explicit competence, but there wasn’t much possibility for going beyond the existing competence allocation”²⁶¹. In fact, even though the TSCG does not change the formal distribution of powers among the member states and the European level, it does lessen the capacities of individual governments to act unilaterally in terms of fiscal policy decisions. However, it establishes a rather heterarchical relationship among the participating member states as outlined in the article dealing with non-compliance (see later). It also reinforces the independent national institutions which shall monitor compliance of the member state with the rules outlined by the TSCG.

Similarly to the AIT in the Canadian context, the TSCG provides for the formalization of intergovernmental institutions. Beyond one of the oldest Council formations in the EU (ECOFIN), the agreement calls for informal Euro Summits where the heads of state or government of the euro-zone countries shall meet with the president of the Commission and the ECB semi-annually. This body shall elect its own president from among its members for a term equal to that of the President of the Council. The body that is responsible for all the preparation of and follow up to the Euro Summit meetings shall be the Euro Group, the meeting of the finance ministers of the euro-zone countries (see Protocol 14 of the Lisbon Treaty). Even though the Council of the EU has its own secretariat which is responsible for operative support, the Euro Group is actually one of the main stakeholders of the activities of the Directorate General for Economic and Financial Affairs within the Commission. According to article 13 of the agreement the role of national parliaments is regulated through Protocol 1.

In case a contracting party is not complying with the agreement, it is only the other Contracting Parties (i.e. the member states) that could bring the issue in front of the Court of Justice of the EU (article 8). In this sense, as one member state official put it, “member states can control other member states now”²⁶². So even though, the Commission has the capacity to decide whether a member state is not complying with the agreement, the other member states have the right to bring the case in front of the court. Similarly to the Canadian case, the

²⁵⁹ Of binding force and permanent character, preferably constitution.

²⁶⁰ Anonymous interview conducted in Brussels, 25 July, 2013. (CAB_REHN01)

²⁶¹ Anonymous interview conducted in Brussels, 31 May, 2013 (MS_EFC05).

²⁶² Anonymous interview conducted in Brussels, 14 June, 2013. (MS_EFC08)

possibility of a lump sum penalty is provided for. However, authority constricting measures also involve requirements of ex ante discussions on economic related reforms, and reporting on public debt related measures (see article 11).

The institutional and procedural changes are reflective of the development of the federal principles featured in the previous part. As a last task, it is important to assess how these principles got formalized and how the actual allocation of competences changed despite the fact that intergovernmental relations came to substitute centralized legislative decisions.

It was already signaled that the Six Pack and the Two Pack which consisted of different regulations (and one directive) did not change the framework established by the SGP. Rather they simply stipulated the strengthening of budgetary surveillance and coordination of economic policies (i.e. multilateral surveillance, European Semester, macroeconomic imbalances procedures, excessive deficit procedures, etc.). Even though they came in the form of regulations, they did not create legislative powers concerning fiscal policy coordination. Recommendations were used to ensure the correction of excessive deficits, and delegated acts were only referenced in connection with administrative matters of reporting. All substantive decisions were to go through the intergovernmental institutions and procedures of the EU, which nevertheless reflected the federal principles highlighted previously.

As for the Euro Plus Pact, it enshrined the autonomy and loyalty principles as it aimed to “strengthen the economic pillar (...) [while focusing] primarily on areas that fall under national competence”²⁶³. Loyalty and comity were also carved into the text as the whole pact was to be monitored politically by the heads of state or government, and “Member States commit to consult their partners on each major economic reform having potential spill-over effects”²⁶⁴. ‘Unity in diversity’ was preserved through the freedom of policy actions while maintaining common objectives, which also reflected on proportionality. The agreement on the European Stability Mechanism (ESM) was a good indication of the partnership principle as well which manifested itself in the ‘mutual agreement’ requirement in most decisions.

The TSCG further reinforced the partnership principle inasmuch as it called member states to police one another’s compliance with the correction mechanism (Article 8.), but provisions for ‘economic partnership programs’ are also indicative. It enshrined the flexibility principle inasmuch as it left the formalization of the intergovernmental agreement open.

²⁶³ http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/120296.pdf p. 13.

²⁶⁴ Ibid. p. 14.

All things considered, even though the different intergovernmental elements from mechanisms in the reformed SGP through the Euro Plus Pact and to the TSCG did not change the formal distribution of powers among the member states and the European level, it did lessen the capacities of individual governments to act unilaterally in fiscal affairs.

4.5.) Conclusion

The aim of this chapter was to show how intergovernmental relations have developed around the issue of economic policy making in the European Union and came to substitute centralized legislative decision-making to settle cross-jurisdictional challenges. Contrary to a rationalist argument where either micro-level (see Bolleyer, 2009) or macro-level institutional changes have an impact on the behavior of the actors to realize their pre-given preferences, it was demonstrated that the sensitivity and complexity of the issue created incentives for the member states to enter into policy deliberations which then allowed for the adoption of certain federal principles that would inform collaborative patterns of interaction among them.

First, through an analysis of the constitutional framework around economic governance (i.e. fiscal policy making) it was demonstrated how little the corresponding sections have facilitated intergovernmental cooperation among and within the different orders of government. To the contrary, the rather vague articles under the Treaty of Rome and the subsequent Single European Act gave little substantive guidelines on how to coordinate economic policies among member states. In fact, a lot more attention has been given to the monetary element of economic policy-making. This has been manifested in the development of the European Monetary System and the European Currency Unit in the 1970s. Therefore, the period from 1957 to the 1980s can be said to have operated on the basic principle of self-determination and autonomy: the independence of the jurisdiction was stressed and no coordination occurred. In fact, formal revisions that would reallocate powers in the area did not occur despite the numerous propositions made by different institutional actors (e.g. Werner Paper).

Secondly, the role of the Delors Committee and its Report on the issue of monetary and economic union cannot be stressed enough. For the first time it created an atmosphere where member states understood the interconnected nature of monetary and fiscal policies, and started to work deliberately towards the end of further economic coordination. During the period between 1989 and 1992, through the passing of the Treaty of Maastricht one could sense a slow but steady shift in the behavior of the actors involved. The former anarchic

nature of intergovernmental relations shifted towards a rather heterarchical understanding where individual member states started to recognize the need to coordinate in order to be able to achieve a better functioning economic union. This recognition had a great impact on the role perceptions they attributed to one another and to themselves. As it was demonstrated, even though the Maastricht Treaty introduced new measures concerning economic policy coordination, it remained the sole responsibility of the member states, and they hardly internalized these measures. The passing of the SGP was another step towards further coordination, however the ‘deficit crisis’ in 2004 showed the low level of internalization of these measures by the member states. This all points to the fact, that the federal principle of self-determination still dominated the area. However, this period created the institutional framework that would allow for deliberations to flourish once the sovereign debt crisis hit the European Union and open up the road for the adoption and further internalization of a special combination of these principles that would underline collaborative federalism.

The crisis simply precipitated the process that already started with the adoption of the SGP. Member states increasingly recognized the fact that they were all in the same boat²⁶⁵. As interview material and the chronological assessment suggests, intergovernmental procedures dominated the political sphere. The sensitivity and complexity of the topic not only created incentives for policy deliberations, but it also pushed member states to be skeptical about centralized decision-making procedures. Consequently, a ‘reversed community method’ emerged where intergovernmental bodies dominated the Commission that struggled with keeping the right of initiative to itself. The proposals coming from the Commission only passed because they have been preceded by intergovernmental deliberations. Despite the regulations that were passed these deliberations also led to the adoption of intergovernmental agreements such as the Euro Plus Pact and the TSCG. It was demonstrated how the institutional and procedural framework changed due to the internalization of the federal principles of partnership, loyalty and comity, unity and diversity, covenanting, flexibility and mutuality. The TSCG is an important political document that is also a manifestation of the internalization of the changed character of intergovernmental relations that has occurred ever since the signing of the Treaty of Maastricht.

²⁶⁵ As Angela Merkel put it in one interview with Der Spiegel. See <http://www.spiegel.de/international/europe/spiegel-interview-with-angela-merkel-on-euro-crisis-and-arms-exports-a-903401-2.html>

5.) LABOR MARKET POLICY COORDINATION IN CANADA

Employment is one of the most important policy areas a government is concerned with. As much as it is an economic issue, it's relevance from a social perspective (e.g. education, training, health care, insurance and benefits, etc.) cannot be underestimated either. What makes it an interesting case is the fact that these two dimensions are separate and exclusive competences of the two different orders of government in Canada. However, demographics, technological change and globalization all have a great influence on labor market policies which challenges the capability of any government to act alone within this area despite their exclusive competences. Unemployment and the economic and social hardships it may create often need a comprehensive approach that requires intergovernmental exchanges. Within this chapter, it will be analyzed how intergovernmental relations have developed from competitive to collaborative patterns resulting in the adoption of Labor Market Development Agreements (LMDAs) between the federal government and the individual provinces.

As in the previous chapters, it will be demonstrated how the growing complexity and sensitivity of the policy problem posed by unemployment and the benefits surrounding it facilitated the adoption of federal principles that would inform the emergence of collaborative patterns of intergovernmental interactions. Consequently, instead of focusing on the constitutional structure and its impact on intergovernmental relations it will be shown that the character of the policy area had a huge impact on intergovernmental relations. Here too, it will be argued that collaborative intergovernmental relations came to substitute a formal transfer of constitutional powers and the subsequent centralized, collective legislative decisions to deal with the most relevant cross-jurisdictional problems. As one former provincial official from social services deeply involved with the Labor Market Development Agreement (LMDA) negotiations argued, "in order to make political accords stick, and avoid their quick fade away, we used bilateral agreements as opposed to legislative actions (...) [which] were

binding through the substance that involved an exchange of money between the different orders of government”²⁶⁶.

First, the constitutional arrangement concerning labor market development policy will be assessed with a historical account of the most relevant changes in the formal framework. Within a historical context, this part will introduce the reader to labor market policies in Canada and will highlight the competitive nature of intergovernmental relations which is informed by the dominance of the basic principle of self-determination and autonomy. It will be shown that before the 1980s, the different orders of government were “on this crash course when it c[a]me to manpower training because the federal government kn[e]w very well that that [wa]s a powerful economic tool. And it d[id]n’t want to withdraw. It want[ed] to keep those powers”²⁶⁷. It will be argued that within this period, the complexity and sensitivity of the labor market topic was not a major concern therefore it did not encourage provinces to change the established framework and move towards informal intergovernmental arrangements.

In a second sub-chapter, the beginnings of the changing character of intergovernmental relations will be assessed covering the period from the repatriation of the Constitution in 1982 to the failed amendment proposal of the Charlottetown Accord a decade later. It will be shown that the complexity and sensitivity of the policy area reached a point where the different orders of government were pushed to have open discussions which allowed for the adoption of federal principles in areas previously connected with separate provincial jurisdiction. The first indication of this open atmosphere was the creation of the Forum of Labor Market Ministers (FLMM) in 1983. The forum was an intergovernmental body that aimed to coordinate policy decisions. It will be argued that the complexity and sensitivity of the policy domain not only created incentives for open deliberation but also created skepticism among provincial governments to settle for collective legislative decisions. It will be demonstrated that while the Meech Lake Accord did not even address the question, the Charlottetown Accord simply wanted to reinforce the intergovernmental method of policy coordination instead of rearranging the constitutional distribution of powers in the area. In a similar fashion to the case on inter-provincial trade, the labor market development file separated itself from a constitutional revision process.

In the third part, the development from the Charlottetown Accord to the adoption of the Labor Market Development Agreements will be assessed. It will be shown how the

²⁶⁶ Anonymous interview conducted in Ottawa, 4 December, 2012. (PROV_LD10)

²⁶⁷ Governments play tug-of-war over manpower training; Province seeks more control over programs, in *The Ottawa Citizen*, 25 July, 1994.

provincial governments slowly but surely adopted the federal principles of partnership, loyalty, comity, unity in diversity, proportionality, mutuality and flexibility in labor development, which eventually led to collaborative patterns of intergovernmental interactions. As the failure of constitutional re-allocation of powers did not stop the provinces to push the issue further on, it can be assumed that intergovernmental arrangements was the preferred option from the beginning that would lead to the signing of the first Labor Market Development Agreements by 1996. The following part will assess the most relevant characteristics of these agreements in light of the federal principles. Last but not least, some concluding remarks will be made.

5.1.) Labor market development policy in Canada - constitutional ambiguity and competitive intergovernmental relations

Before addressing the question of how the constitution of Canada arranges the competences around labor market policy, it is important to clarify what labor market issues entail. Labor market policies are government programs that aim to improve employment opportunities. As Bakvis and Aucoin (2000: 3) put it: “labour market policy concerns those social and economic activities of governments aimed at making more effective use of the country’s human resources”. As argued before, this covers a broad spectrum of economic (e.g. increasing employment, thus productivity and earnings) and social (e.g. improving inclusion and participation, health care benefits, social security, etc.) issues. In general, these measures are considered to be active measures as opposed to passive ones, such as unemployment insurance or social transfers to the unemployed facing financial difficulties. In general, active labor market management covers a wide range of activities from raising the quality of labor supply (e.g. training, retraining) through increasing labor demand (e.g. public works) to the improvement of labor demand-supply relations (e.g. job centers and job search assistance, activation programs). In order to effectively influence labor market outcomes governments need to activate these measures in a parallel manner. To this end policy coordination is essential even in cases where legislative competences among the different orders of government are separated depending on the policy area concerned. In Canada, competences over labor market policies are not explicitly mentioned in the constitution. As one provincial ministry official argued, “the lines are grey and there are numerous overlaps”²⁶⁸.

²⁶⁸ Anonymous interview conducted in Ottawa, 17 November, 2012. (PROV_LD08)

Consequently, jurisdictions are implied within the exclusive powers of the different orders of government.

In general, it could be argued that there are several sections in the Constitution Act (1867) which put together indicate the legislative complexity of labor market issues. Section 92 (13) clearly gives legislative authority over non-criminal matters, and explicitly over property and civil rights, to the provinces which would imply power over most labor-related law. This was further buttressed by Section 92 (16) which gave provinces constitutional legislative responsibility over "generally all matters of a merely local or private nature in the Provinces". Furthermore, Article 93 established that each province "may exclusively make Laws in relation to Education". However, even though the federal government did not have an explicit jurisdiction in labor market issues, its power could be derived from the general Peace, Order and Good Government (POGG) (Article 91) clause which serves as a residual power clause that gives the federal government comprehensive legislative power in all areas that has not been allocated exclusively to the provinces. However, the jurisprudence of the Judicial Committee of the Privy Council (JCPC) narrowed the scope of the POGG competence based on two different principles. Under the 'emergency principle', based on the *Russell v. the Queen*²⁶⁹, the *Board of Commerce*²⁷⁰, and the *Reference re Anti-Inflation*²⁷¹ cases, the federal Parliament can intervene into provincial matters in cases of emergency (e.g. famine, war, considerable economic problem, etc.). The 'national concern principle' can be understood as a specialization of the emergency principle as it states that the federal Parliament can legislate in matters normally falling under provincial jurisdiction when a particular issue becomes of such importance that concerns the entire country or in new policy areas which did not exist at the time the constitution was drafted. The specific elements of the doctrine were established by the *Local Prohibition*²⁷², the *Ontario v. Canada Temperance Foundation*²⁷³ and the famous *R. v. Crown Zellerbach Canada Ltd*²⁷⁴ cases. Another option for the federal government to influence provincial jurisdiction is through its 'spending power' which is not explicitly in the Constitution Act, but rather inferred from the tax power (Section 91[3]), the public property and debt power (Section 91[1A]) and the power to appropriate federal funds (Section 106). The first mentioning of the 'spending power' can be found in the June, 1969 *Federal-*

²⁶⁹ http://www.bailii.org/uk/cases/UKPC/1882/1882_33.html

²⁷⁰ <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/9418/index.do>

²⁷¹ <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2696/index.do>

²⁷² http://www.bailii.org/uk/cases/UKPC/1896/1896_20.html

²⁷³ http://www.bailii.org/uk/cases/UKPC/1946/1946_2.html

²⁷⁴ <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/306/index.do>

*Provincial Grants and the Spending Power of the Parliament*²⁷⁵ paper which was prepared for the federal-provincial first ministers' conference by the federal government that year, and its extensive use was practically guaranteed in the *Reference re Canada Assistance Plan*²⁷⁶.

In sum, it could be argued that the constitutional distribution of powers favoured the provinces in the area of labor market policy as long as its local nature and its social dimension was emphasized over the general economic concerns. However, the federal government had a lot of potential to establish its jurisdiction within labor market policies by making reference to the POGG article of the constitution and by using its fiscal capacity through the 'spending power' clause. In general, it could be argued that from the perspective of legislative responsibilities, the division of powers between the federal and the provincial governments within the policy domain of active labor market development is quite ambiguous and it created a rather competitive relationship between the different orders of government right from the beginning. As long as the social and economic dimensions of labor market policies could be separated the framework established by the constitution proved to be sufficient in dealing with cross-jurisdictional matters.

As early as 1910 the Royal Commission on Industrial Training and Technical Education made proposals concerning vocational and technical training in secondary schools which highlighted the jurisdictional problems outlined in the previous paragraph. It was not until after WWI when the inadequacy of the existing framework for vocational training became apparent. As a consequence, the federal government passed the Technical Education Act in 1919 under which it provided \$10 million to the provinces to promote technical education. However, funding regulations were so strict that participation by the provinces was rather low. Nevertheless, this signaled at a very early stage that Ottawa held training matters highly relevant from an economic perspective, despite the fact that they formed a provincial responsibility. In fact, as the Rowell-Sirois Commission Report (1940) argued, over the years, "education, like the social services, has developed aspects which have led to action by the Dominion"²⁷⁷. Consequently, Ottawa started to get involved in cost-shared or conditional grant programs. First, due to WWII the *Vocational Training Coordination Act* (1942) was passed which funded different programs with regard to labor market issues from vocational courses to unemployment programs. In 1945, the *Vocational Schools Assistance Agreement* was signed which went one step further and aimed to establish a cost-shared framework to

²⁷⁵ See further information at <http://www.parl.gc.ca/Content/LOP/researchpublications/bp272-e.htm>

²⁷⁶ <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/781/index.do>

²⁷⁷ Rowell-Sirois Commission Report, Book 2, Chapter 3, p. 50.

create provincial, vocational high schools. These measures that were during the war could be based on Article 91 or on the *War Measures Act* (1914) which gave special powers to the federal government in times of war. Even though they are reflections of special circumstances, they indicate how the federal government may get involved in these matters despite a direct responsibility in these areas.

In 1948 the federal government passed the *Vocational Training Agreement*. It was further extended in 1960²⁷⁸, which was a continuation of the 1942 coordination act. While funding regulations kept poorer provinces from participation, other provinces (Quebec and Newfoundland) decided to opt out. In 1966²⁷⁹, the federal government announced its intention to change the previous practice, and instead of channeling the money through provincial departments of education, it wanted to purchase training services directly from provincial institutions or the private sector. Furthermore, the federal government made a distinction between short-term retraining and long-term vocational preparation making the former the responsibility of the federal government while the latter of the provinces. This new act involved a change of focus from vocation training towards adult occupational training. To further the aims of these programs federal Canada Employment Centers²⁸⁰ were established. Despite the growing federal involvement, provinces managed to secure that a great percentage of Ottawa funds were to be used in training programs in their community colleges. Yet, the federal government “worried that provincial influence over federal (...) spending was being used to protect the financial wellbeing of the colleges, not to maximize the economic value of training” (Haddow, 2003: 247). Despite its concern, the legislative framework did not change until 1982 when the National Training Act (NTA) was adopted to reassert federal control over training purchases that would correspond with labor market needs (see later). As a response to the 1966 changes the Council of Ministers of Education Canada (CMEC) was established in the following year. Its main purpose was to serve as a forum to discuss policy issues of mutual interest and work out means by which to consult and cooperate with one another and the federal government.

The main characteristics of the intergovernmental arrangement between the provinces and the federal government remained constant within this period. Even though the federal government established its role in vocational training, its cost-shared programmes remained underused by the provinces due to funding regulations which effectively yet unintentionally

²⁷⁸ With the Technical and Vocational Training Assistance Act (TVTA).

²⁷⁹ With the Adult Occupation Training Act (AOTA).

²⁸⁰ Formerly also known as National Employment Service then Canada Manpower Centers, and nowadays as Human Resource Development Centres (HRDC).

avoided federal intrusion in training-related matters of labor market policy. In general, relations remained quite competitive and only exceptional circumstances, such as the two world wars pushed the different orders of government to change the established framework.

Before the First World War, there was little consideration given to the topic of unemployed people and their re-integration to the labor market. In 1916, the first Commission on Unemployment was called together in the province of Ontario which was later followed by other provinces as well (Moscovitch et al., 1983: 203). This indicates the extent to which provinces considered employment issues to fall under their own jurisdictions. In fact, the federal government refused any responsibility for social assistance prior to World War II. Rather, this role was assumed by Section 92 (7) of the BNA Act that assigned jurisdictions over hospitals, asylums and charities to the provinces. In 1925, in the *Toronto Electric Commission v. Snider*²⁸¹ decision, the JCPC held that labor relations were a matter of property and civil rights in the province, thus, they fell under Section 92 (13) of the BNA Act with the exception of federal employees²⁸².

In 1935, the Bennett government tried to change the status quo and attempted to introduce minimum wage and unemployment insurance measures as part of its own version of the New Deal. Provincial governments proved to be highly skeptical²⁸³ and challenged the federal government's power to pass such a bill, and the JCPC eventually struck down the different parts of a comprehensive employment and social insurance legislation. Yet, the issue was kept alive. Prime Minister *William Lyon Mackenzie King* called together the National Employment Commission (1936) and the Rowell-Sirois Commission (1940) the purpose of which was partly to make recommendations about rising unemployment issues as well. In the latter report it was argued that "the jurisdiction of the Dominion Parliament over labour legislation should be considerably enlarged (...) [yet] situations may arise in labour matters in which prompt action may be needed and it may often be the provincial government which is better able to act promptly and effectively"²⁸⁴. The report generally supported the case for greater jurisdiction by the federal Parliament based on the efficiency provided by uniformity in setting standards (e.g. minimum wages, maximum working hours and age of employment),

²⁸¹ http://www.bailii.org/uk/cases/UKPC/1925/1925_2.html

²⁸² See *Reference re: Legislative Jurisdiction over Hours of Labour* [1925] S. C. R. 505 <http://scc-csc.lexum.com/scc-csc/scc-csc/en/9209/1/document.do> and *Reference re: Minimum Wage Act (Saskatchewan)* [1948] S. C. R. 248. <http://scc-csc.lexum.com/scc-csc/scc-csc/en/6306/1/document.do>

²⁸³ As the Rowell-Sirois Commission Report argued: „mass unemployment was regarded as a temporary phenomenon, and no steps were taken to set up any permanent organization (other than co-ordination of provincial employment offices)” (Book 2, Chapter 1, p. 16).

²⁸⁴ Rowell-Sirois Commission Report, Book 2, Chapter 2, pp. 45-46.

even though it wanted to see enforcement of any legislation in the hands of the provinces. Despite the support for centralized legislation, the report stressed that “uniformity could be achieved by agreement between the provinces”²⁸⁵ even though “there has been no particular means for facilitating co-operation, and has, therefore, been lacking”²⁸⁶. The report also argued that the lack of cooperation was also characteristic to federal-provincial relations which should have been remedied through regular conferences of representatives of labor departments.

The Canadian Association of Administrators of Labor Legislation (CAALL) was established in 1938 with the purpose to provide governments with an opportunity to develop strong and cooperative working relations. The CAALL comprises the Deputy Ministers and other senior officials and usually serves as a preparation vehicle for the Forum of Labour Market Ministers (FLMM). The main idea behind the CAALL was to exchange information on labor market issues and encourage studies on subjects related to them, yet its role has changed considerably over the years. More and more discussion is led on identifying common problems and working cooperatively on national issues that influence labor market matters.

As far as unemployment and corresponding labor market policies were concerned, since mass unemployment was first experienced during the peak of the Great Depression, the first measures have been taken by the local governments. However, as the situation became more and more severe federal government involvement was becoming a reality. The commission report argued that provinces were not the “convenient authority for spreading the risks of unemployment over a term of years, by insurance methods or otherwise”²⁸⁷. Its revenues were eventually to run out, and given the provinces limited competence over taxation, expenditures of relief programs could not be met in the long run. The main conclusion was that “so long as the responsibility for unemployment rests with the nine provinces”²⁸⁸ which may follow different and conflicting budgetary, taxation, development, and public works policies, Canada will be unable to eliminate the avoidable economic wastes and social consequences of mass unemployment”²⁸⁹ while also stressing that “rigidity in the matter of jurisdiction should be avoided”²⁹⁰.

In 1940, a constitutional amendment allocated a new jurisdiction to the federal government over unemployment insurance programs (Article 91[2A]) the aim of which was

²⁸⁵ Rowell-Sirois Commission Report, Book 2, Chapter 2, p. 46.

²⁸⁶ Rowell-Sirois Commission Report, Book 2, Chapter 2, p. 49.

²⁸⁷ Rowell-Sirois Commission Report, Book 2, Chapter 1, p. 23.

²⁸⁸ Newfoundland only became a province in 1949.

²⁸⁹ Rowell-Sirois Commission Report, Book 2, Chapter 1, p. 24.

²⁹⁰ Rowell-Sirois Commission Report, Book 2, Chapter 1, p. 43.

to help provincial governments in providing adequate economic and social assistance to the unemployed. Through the Unemployment Insurance program, Ottawa started to finance and administer job training programs and worker benefits. In the next couple of decades, Ottawa offered financial incentives to the provincial governments through its spending power to promote the establishment of a welfare state. The shared-cost initiatives listed in the previous paragraphs concerning training programs also played an important role in advancing that goal. In 1956 an Unemployment Assistance Act was passed by Ottawa, according to which half of the provinces' assistance costs for employable people were taken up by the federal government. It was further extended by the Canada Assistance Plan in 1966.

In sum, Ottawa was becoming "the dominant actor in the field until World War II and during the first two or three post-war decades" (Haddow, 2012: 224). It played an increasingly important role in four different areas: (1) paying for training in community colleges or in the private sector, (2) administering the National Employment Services, (3) creating jobs, and (4) gathering data on labor market trends. This early period can be described as an era with very little intergovernmental and much more unilateral activity by the different orders of government. The dominance of the self-determination principle can be traced in the Supreme Court decisions which aimed to delineate legislative jurisdictions despite the ambiguous provisions of the constitution. These early years were marked by competing jurisdictional claims, policy-making capacities and program goals which generally led to very little substantive changes. Nevertheless, there was an internal tension rising within policy decisions that had a great impact on the perceptions of intergovernmental relations among the different orders of government. As the federal government intruded more and more into issues of provincial jurisdiction (see spending on training) constituent unit governments started to alter their perceptions of one another. The institutional structure of this period, nevertheless, suggests that the federal level was becoming the dominant jurisdiction over labor market matters. Ottawa managed to formally gain competence over unemployment insurance which was denied before by the provinces and which enabled it to increase its program portfolio concerning labor issues. On the other hand, provincial governments tried to counterbalance this development by the early establishment of the CAALL, yet, there was no concerted action from the provinces to deal with labor market issues in a more comprehensive manner. Each province tried to deal with employment problems and opportunities in its own way, which did not provide much room for collaboration and eventually made them the subordinate actors in the policy area. As most decisions were made in a unilateral manner, self-determination and autonomy was the only principle adopted by the different orders of

government. There was little or no sense of partnership concerning labor market management and instead of non-centralization dynamics there was a great tendency towards centralization in the area of unemployment insurance.

Before 1982 the complexity and sensitivity of active labor market policy was almost a non-issue for provinces. Depending on the governmental level either the social or the economic aspects of the labor policy issue was emphasized but there was a general lack of a comprehensive approach. This was also reflected in the bilateral arrangements the provincial governments entered into with the federal government to draw funds for training or unemployment measures. Furthermore, as the different dimension of labor market policy were kept apart as much as possible, the sensitivity of the topic was not triggered by the different orders of government. As one former provincial official put it, “during the early 1980s provinces were not really in the game (...) ‘active measures’ wasn’t a big deal for them”²⁹¹. This low level of concern from the perspective of provinces was also indicated by the fact that the 1982 Constitution Act did not touch the matter. It focused more on aboriginal rights and the amending formulas while also adding a Charter of Rights and Freedoms to the constitutional framework, but it did not address the competence question over active labor market matters. Why didn’t the provincial governments raise the issue while negotiating the terms of ‘bringing home’ the constitution? It suggests that provincial governments still approached the topic based on the principle of autonomy and self-determination.

5.2.) From the repatriation to the Charlottetown Accord – acknowledging the complexity and sensitivity of active labor market measures

As demonstrated before, the early 1980s were dominated by the actions of the federal government in active labor market measures through the unemployment insurance programs. However, soon it became clear that federal funds alone could not resolve the unemployment problem. The complexity and sensitivity of the matter was acknowledged and jurisdiction over labor market policy was becoming more and more contested as provincial governments started to get involved through social assistance programs. “Alberta was one of the first provinces that started active measures with people on social assistance in the late 1970s and they were able to cost-share those services through the Canada Assistance Plan because it had those provisions”²⁹². As it was argued by officials it was a provincial decision based on the

²⁹¹ Anonymous interview conducted in Ottawa, 4 December, 2012. (PROV_LD10)

²⁹² Anonymous interview conducted in Ottawa, 17 November, 2012. (PROV_LD08)

mentality of the government that you cannot help people on social assistance to get a job without involvement in active measures. Furthermore, there was a general conviction emerging among provinces that “the federal government was doing a bad job...provinces became skeptical because they were dissatisfied”²⁹³. As it was argued in the Alberta assembly, “We certainly felt that the people of the province (...) shouldn't suffer unemployment simply to make a federal policy look good so far as balancing their budget is concerned”²⁹⁴. The demand coming from provinces to take over active measures was part of a ‘province-building’ approach that showed a clear change of role perceptions among the different orders of government. As it was argued, “some provinces resent the federal government’s presence in job-training programs and have requested greater autonomy in economic planning”²⁹⁵. This was induced also by some of the actions initiated by the federal government. They reduced their role in both job creation activities and training purchases even though they got integrated within a Canadian Jobs Strategy (CJS) that functioned in parallel with the NTA from 1985. Slowly but surely a bigger percentage of the federal money was spent directly without provincial involvement that led to financial stress between the different orders of government. The situation got even worse once the federal government initiated the Labour Force Development Strategy (LFDS) which was to expand the amount of money Ottawa used for training and job creation at the expense of the passive labor market policies delivered through the Unemployment Insurance program. This inevitably led to more disputes between the different orders of government as ‘at risk’ people had to be compensated more and more with provincial money. As a last measure Ottawa tried to create a comprehensive corporatist system which failed due to suspicion coming from a number of provinces, and created “more grounds for distrust between Ottawa and the provinces” (Haddow, 2003: 250).

As the Constitution Act in 1982 was passed without the consent of Quebec, the federal government aimed to bring the province back to the country’s constitutional framework. The topic of active labor market management was becoming a highly contested area due to the changes initiated by the CJS and the LFDS and the slowly emerging ‘province-building’ agenda. The complexity and sensitivity of the policy area started to have two different yet inter-related effects on the Canadian federation. First, it created skepticism among provincial governments towards the role of the federal government in this policy domain, yet it opened policy deliberation among them that would allow for the adoption of federal principles that

²⁹³ Anonymous over-the-phone interview conducted in Brussels, 24 March, 2013. (PROV_LD09)

²⁹⁴ Alberta Hansard, 27 March, 1972, p. 39.

²⁹⁵ Quebec prepares for job training-fight, in *The Globe and Mail*, 4 March, 1982.

would underline the emergence of collaborative patterns of intergovernmental interactions. The first sign of the emergence of deliberative procedures came with the creation of the Forum of Labor Market Ministers (FLMM) in 1983. It was composed of provincial and territorial ministers and the federal minister responsible for labor market issues and its purpose was to promote discussion and cooperation among the different orders of government concerning common labor market matters. The FLMM was co-chaired by the federal government and had a lead province on a rotating basis. Between 1985 and 1995, FLMM deputy ministers met 21 times and ministers 13 times (see Wood, 2009: 10) which shows how important this institution was in establishing and channeling coordination between the different orders of government in labor market matters. This activism was partly induced by the Macdonald Commission Report which paid considerable attention to the topic of active labor market management. Part V of the report dealt extensively with the functioning of labor markets, education and training, and other social services, while in Part VI the commission proposed a corresponding institutional framework. As for training, the commission report concluded that “we do not believe (...) that it is necessary to shift powers or responsibilities (...) federal and provincial governments (...) must all participate. The need here is for effective co-ordination”²⁹⁶. As far as education was concerned, it was argued that the extension of the scope of federal involvement was rather limited²⁹⁷ and instead the intergovernmental Council of the Ministers of Education (CMEC) was called upon to increase its activity. Last, but not least, the commission suggested to establish more efficient employment services, mobility grants and further intervention into wage-setting through federal tax incentives²⁹⁸ in the forms of a new Universal Income Security Program and the Transitional Adjustment Assistance Program. Also, experimentation at the provincial level was listed as an important factor in successfully dealing with labor market issues. “An important advantage of the existing jurisdictional division, from a national perspective, is [the] ability to experiment with labour legislation, as well as to tailor the legislation to the conditions in each province”²⁹⁹.

Even though the Macdonald Commission made valid recommendations, the different orders of government still did not dedicate any particular attention to the topic in the proposed amendment of the Meech Lake Accord in 1987. As a matter of fact, the first formal attempt to

²⁹⁶ Macdonald Commission Report, Part VI. p. 170.

²⁹⁷ The only option was through the use of the ‘spending power’ yet, it was suggested that „considerable federal-provincial consultation is essential to determine realistically and productively overall levels of funding and of national educational goals” (Part VI, p. 172).

²⁹⁸ Macdonald Commission Report, Part VI. p. 162.

²⁹⁹ Macdonald Commission Report, Part V. pp. 672-673.

change the constitutional distribution of powers came five years later with the Charlottetown Accord. As a conclusion of the growing suspicion between Ottawa and the provinces, the Charlottetown Accord aimed to limit federal intrusion into the provincial jurisdiction over training and education as much as possible. Under the proposed amendment (Section 93B[1]) “The Government of Canada shall, *at the request of* the government of any province or territory, negotiate with that government for the purpose of concluding an agreement under which the Government of Canada is required to withdraw partially or completely, as soon as is practicable, from any program or activity in respect of the province or territory that relates to labor market development or training, including labor market training in the province or territory under any unemployment insurance program or activity, and is required to provide reasonable compensation to the province or territory”³⁰⁰. In other words, this proposal would not have changed the constitutional distribution of powers, but rather called for deliberations among the different orders of government to negotiate co-management or full devolution. This implies that the different orders of government did not choose the intergovernmental method of policy coordination in this area because of the constitutional failure at Charlottetown, but rather it was a deliberate decision on their part. On the other hand, federal jurisdiction over unemployment insurance and job creation programs would have remained untouched. Furthermore, under proposed Section 93C[1-2] the withdrawal of the federal government would have had to be orchestrated in a way that “ensure that all labor market development programs and activities (...) are compatible with national objectives” that are defined by the Government of Canada with the provinces and territories.

The period between the repatriation of the constitution and the failure of the Charlottetown Accord brought important changes to intergovernmental relations in the area of active labor market management. The former consensus that social and economic considerations of the area could be separated and covered by independent actions of the different orders of government was increasingly questioned by provincial governments. Due to the grim unemployment situation an emergency debate among the premiers and the prime minister was called together³⁰¹. Later, the Mulroney government acknowledged provincial jurisdiction over labor market matters³⁰². As a response, Ontario proposed a new Canada Training Allowance in 1987 which “would also reinforce an important federal-provincial partnership, a partnership

³⁰⁰ Emphasis added by the author.

³⁰¹ Alberta Hansard, 11 March, 1983, p. 18.

³⁰² See e.g. Tory job plan not good for Canadians, in *Calgary Herald*, 21 January, 1992.

based on strong provincial training programs and a reliable federal income support mechanism"³⁰³. In general, active labor market policy was becoming more and more complex which pushed governments towards opening discussions on policy coordination while the sensitivity of the matter also created skepticism among provinces to transfer formal legislative powers to the federal level which was indicated by the proposed amendment to the constitution made in the Charlottetown Accord. Instead of collective, centralized legislative decisions provinces favored a rather informal way of intergovernmental policy coordination. The establishment of the FLMM was quite indicative of this ambivalent change. This intergovernmental forum was extensively used to deliberate on common policy challenges between 1985 and 1995, yet it also signaled a deliberate aim of the different orders of government to deal with the cross-jurisdictional challenge through intergovernmental arrangements. This deliberate action was further buttressed by the fact that the 1987 Meech Lake Accord did not deal substantively with the question of competence over active labor market measures. Furthermore, even the Charlottetown Accord simply carried the possibility of negotiating a partial or complete withdrawal of the federal government from the areas of labor market development and training. It was a clear indication that provinces, and in fact the federal government, wanted to deal with this cross-jurisdictional issue in a rather informal way. The proposed constitutional amendment would not have changed the constitutional distribution of powers. Rather, it would have created an intergovernmental framework within which policy coordination could have been carried out. It comes of little surprise then that after the rejection of the Charlottetown Accord, deliberations continued between the provinces and the federal government on policy coordination in active labor market management. In fact, Quebec expressed its hope to reach a deal with Ottawa right after the death of the Accord³⁰⁴. In terms of the perceived attitude, the words of the Quebec Manpower Minister, André Bourbeau were quite telling: "We're preparing to go knocking on the door of the federal government to try to get the discussions going again (...) There is nothing that makes me think that the federal government will not accept our request"³⁰⁵. By January next year the ministers responsible for labor policy agreed to create a labor ministers forum to meet at least once a year³⁰⁶. Joe Clark, the constitutional affairs minister at the time argued that "there are a number of other issues that would allow us to move forward quickly in terms of practical arrangements that don't require us to change the Constitution in the same formal

³⁰³ Help Canadians retrain, Ontario Premier urges, in *The Toronto Star*, 27 November, 1987.

³⁰⁴ See Quebec eyes deal with Ottawa to expand jurisdiction over labor, in *The Gazette*, 6 November, 1992.

³⁰⁵ Quebec seeking to control job training, in *The Globe and Mail*, 6 November, 1992.

³⁰⁶ See Labor Minister Valcourt ripped for 'breaking promises', in *Hamilton Spectator*, 21 January, 1993.

way”³⁰⁷, especially those matters that were agreed to through the negotiation process but failed in the referendum. Similar to the case on inter-provincial trade, the issue of intergovernmental coordination of active labor market measures detached itself from the constitutional agenda. Despite the failures of the Charlottetown Accord, deliberations continued.

5.3.) From the Charlottetown Accord to the Labor Market Development Agreements – the emergence of federal principles in intergovernmental relations

Despite the early refusal of the federal government to deal with Quebec’s demand to continue negotiations on labor market development, Ottawa’s position soon changed. In fact, Kim Campbell, the Prime Minister at the time argued in relation to the changed attitudes that “when we get caught up in the Constitution, we get into this whole question of jurisdiction. [Now] we’re not changing the Constitution, what we’re doing is working together in a very co-operative way”³⁰⁸. Slowly but surely, it became evident that despite the failure of the 1992 Charlottetown Accord, coordination between the federal and provincial governments in the area of labor market policy did not stop. Quite the contrary, intergovernmental relations have become more intensive in nature with one important change: Ottawa was no longer looked upon as the dominant actor in the area, rather provinces kept their demand that the federal government withdrew from the labor market policy field. A more comprehensive approach taken by the federal government was signaled by the reorganization of the cabinet that led to an integrated department (Department of Human Resources Development Canada) which was to deal with labor market issues in a more systematic fashion and it began discussions with the provinces on how they could take over some of the program responsibilities.

However, the change of government at the federal level brought some new winds with it. Similar to the provincial responses in the 1980s to increased federal activism, the new liberal leadership’s initial answer in Ottawa was to counterbalance the provincial demands for decentralization of labor market matters³⁰⁹. The Chrétien government tried to introduce its Red Book initiative through which the federal level attempted to create a national program for apprenticeship while also increasing workplace training and working opportunities for the youth. Soon, this platform was abandoned which was also influenced by the grim financial situation of the federal government.

³⁰⁷ Constitutional reform can wait, Clark says, in *The Toronto Star*, 11 March, 1993.

³⁰⁸ Ottawa-Quebec training policy sets good example, in *Financial Post*, 7 August, 1993.

³⁰⁹ In fact, even though Prime Minister Campbell and Premier Bourassa reached agreement on responsibilities over labor market training, the incoming Chrétien government never ratified it.

On June 22, 1994 Ottawa offered “to transfer most of the federal budget for training purchases to provinces; the federal government would work jointly with the provinces to set strategic priorities for this spending” (Haddow, 2003: 252). As for employment services and labor market information, the federal government would continue its exercise through the Human Resources Canada Centres the number of which was reduced nevertheless. Yet, this proposal did not go far enough from the standpoint of the Charlottetown Accord. In 1995, a report was sent to the Premiers from the *Ministerial Council on Social Policy Reform and Renewal*. “It recommended that responsibilities within the federation be clarified and realigned, and commensurate resources be transferred; that joint federal-provincial responsibilities be minimized where this would improve the effectiveness of programs; and that use of the federal spending power [does] not allow the federal government to unilaterally dictate program design” (Bakvis and Aucoin, 2000: 8). On many points the report’s recommendations resonated with those of the Macdonald Commission (e.g. unemployment insurance reform, the introduction of transitional arrangements, etc.). The relevance of this report derives from the fact that it demonstrated a common position of the provincial governments to cooperate closer “with respect to sectors within their jurisdiction, [which was] essential in order to achieve greater efficiency and effectiveness within the federation”³¹⁰. It signaled a demand “to collectively assume a more cooperative leadership and coordination role with respect to their common national agenda in their areas of responsibility”³¹¹. Provinces aimed to speak with a common voice on national matters that affected areas of their jurisdiction such as labor market development. In general, it could be argued that the sensitivity and complexity of the topic led to the involvement of the highest political levels in the deliberations. As one federal official argued, “the whole idea of the LMMA came from an offer made by the Prime Minister, and even though there was no multilateral first ministers’ involvement, I can assure you that at the provincial level, there was absolute involvement of the Premiers in this file because this was a very big deal”³¹². The report talked about a need for “a new and genuine partnership between federal and provincial/territorial governments”³¹³. Slowly but surely provincial governments started to adopt the different federal principles in the area of labor market development. As the council report suggests, there was a growing sense of partnership and loyalty spreading among the provinces. In fact, it was stressed by more than one official that the report was very important in creating a sense of equality

³¹⁰ <http://www.exec.gov.nl.ca/exec/PREMIER/SOCIAL/ENGLISH.HTM>

³¹¹ <http://www.exec.gov.nl.ca/exec/PREMIER/SOCIAL/ENGLISH.HTM>

³¹² Anonymous interview conducted in Ottawa, 5 December, 2012. (FED_IGR02)

³¹³ <http://www.exec.gov.nl.ca/exec/PREMIER/SOCIAL/ENGLISH.HTM>

among the different orders of government in the field. It also suggested the existence of a collective attitude, yet negotiations with the federal government were carried out on a bilateral basis which reflected the existence of the principle of unity in diversity, nevertheless. In sum, the role of the council report was very much the same as the 1985 intergovernmental paper *On the Principles and Framework for Regional Economic Development* in the case of inter-provincial trade.

There was another relevant event in 1994 that had an impact on the course of intergovernmental developments: the election of a separatist government in Quebec. Eventually, the new Premier led the province to another referendum on independence in 1995. Even though the ruling separatist party failed to ensure a majority for the cause, during the campaign Prime Minister Chrétien “recognized explicitly the provinces as having primary responsibility regarding labour market training” (Haddow, 2003: 252) which was very much a repetition of the proposed amendment from the Charlottetown Accord. There was a strong initiative to prove that federalism can in fact work in practice and can help jurisdictions overcome constitutional dead-ends through working out alternative arrangements that would accommodate the demands of Quebec as well. Soon after the referendum, the federal government made a commitment that no new programs affecting labor market policy would be passed without the consent of the provinces. Furthermore, federal legislation changed the Unemployment Insurance scheme: it was renamed to Employment Insurance and its terms concerning training and job creation were revised. Skill development was the largest component that still needed provincial consent after Chrétien’s promise. Part II of the Employment Insurance program became the main vehicle for active labor market measures. It covered five specific areas: (1) targeted wage subsidies, (2) targeted earning supplements, (3) self-employment assistance, (4) job-creation partnership, (5) loans and grants for skills development. The fifth element was the biggest, and Ottawa repeated its promise not to proceed in this area without provincial agreement. In sum, this new legislation did not indicate too many changes in the federal-provincial distribution of competences.

Starting from early 1996, the proposal of the federal government became more and more generous. Not only was it influenced by Québec’s continuing demand for further responsibility transfers in labor market issues but also by personal changes in the federal government. “The department was reorganized to give federal-provincial relations concerns greater prominence in its internal deliberations” (Haddow, 2003: 253) and officials became more involved in discussions. Finally, by the end of May, 1996 Ottawa offered to transfer the responsibilities over existing labor market programs to the provinces in all five areas not just

in ‘skills development’, and to phase out of training purchases in the provinces within three years. Full devolution would also entail the taking over of the responsibility over employment and skills services, previously delivered through the Human Resources Canada Centres. Under this scheme, the only option for the federal government to influence labor market policies would be through the Employment Insurance program. All of a sudden, “Ottawa was offering far more than what (...) many provinces were expecting, going much further than what had been promised by the prime minister in his Verdun statement” (Bakvis and Aucoin, 2000: 11). It was a very “untraditional” offer that was hard to turn down by any provincial government; an offer that represented a clear change of attitude in intergovernmental relations. Not only was there an agreement among the actors to deal with cross-jurisdictional matters in an informal way without touching upon constitutional issues – thus avoiding amendment failures –, but increasingly, the traditional competition-based hierarchical model where the federal government’s unilateral action dominated the relations gave way to a more collaborative scheme that was informed by the adoption of important federal principles. As for the principle of autonomy, one former provincial official argued that “there was a pretty strong sense of self-determination only because frankly the labor market tends to come within the confines of the individual provinces and territories”³¹⁴. In general, there was a growing sense among provincial governments that they needed to have a voice in national matters that affected their jurisdictions. As for the partnership principle, most officials argued that even though there was a sense of partnership before and during the negotiations leading to the LMDAs, it would break down around the question of funding. However, it was generally stressed that “there was a lot of deliberation around federal-provincial-territorial tables (...) when the feds were present there was a very careful conversation, but discussion was always very amicable”³¹⁵. It was stressed by multiple officials that even though individual provinces played in different divisions, in terms of their economic power, there was generally a fair amount of support from bigger to smaller provinces. As one former official argued, “there was a good sense of the notion of fairness inter-provincially (...) [while] provinces thought that the federal government tried to be fair”³¹⁶. While these speak to the principle of comity, the council report also suggested the existence of the principle of loyalty by referring to the provincial governments’ role in national policy coordination in their areas of jurisdiction. As for unity and diversity, one retired official argued that “the arrangement reflected the notion

³¹⁴ Anonymous over-the-phone interview conducted in Budapest, 4 April, 2014. (PROV_LD07)

³¹⁵ Anonymous over-the-phone interview conducted in Budapest, 4 April, 2014. (PROV_LD07)

³¹⁶ Anonymous interview conducted in Ottawa, 9 December, 2012. (PROV_IGR05)

that there was no cookie-cutter approach to Canadian policy-making³¹⁷ which could be translated as an opposite to one-size-fits-all, since there was no real national labor market, as provinces argued. Accordingly, the role perceptions of the individual actors changed as well: provinces started to look at themselves as the most relevant unit of government whose responsibility in labor market matters had to be represented accordingly. This has set the scene for the negotiations leading up to the signing of the Labor Market Development Agreements. The federal government was determined to have an agreement with all provinces, however, proportionality concerns were raised more and more in determining which elements remain under federal responsibility and how provincial overtake of certain programs should be monitored.

At the beginning, not all provincial government took up on the offer by Ottawa, consequently besides a full devolution scheme supported mainly by Alberta and Quebec, there was a need for a co-management one as well where provinces only have a say over the content and management of the programs. Smaller provinces such as Nova Scotia or Prince Edward Island needed to face the reality of assessing their own capacities in the administration and delivery of those program areas. Last, but not least, there was a third group that was rather irresponsible to the offer made by the federal government. Ontario and British Columbia both fell into this category. What was interesting and indicative of the changed role perceptions nevertheless is the fact that “a number of provinces that would normally be considered to be fairly cautious, such as Nova Scotia and PEI began exploring the possibility of taking up the full offer” (Bakvis and Aucoin, 2000: 12). Yet, once they have analyzed their capabilities they identified potential threats that would undermine their efficient delivery of the programs. Furthermore, especially in the case of Alberta, there was an explicit demand to alter the federal government’s perception of them from being simply a contractor that delivers federal programs to an actual government exercising its legitimate jurisdiction. Similar concerns also led to explicit listing of roles and responsibilities in the agreements while also avoiding direct reference to federal legislation (e.g. in Quebec) which was an indication of how much informal coordination was valued by the provinces. The increasingly heterarchical nature of the negotiations was ensured through the acceptance of the “equality of treatment” clause that guaranteed that no provision in any of the agreements was to be more favorable than others.

³¹⁷ Anonymous interview conducted in Ottawa, 15 November, 2012. (PROV_LD07)

The first provinces to sign the Labour Market Development Agreements were Alberta and New Brunswick followed by Quebec and the rest of Canada with the exception of Ontario that did not conclude an accord until November, 2005. Quebec's and Alberta's positions on and replies to the federal offer were very similar. They both aimed to establish maximum responsibility over labor market affairs and they were both in a good position to do so. One important aspect of the intergovernmental negotiations was the involvement of the highest levels in the finalization of the deals. It has already been implied that provincial Premiers (e.g. Bourassa, McKenna) and the Prime Minister (Campbell, Chrétien) as well were clearly pushing the matter. In fact, Bakvis and Aucoin (2000: 13) argued that "the New Brunswick premier was in good part directly responsible for driving the LMDA agenda". Personal perceptions of the issue became highly relevant, as Newfoundland's example indicates where first the province aimed to go for the full devolution scheme, yet the new Premier saw more advantages in maintaining a strong federal presence.

The federal government chose to deal with the jurisdictional matters in a bilateral manner. Yet, even though it drove negotiations separately, they were carried out in a simultaneous way. The 'May offer' was accepted by the participating actors as the basis for discussion. There was a special steering committee established at the HRDC's Ottawa headquarters which worked in close connection with ministers and deputy ministers. However, the actual day-to-day business was conducted through senior officials at the regional headquarters. In case there was a soaring issue that could not be resolved the Regional Executive Head from the regional headquarter of the HRDC would directly contact his provincial counterpart to work out a solution. In some provinces, nevertheless, discussions were handled by the executive head right from the beginning. Provinces were generally represented by deputy ministers or ministers. As argued before, the Premiers' role cannot be underestimated in working out deals. "According to premier Bouchard, he and the prime minister finalized the deal in a series of four telephone discussions in the week before the signing of the agreement-in-principle" (Bakvis and Aucoin, 2000: 18).

It is important to note that there was a great level of uncertainty among the provinces on how to take over and deliver labor market development programs. In fact, Quebec seemed to be the only province capable of taking on the new responsibilities. However, it was not only the lack of capacities and expertise among the provinces but often their internal institutional structure (i.e. conflictual relations between line departments) also contributed to higher uncertainty and a lack of pre-existing positions. In fact, the overall arrangement of the 'devolution scheme' could be characterized as an open process where individual provinces

negotiated freely with the federal government their terms of dealing with labor market matters.

In sum, the complexity of the labor market file created incentives for open deliberations while sensitivity of the issue pushed the different orders of government towards intergovernmental arrangements. This allowed for the adoption of federal principles within the area of labor market development. Since the MacDonald Commission Report “intergovernmental relationship has been subject to frequent and, from a provincial perspective, often unanticipated and uninvited transformation” (Haddow, 2003: 263). A different approach came from the federal government that changed the status quo among the different orders of government. “Ottawa was willing not only to reorganize the primacy of provincial jurisdiction in labour market training but also to give all provinces the opportunity to administer important aspects of labour market development policy generally” (Bakvis and Aucoin, 2000: 1).

5.4.) Labor Market Development Agreements and the formalization of federal principles

Labor Market Development Agreements are the result of collaborative dynamics in the Canadian federation that allows the different orders of governments to work out cross-jurisdictional problems in an intergovernmental way rather than relying on centralized, federal legislative decision-making procedures. All in all there are 13 separate agreements that have been signed over the years, one with each province and territory. However, it has to be noted that the LMDAs led to further intergovernmental agreements among the different orders of government: Labor Market Agreements (LMAs), Labor Market Agreements for Persons with Disabilities, Targeted Initiatives for Older Workers are all examples of these.

As argued before the LMDAs can be divided up into two major groups that correspond to the full devolution and the co-management models. For practical reasons, this chapter only analyzes five different LMDAs that correspond to the two models and are distributed in an equal manner among the different provinces. The five cases consist of Alberta, Quebec, Nova Scotia, British Columbia and Ontario. As far as the similarities of the individual documents are concerned, each has a separate part describing the purpose and scope of the agreements. In general, they establish that the provincial governments assume an expanded role in the design and delivery of labour market development programs³¹⁸ which acknowledges the

³¹⁸ E.g. http://www.esdc.gc.ca/eng/jobs/training_agreements/lmda/on_agreement.shtml Under Purpose and Scope.

internalization of the principle of *self-determination* understood as interdependent decision-making authority. The accords also provide for cooperative arrangements between the individual province and the federal government stressing that “each government has certain responsibilities in the area of labor market development”³¹⁹. Consequently, there is a strong sense of equality between the different orders of government which signals the adoption of *partnership* within the area. This is manifest in the actual program deliveries. They each stress that Ottawa retains certain responsibilities for the delivery of insurance benefits under Part I of the EI Act and for the national aspects of labor market development (i.e. national emergencies, labor mobility, labor market information, etc.). All agreements speak about delegated authority to provinces with respect to certain National Employment Services functions with the exception of Quebec. There a separate chapter is dedicated to delineating roles and responsibilities between the different orders of government. Ottawa’s jurisdiction is strictly confined to areas connected to the employment insurance scheme whereas the provincial government has more power in determining labor market priorities, designing and implementing active employment measures, producing labor-related information, etc.

As far as the delivery of the programs was concerned, each document spoke about those arrangements, however they are different to some extent. Ontario, for instance, agreed to establish an LMDA Management Committee (composed of equal representation of the province and the federal government which indicates the partnership principle again) to oversee the implementation. Nova Scotia and British Columbia both agreed to work together to coordinate the delivery of their respective labor market programs and services as well, thus providing an integrated approach, but the provincial governments foresaw a site-by-site review of federal service delivery points. In Alberta, administration was to be channeled through its department responsible for advanced education and career development. In the case of Quebec the five point program list was renamed to better reflect provincial objectives. Both in Nova Scotia and in British Columbia transitional measures were included in the documents.

The twin principles of *loyalty and comity* are best represented in the recitals of the Alberta agreement which acknowledged both the importance of measuring, monitoring, assessing and evaluating of labor market programs on the provincial side and the relevance of the predictability and transparency of funding on the federal side³²⁰. Furthermore, the loyalty principle was reflected in the commitment of the different orders of government to reintegrate

³¹⁹ http://www.esdc.gc.ca/eng/jobs/training_agreements/lmda/ab_agreement.shtml Under Recitals.

³²⁰ http://www.esdc.gc.ca/eng/jobs/training_agreements/lmda/ab_agreement.shtml

the unemployed into the workforce³²¹. Comity was reinforced by the requirement to “keep each other informed of their planned activities and initiatives in this area”³²².

The principle of *unity in diversity* was upheld by the fact that bilateral agreements were signed between the federal government and the individual provinces (and territories). While the “equality treatment” principle ensures unity between the agreements and combines them into a quasi-national scheme, the different details enshrined within the individual agreements guarantees diversity. This diversity speaks both to roles and responsibilities across the different orders of government and substantive policy elements as well as it was demonstrated in the previous paragraphs (see e.g. program delivery details). It was also reflected in the evaluation procedures. Each document stresses the importance of an accountability framework through which efficiency of program delivery was supposed to be guaranteed. Alberta especially favored stronger monitoring and reporting measures. On the other hand, as far as evaluation measures were concerned most parties to the accords agreed that direct links between expenditures and changes in unemployment were difficult to set. In Alberta joint evaluation was to be worked out whereas Quebec took sole responsibility for that and only gave a role to the federal government in detecting and controlling the abuses in the program delivery while also agreeing to report to Parliament from time to time.

As far as *proportionality and mutuality* was concerned although the agreements separated the roles and responsibilities between the different orders of government, and there was a great deal of transfer of responsibilities from the federal to the provincial level, the federal government did retain some roles in the area. Not only through the EI payments, but most agreements noted that the federal government does have a responsibility in the field which would reflect national interests, “such as responding to national emergencies, activities in support of inter-provincial labor-mobility, the promotion and support of national sectoral councils, the operation of national labor market information and national labor exchange systems, other labor market programming and the provision of support for labor market research and innovative projects”³²³. Instead of delineating legislative competences in the area a procedural approach to the subsidiarity principle is used which determines under which conditions one order of government can exercise a given power in a given area.

³²¹ http://www.esdc.gc.ca/eng/jobs/training_agreements/lmda/bc_agreement.shtml ;
http://www.esdc.gc.ca/eng/jobs/training_agreements/lmda/on_agreement.shtml

³²² http://www.esdc.gc.ca/eng/jobs/training_agreements/lmda/ns_agreement.shtml

³²³ http://www.esdc.gc.ca/eng/jobs/training_agreements/lmda/ns_agreement.shtml The same measures can be found in the Ontario, Alberta, British Columbia agreements.

The principle of *flexibility and open-endedness* was reflected in the timeframe of the documents. All provinces felt that three years was a too short period of time and they wanted guarantees for longer term funding. Eventually, due to pressures coming from Quebec the agreements were concluded with indeterminate timeframes.

Even though LMDAs are bilateral agreements based on bilateral negotiations they have to be looked at from a systemic point of view as they have evolved simultaneously and are connected through the “equality treatment” principle. Furthermore, if one looks into the agreements, one finds a high level of similarities within the texts. In other words, Canada used the bilateral framework to establish a national policy delivery system that acknowledges the relevance of provincial differences. The monitoring and evaluation process used under this framework is very close to the multilateral surveillance system described in the economic governance case in the EU.

5.5.) Conclusion

This chapter had the aim to demonstrate how intergovernmental relations came to substitute a formal transfer of competence and subsequent collective, legislative decisions to settle the cross-jurisdictional challenge within the policy area of labor market development. As a starting point it was argued that labor market development was a highly complex area where the different orders of government developed a rather competitive relationship due to constitutional ambiguities around competence allocation. Before the 1980s intergovernmental relations could be characterized as rather competitive in nature as each order of government attempted to dominate the other by referring to different implied powers of the constitution that gave them jurisdiction over labor market matters. Before the Great Depression era and the experience of mass unemployment, there was no comprehensive and cooperative approach coming from the different orders of government to address common challenges. Nevertheless, the federal government, through its spending power, managed to increase its presence in training programs. Provincial governments did not react to those measures until they reached a point where the delicate balance between federal-provincial powers was endangered. Until then there was no attempt initiated by the provinces to alter the constitutional allocation of powers to settle the matter once and for all.

However, the growing complexity of the topic encouraged provinces to open discussions, while the sensitivity of the issue created a sense of skepticism towards centralized legislative decisions. The establishment of the FLMM was a clear manifestation of

these diverging yet interrelated dynamics. The reluctance towards former reallocations of power among the different orders of government can be traced in the fact that the 1987 Meech Lake Accord did not address the question while the 1992 Charlottetown Accord provisioned intergovernmental negotiations to reach policy coordination among the different orders of government. Consequently, even though the Charlottetown Accord failed, it did not affect deliberations on the labor market file. The provinces faced an interesting situation where they wanted to preserve or even regain competence over certain issues, yet, they proved to be reluctant to do it in a formal way. Complexity and sensitivity of the policy area increased uncertainty among the actors as for their respective preferences. Not surprisingly, the topic was often dealt with at the highest of the political level (e.g. Bourassa, McKenna, Bouchard, Campbell, Chrétien, etc.) instead of rendering it to being addressed by ministerial officials.

Despite the failure of the Charlottetown Accord intergovernmental negotiations continued with the aim to accommodate cross-jurisdictional policy coordination without formal power transfers and subsequent centralized legislative decisions. Soon it became obvious that “insofar as matters requiring uniformity of treatment, or concerted action can be dealt with by co-operation among the provinces, or between the, Dominion and the provinces, the case for additional centralization to promote efficiency or uniformity will not arise”³²⁴. Indeed, as provincial governments acknowledged both the complexity and sensitivity of the policy area they started to adopt new federal principles in their intergovernmental interactions. It seemed as if the principle of self-determination was increasingly complemented by further federal principles the special combination of which led to collaborative patterns of intergovernmental relations. It was no longer a question about ambiguous constitutional jurisdictions falling under implied powers of the different orders of government but rather about the actual coordination of policy-decisions that would influence the roles and responsibilities of the individual actors, nevertheless. Once both orders of government realized the need for coordination the stage was set for the negotiations that led to the signing of Labor Market Development Agreements. As it was argued before, the relevance of the topic was indicated by the involvement of the highest political levels in the discussions. Also, negotiations turned out to be rather open-ended as the different elements of the individual deals were addressed and the federal government came out with putting everything on the table and practically making it difficult for the provinces to pull away from the deliberations. In fact, negotiations were not about hardcore bargaining but rather about policy deliberation

³²⁴ Rowell-Sirois Commission Report, Book 2, Chapter 5, p. 70.

where the different elements of responsibilities over policy deliveries were to be settled. This was enabled by the fact that there was “considerable goodwill and a willingness to show flexibility” (Bakvis and Aucoin, 2000: 34). At the end, the federal government entered into bilateral agreements with its provincial counterparts. These accords shared certain characteristics yet they ensured flexibility through unique measures directed towards the special demands of the individual provinces. The importance of the LMDAs derives from the fact that even though they do not alter the constitutional distribution of powers among the different orders of government they do have an impact on the exercise of those powers.

In sum, it is argued here that from the 1980s there was a considerable change in the character of intergovernmental relations that enabled the different orders of government to address cross-jurisdictional policy matters without centralizing decision making in the federal legislative body. It has been argued that the growing complexity and sensitivity around labor market development pushed actors to become more open and eventually adopted new principles and basic norms upon which the procedures and institutions of intergovernmental relations relied.

6.) LABOR MARKET GOVERNANCE IN THE EUROPEAN UNION

Similar to the Canadian case, employment policy governance in the European Union stretches over different areas of concern and across jurisdictions of the different orders of government. There are economic, social and even fundamental rights aspects of labor market development. As a former European Commissioner argued, “employment cannot be viewed in isolation (...) policies on employment and labor market must be integrated into, and coherent with, the Community’s overall economic and social policies”³²⁵. In fact, the social dimension was always an important and integral part of the demands of the European integration process (see Wood, 2009) and naturally employment policy was first approached from this angle. Over the years, however, with growing interdependence labor market issues soon became matters of common economic concern.

Historically, the competence over employment remained with the member states. However, technological development, demographical changes and globalization in general challenged member states’ efficiency in delivering policy solutions within this complex area. Addressing unemployment and active labor market measures in a more comprehensive manner increasingly required intergovernmental exchanges from member states. The aim of this chapter is to analyze to what extent the character of intergovernmental relations developed from competitive to collaborative patterns and how the latest intergovernmental evolution with the Euro Plus Pact, the TSCG and the Compact for Growth and Jobs impacted on the European Employment Strategy. It will be demonstrated that the character of the policy area, namely its complexity and sensitivity, has great impact on intergovernmental relations which increasingly comes to substitute formal transfers of competences and subsequent collective, legislative decisions in the area.

This chapter aims to introduce the reader to the different periods of employment policy development and show how the character of intergovernmental relations changed over time highlighting the most relevant factors leading to such alterations. First, as in previous

³²⁵ EC rejects Thatcher’s line, in *The Times*, 21 July, 1989.

chapters, the ‘constitutional framework’ around labor market governance will be assessed, stressing the most relevant features of the existing system based on a historical overview stretching from the Treaty of Rome to the Delors White Paper. It will be argued that formalization of active labor market policies proved to be rather limited over the course of the Treaty of Rome, the Single European Act, and the Maastricht Treaty. Little more than general clauses existed that stressed the aim of cooperation among member states in areas related to employment. In fact, this period could be characterized as an era where labor market policies were still thought to be best addressed through measures of the individual member states, and any attempt to formally transfer competences to the European Community was regarded as unwanted by the member states. This was a period of preserving the status quo based on the principle of self-determination and autonomy, where no real effort was made to coordinate employment policies among member states. Intergovernmental relations were rather ad hoc in nature, and no substantive consideration was given to fight for high levels of employment, as the treaties had outlined. Coordination of member states’ policies at the European level focused mainly on employment protection as opposed to employment promotion within this period that was also reflected in the Council Directives of the time.

Not until rising unemployment rates and increased levels of economic and social interdependence hit member states was the topic addressed in a more comprehensive manner. In the second subchapter, the developments from the Delors White Paper on Growth, competitiveness, employment to the Lisbon Treaty will be assessed. It will be demonstrated that during this period, the topic of employment policy coordination was increasingly considered by the member states as an area of “common concern”. In many ways the Amsterdam Treaty can be considered as the peak of formal competence division between the different orders of government. However, from many different aspects the treaty merely repeated provisions from previous treaties. Even though it allowed Community institutions to facilitate coordination among member states, the treaty did recognize the competence of member states over employment matters. Possible recommendations were legally non-binding, and there were no sanctions introduced to the system in case of non-compliance. However, this period witnessed a move away from employment protection measures through legislative decisions in the form of Council Directives, towards employment promotion measures in the form of intergovernmental coordination mechanisms through the established European Employment Strategy. The subsequent treaties to Amsterdam did not change the formal distribution of powers, yet, the European Council Conclusions step-by-step fine-tuned the overall framework of the open method of coordination within which employment policy

was supposed to be governed. In sum, member states started to acknowledge both the complexity and sensitivity of the employment policy file, yet, this acknowledgement remained rather constrained which was reflected in the prevailing dominance of the self-determination principle. As complexity of the policy area was only partially admitted and member states' interests were emphasized, open discussions remained scarce, which allowed for a limited adoption of federal principles underlying collaborative patterns of intergovernmental interactions. Nevertheless, this period could be characterized with high levels of activism in the European Council (e.g. special council on employment) and gradual development of intergovernmental exchanges.

The third subchapter will highlight how little formal changes have been initiated ever since the adoption of the Amsterdam Treaty. It will be demonstrated that the latest 'constitutional' document, the Lisbon Treaty merely repeated the most relevant clauses concerning employment policy without any substantive change. This indicates that after the Amsterdam Treaty had been signed, there was a growing reluctance among member states to actually transfer more competences formally over to the EU institutions, and thus centralize decision-making procedures. Nevertheless, the coordination process did not stop. To the contrary, with the Europe 2020 Strategy member states committed themselves to further intergovernmental coordination which was regulated partly through the Euro Plus Pact, the TSCG and the Compact for Growth and Jobs in the years of 2011 and 2012. This subchapter will analyze the process leading to the adoption of these measures and it will highlight the most relevant changes it initiated on the intergovernmental framework concerning employment policy with a special focus on the adoption and internalization of federal principles.

The fourth subchapter will give a short overview of the existing European Employment Strategy as it stood in 2012. Last but not least some concluding remarks will be made concerning the emergence and development of collaborative patterns of intergovernmental relations within the area of employment policy.

The same methodological considerations have to be repeated here as was expressed in the chapter on economic governance. Even though the study builds upon existing research (Goetschy, 1999, 2007; Zeitlin et al., 2005; Nedergaard, 2006; Heidenreich, 2009) interview materials have a special focus on the emergence of federal principles in intergovernmental relations, therefore, they provide with additional value to the literature. Furthermore, considerations of the employment file with regard to the latest intergovernmental developments as manifested in the TSCG and the Euro Plus Pact have not been addressed so

far (see similar argument by Weishaupt and Lack, 2011), especially not from a federalist perspective.

6.1.) From the Treaty of Rome to the Delors White Paper – the social dimension and competitive intergovernmental relations in employment policy

Labor market governance refers to both passive measures, such as unemployment insurance, and active ones which aim to increase employment opportunities. Globalization dynamics, demographical and technological changes had a great impact on the quality of labor supply, the quantity of labor demand and the overall quality of the relationship between the two. Step-by-step it became clear that individual member states could less and less face this complex challenge in an efficient manner. Consequently, there was a slowly but surely emerging consensus on the need for stronger and closer coordination between separate yet inter-related policy areas and among the different orders of government in the EU. As in the case of Canada, active measures will be the focus of analysis in this chapter.

As for the legal constitutional status of labor market development, the first rather general reference was made in the Treaty of Rome (1957). Article 3 (i) provisioned “the creation of a European Social Fund in order to improve employment opportunities for workers” while Article 123 continued by arguing that the European Social Fund (ESF) “shall have the task of rendering the employment of workers easier and of increasing their geographical and occupational mobility within the Community”. To ensure these aims Article 125 elaborated on the application of the ESF funds for the purposes of re-employment of workers by means of vocational training and resettlement allowances and through aid. All in all, the ESF served as a ‘quasi’ cost-shared program between the member states and the Commission which allowed the European level to influence member state policies through funding, similar to the “spending power” of the federal government in the Canadian context. As it was argued before, the topic was embedded within the social policy dimension. According to Article 118 “the Commission shall have the task of promoting close co-operation between Member States in the social field, particularly in matters relating to: employment, labor law and working conditions, basic and advanced vocational training”. Furthermore, Article 48 entailed provisions concerning the free movement of workers which was further supported by “ensuring close co-operation between national employment services” (Article 49 (a)). However, the issue did have an economic aspect to it: Article 104 argued that “each Member State shall pursue the economic policy needed to ensure the

equilibrium of its overall balance of payments and to maintain confidence in its currency while taking care to ensure a high level of employment and a stable level of prices”. Article 105 simply stated that member states shall cooperate for these purposes. Despite the number of provisions relating to employment policy governance, this early period witnessed “extremely little utilization of the Classic Community Method (CCM) in the employment field” (Kilpatrick, 2006: 122), which was also demonstrated in the low number of legislative decisions. During these years the main focus of the European Community was employment protection as opposed to employment promotion. Consequently, the first directives aimed to resolve issues such as collective redundancies (1975)³²⁶, to safeguard employee’s rights in the event of transfers of undertakings (1977)³²⁷, and to protect employees in the event of the insolvency of their employer (1980)³²⁸.

To further employment policy coordination among member states, the Standing Committee on Employment was established in 1970 which composed of the Ministers of Labor, the social partners and the Commission. The Committee was also supposed to make employment policy measures compatible with the overall economic objectives of the Community. Member states, however, showed great reluctance towards the involvement of the European level into affairs which they considered to be their own responsibilities. By the 1980s a number of structural fund initiatives pointed towards alleviating the economic and social stress of unemployment among the most vulnerable groups in the labor market and the economically most disadvantaged regions. Community decisions were still confined to passive rather than active measures. Once again, the Commission tried to take the lead with the revitalization of the European Social Dialogue in 1985, the goal of which was to provide a tripartite forum for joint opinions of employment related matters. In sum, “during the 1970s and 1980s, the European Community attempted to launch a number of initiatives in the field of labor market policy. These largely failed to find favor among national labor ministers, who regarded employment policy as a strictly national prerogative” (Van Rie and Marx, 2012: 336).

The Single European Act in 1986 did not touch the employment chapter. There was no formal amendment made to the general provisions under which labor market issues have been dealt with. Almost the same could be said in relation to the Maastricht Treaty. Even though

³²⁶ Council Directive of 17 February, 1975 (75/125/EEC). <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31975L0129&from=EN>

³²⁷ Council Directive of 14 February, 1977 (77/187/EEC). <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31977L0187&from=EN>

³²⁸ Council Directive of 20 October, 1980 (80/987/EEC). <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31980L0987&from=EN>

Article (2) was revised to include a reference to “high level of employment” as a goal to be promoted by the member states and the community institutions, other sections merely repeated clauses already incorporated within the Treaty of Rome. There was nothing new about the free movement of workers (Article 48), the close cooperation between national employment services (Article 49 (a)), the social provisions (Article 118), and the European Social Fund (Article 123). One of the few developments in the Maastricht Treaty was a social protocol that was to guarantee the common objective of ensuring high employment among member states. To that end “Member States shall implement measures which take account of the diverse forms of national practices” (Article 1 on Protocol on social policy). Furthermore, the article concerning vocational training was further developed, and it argued that “the Community shall implement a vocational training policy which shall support and supplement the action of the Member States while fully respecting the responsibility of the Member States for the content and organization of vocational training” (Article 127[1]). For the first time, the treaties gave jurisdiction – limited as it may have been – to the Community in a matter that was long considered to be the exclusive competence of the member states: education.

Interestingly enough, despite the growing concern about employment issues member states proved to be rather resistant to formal changes in the ‘constitutional framework’. In fact, despite the different articles in the Maastricht Treaty concerning employment policy Article 3 lists 20 different policies and actions the Community should pursue omits entirely the mentioning of labor market development in relation to the ESF. Ultimately, “the Maastricht text was essentially a Treaty on Monetary Union, accompanied by a social protocol without a convincing political will to fight unemployment” (Goetschy, 1999: 119). Consequently, the drafters of the treaty looked upon employment policy as an aspect of social rather than economic matter that fell under national as opposed to European jurisdiction.

In sum, this early period can be characterized with competitive intergovernmental relations as the most dominant principle underlying intergovernmental interactions was that of self-determination and autonomy understood as the independence of policy-making authorities. This was reflected in the different approaches taken to the employment chapter by the member states and the community. Whereas the former stressed the social dimension, the latter aimed to bring it under economic considerations. The complexity and sensitivity of the topic was not acknowledged by the different actors. In general, member states regarded labor market development as an area under their sole responsibility. Attempts to create grounds for increased involvement of the community level were often watered down by the skepticism of member states. Clearly, the principle of partnership was not adopted as member states did not

consider one another equal when it came to employment measures within their own constituencies. Consequently, the other federal principles could not evolve either. In general, it could be argued that the measures initiated during this period were “at best – weak” (Pochet, 2005: 37) and most decisions aimed at employment protection as opposed to employment promotion which was demonstrated in the character of Council Directives adopted during this period as well.

6.2.) From the Delors White Paper to the Lisbon Treaty – acknowledging the complexity and sensitivity of employment policy

Employment policy, as an integral part of traditional welfare state policy areas, slowly but surely became an area of common concern among the EU member states over the decades and thus seized to exist as an exclusive national competence. As it was argued by many, “the European debate moved away from the Maastricht Treaty and on to the employment crisis. It had taken a European recession to bring commonsense into the reckoning about Europe’s priorities”³²⁹. This was also a natural consequence of the implementation of the economic and monetary union which greatly increased the level of interdependence among the individual member states with a special impact on employment³³⁰ (see Van Rie and Marx, 2012: 337-338). Consequently, in the early 1990s, growing unemployment levels shifted the attention away from social regulatory policies to coordinated action and voluntary convergence of labor market policies (Jacobsson, 2004: 357) and with that the focus turned from employment protection to employment promotion measures.

The situation was ripe for action when Jacques Delors published the influential White Paper on *Growth, competitiveness, employment*³³¹ in December, 1993. During the Copenhagen European Council (21-22 June, 1993) the Commission was invited to prepare a document as the European Council was increasingly concerned with the unemployment situation in the member states of the Union. The heads of state and government agreed to initiate concerted action based on the principles previously agreed upon during the Edinburgh European Council meeting³³². Like the 1985 Delors Report on the internal market, this 1993

³²⁹ Brussels to unveil new social package, in *The Guardian*, 7 September, 1993.

³³⁰ It was argued that the EMU limited the scope for expansionary fiscal policies, lessened incentives for labor market reform and increased unemployment through a relatively low level of inflation.

³³¹ http://europa.eu/documentation/official-docs/white-papers/pdf/growth_wp_com_93_700_parts_a_b.pdf , COM(93) 700, 5 December, 1993.

³³² In December, 1992, the Edinburgh European Council reached agreement on the establishment of a plan of action by the member states and the Community to promote growth and to combat unemployment.

document was intended to push European integration forward as well. The report set out to facilitate debate and assist decision-making in creating millions of jobs through finding a synthesis between job creation, equal opportunities and competitiveness. Its major contribution was to put employment policy on the political agenda of the member states, and consequently set the framework for subsequent social and economic policies as well. “By bringing the employment question into a field previously within the competence of single national systems, macroeconomic policy aiming to reach full employment was taken into consideration for the first time (...) It marks a common awareness of the compelling need to give a European dimension to the fight against unemployment” (Regent, 2003: 193).

The document was divided up into three major chapters, as its title would indicate. In its third chapter it specifically highlighted the importance of vocational training programs in active labor market measures. It argued that “well-planned education and training measures should produce positive results in three areas: combating unemployment (...), boosting growth (...), developing a form of growth which produces more employment by improved matching of general and specific skills to changes on the markets and to social needs” (p. 117). The document identified the major weaknesses (e.g. relatively low level of training in the Community, inadequate development of systems and types of training, inequality of access, limited recognition of qualifications and skills across the Community, etc.) and strengths (quantitative and qualitative steps taken to improve training systems, rapprochement between education systems and industry, etc.) of the existing system. In its general objectives, the paper argued for assistance in skills development, in-service training, programs of lifelong learning, etc. As far as the specific provisions were concerned, the document suggested a concerted action among member states at the European level. It supported the establishment of a framework within which it was possible to draw on the experience gained in another member state and to adapt the measures to those conducted elsewhere (p. 121). The paper also advised member state governments to decrease their fiscal instruments in relation to passive labor market measures and use those released funds to finance active labor market programs instead. As far as the Community was concerned, the document suggested that the Community “set firmly and clearly the essential requirements and long-term objectives for measures and policies in this area” (p. 122).

Concerns about employment policy were embedded in a wider discussion on competitiveness and economic growth. As one Commission official argued, “the Delors White Paper demonstrated that there was a general consensus among member states about a competitiveness discourse in employment measures which led to ‘a bit more

coordination”³³³. The white paper recognized the need for more efficient labor markets through investment in people. It implied “a remodeled, rational and simplified system of regulation and incentives which will promote employment creation” (p. 123). The document stated that member states reached an agreement on the fact that labor markets did not work efficiently due partly to an inadequate match of labor supply to the needs of the market. The member states not only agreed on the diagnosis but also on certain measures that needed to be taken to ease the situation. There was a clear need “for a thoroughgoing reform of the labor market with the introduction of greater flexibility in the organization of work and the distribution of working time, reduced labor costs, a higher level of skills, and pro-active labor policies” (p. 124). In its conclusion, the white paper stressed the role of the Community in providing a forum where a common broad framework strategy can be agreed and in underpinning national measures with complementary Community actions through, among other steps, ensuring the transfer of good practice and experience (p. 135). Even though, “the document is neither a source of obligations, nor a legislative programme, nor yet a plea for broader Union powers (...) the White Paper introduces a shift of method from harmonization to the definition of pertinent policies and thus opens the way to a Community approach by means of soft law” (Regent, 2003: 193).

The white paper was debated extensively among member states and within the major institutions of the EU. Even though the white paper was generally judged positively in the member states, “a fragmentary approach [wa]s still noticeable, and the need for ‘collective action’ has not yet been realized”³³⁴. Most of its initiatives were taken as too ambitious by numerous member states, yet, it provided a firm reference point for further discussion and set the stage for a renewed European Employment Strategy. In fact, the Essen summit in December, 1994 created a new platform for employment policy coordination. It was argued that “there must be further determined efforts to improve competitiveness and the employment situation”³³⁵. Five different areas were mentioned where individual measures could and had to be taken: investment in vocational training, increasing employment-intensiveness in growth, reducing non-wage labor costs, improving the effectiveness of labor market policies through increased level of active measures, and improving steps to help groups which were particularly hit by high unemployment rates. In order to ensure the effective transposition of these recommendations in member state policies, the council

³³³ Anonymous interview conducted in Brussels, 23 April, 2013. (CAB_ANDOR03)

³³⁴ Delors jobs plan wins backing, in *Financial Times*, 13 June, 1994.

³³⁵ European Council Conclusions, 9-10 December, 1994, Essen, in the introduction. http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00300-1.EN4.htm

conclusion requested the Labor and Social Affairs and the Economic and Financial Affairs Councils and the Commission to keep close track of employment trends and monitor the relevant policies of the member states while also reporting annually to the European Council on progress concerning labor markets. This procedure intended to have three different effects: 1.) it would improve the efficiency of national employment policies, 2.) it would facilitate greater integration of social and economic aspects of employment policies through the required cooperation between ECOFIN and the Employment and Social Affairs Council, 3.) monitoring would ensure greater convergence of employment policies among member states. The impact of the ‘Essen strategy’ remained rather limited, nevertheless. Not only was there a general lack of measurable objectives, coordination was further weakened by an insufficient level of political consensus (see Regent, 2003: 194).

The subsequent Cannes European Council in June, 1995 requested member states to press ahead with structural reforms in the spirit of the five points outlined in the Essen conclusions. Also the European Council called the Council and the Commission to study the mutually reinforcing effects of increased coordination of economic and structural policies which report had to be presented in the following European Council. In December, 1995 in Madrid, the council conclusion stated for the first time that “job creation is the principal social, economic, and political objective of the European Union and its Member States”³³⁶. The Essen framework was once again confirmed and it was noted with content that recommendations have been translated into multi-annual employment programs.

In June, 1996, the new president of the European Commission, *Jacques Santer* submitted a proposal for a European *Confidence Pact* for Employment during the Florence European Council³³⁷. This pact was intended to balance the Stability and Growth Pact, and gave special emphasis to employment matters “in response to fears that the drive towards monetary union is putting people out of work”³³⁸. It argued that “the European Union (even less the Commission) cannot solve the problem of unemployment alone (...) But the Union must define the general framework for the fight for jobs and launch a concerted drive to seek the commitment of one and all” (p. 1.). The Confidence Pact had four main objectives: 1.) reinforcing the dynamics of European Monetary Union, as it was thought to be able to reduce unemployment, 2.) maximize the potential of the internal market, 3.) speed up the reforms of

³³⁶ http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00400-C.EN5.htm Under Introduction.

³³⁷ The Confidence Pact was first mentioned during the Turin European Council in March, 1996, and its official name was Action on Employment: A Confidence Pact. <http://aei.pitt.edu/5139/1/5139.pdf>

³³⁸ Santer launches ‘confidence pact’, in *Financial Times*, 1 February, 1996.

employment policies and institutions based on the principles and recommendations made in Essen, 4.) develop Community-level structural reforms to encourage employment. In general, the Confidence Pact was “a foretaste of the wider argument about the division between national and EU-wide powers and responsibilities”³³⁹. Santer argued that “the challenge of tackling the problems of reconstructing labor markets (...) must be done on a partnership basis”³⁴⁰, yet “concrete instruments converting words into action were still missing” (Regent, 2003: 195).

In December, 1996, the Dublin Declaration on Employment³⁴¹ was adopted which reflected the recommendations on employment made jointly by the Council and the Commission. The declaration further strengthened the connection between social and economic considerations of employment policy by emphasizing a more employment-friendly taxation system and through strengthening the interplay between macroeconomic and structural policies in the member states’ Multi-annual Employment Programs. The declaration served as the groundwork for an employment chapter in the negotiations on a new treaty.

In 1997, the Treaty of Amsterdam³⁴² was signed. As opposed to the Maastricht Treaty, this new document manifested a changed attitude of the member states in relation to employment policy by making clear reference to the topic among the activities the Community shall undertake. According to Article 3 (i) one such action is “the promotion of coordination between employment policies of the Member States with a view to enhancing their effectiveness by developing a coordinated strategy for employment”. Consequently, within the new ‘constitutional’ document, a separate chapter was dedicated to employment policy (Title VIII, Articles 125-130). The treaty stated that “Member States and the Community shall (...) work towards developing a coordinated strategy for employment and particularly for promoting a skilled, trained, and adaptable workforce and labor markets responsive to economic change” (Article 125). Under Article 126 employment policy was rendered to become an area of “common concern” for the first time, which signaled a change of attitude among member states³⁴³. Policy decisions needed to be coordinated within the Council. Even though there was a formal, legal recognition of employment policy within the treaties it did not change the allocation of competences substantively. In fact, Article 127 stated that Community action could only aim at encouraging coordination among member

³³⁹ Santer seeks to rebuild confidence, in *Financial Times*, 13 February, 1996.

³⁴⁰ Santer launches EU jobs ‘pact’, in *The Irish Times*, 29 April, 1996.

³⁴¹ http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/032a0003.htm

³⁴² <http://www.lexnet.dk/law/download/treaties/Ect-1997.pdf>

³⁴³ Compare this with Article 103 of the Maastricht Treaty on economic governance.

states or at complementing their actions, and “the competences of the Member States shall be respected”, while “measures shall not include harmonization of the laws and regulations of the Member States” (Article 129). The new treaty repeated a lot of elements that were explicitly mentioned in previous treaties and council conclusions. The explicit priority of “a high level of employment” was already mentioned in the Maastricht Treaty and the European Council conclusions in Madrid.

Nevertheless, Article 128 established the institutional and procedural mechanisms through which monitoring of the employment situation was to be assured, guidelines and recommendations to employment policies were to be made, and reports on implementation were to be produced. Under Article 130, an Employment Committee was established with two members appointed by each member state and the Commission. The main task of the committee was to monitor the employment situation and employment policies in the Member States. “The mechanisms set up for employment policies borrow broadly from the economic policy model set up by Article 103 of the Treaty of Maastricht” (Regent, 2003: 197). Nevertheless, any recommendations on employment matters were of non-binding nature, and there were no sanctions provided for. The new framework introduced an alternative to traditional ways of legislative decision-making by moving away from ‘management by regulation to management by objectives’ (see Regent, 2003). Legislative measures adopted during this period were simply extensions of the previous directives that focused on employment protection and rights as opposed to employment promotion. The Young People at Work Directive (1994)³⁴⁴ was to protect and monitor young workers’ health and safety, while the European Works Councils Directive (1994)³⁴⁵ provided workers with the right to establish works councils in companies. Furthermore, the Posting of Workers Directive (1996)³⁴⁶ aimed to guarantee the rights and working conditions of a posted worker, while the Part-time Work Directive (1997)³⁴⁷ required part-time workers’ employment conditions to be similar to comparable full-time workers’.

Similar to the case of the Maastricht Treaty in relation to economic policy coordination, the Amsterdam Treaty merely consolidated the already existing framework outlined in the Delors White Paper and the ‘Essen strategy’. Furthermore it served as a

³⁴⁴ Council Directive of 22 June, 1994, 94/33/EC. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31994L0033&from=EN>

³⁴⁵ Council Directive of 22 September, 1994, 94/45/EC. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31994L0045&from=EN>

³⁴⁶ Directive 96/71/EC of the European Parliament and of the Council of 16 December, 1996. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31996L0071&from=EN>

³⁴⁷ Council Directive of 15 December, 1997, 97/81/EC. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997L0081&from=EN>

‘constitutional peak’ with regard to employment policy (similar to Maastricht in case of economic governance). As one member state official argued, “the legal basis peaked at Amsterdam which did not highlight the limitations of the treaties until the crisis”³⁴⁸. In fact, it could be argued that much of today’s framework around labor market policies were put in place under the procedures first outlined during the Essen European Council. The Nice Treaty did not change any of the provisions concerning employment. It merely repeated those of the Amsterdam Treaty. All in all, formal, legal development of employment policy measures stopped with the Amsterdam Treaty. However, this did not mean the end of the further refining of the institutional framework.

The European Council meeting in Luxembourg following the adoption of the Amsterdam Treaty was an extraordinary one specifically dedicated to matters of employment where the European Parliament presented a resolution on an employment initiative. It was the first time that an entire session was conducted on questions of employment policy and it showed the level of attention dedicated to the subject by the member states. It was decided that the new provisions enshrined in the Amsterdam Treaty in relations to labor market issues were to put into action immediately. An innovative method was introduced through which Union-wide employment guidelines were to be established with specific targets that were regularly monitored. These guidelines with respect to the principle of subsidiarity were to be incorporated within national employment action plans drawn up by the member states. There were four main objectives decided upon: (1) improving employability by offering training to the unemployed in the first six months, (2) creating a new culture of entrepreneurship by changing the tax system, (3) promoting the adaptability of firms and their workers through flexibility and security for workers, (4) strengthening equal opportunities measures through a reduction of discrimination. “The Luxembourg Process was (...) initially meant to be a ‘peer pressure’ process, which would leave the employment policy to remain a matter for national governments” (Regent, 2003: 203). The aim was “not to impose some big plan from on high on a diverse range of European labor markets but to accept (...) differing solutions and emphases in line with individual situations”³⁴⁹.

The Vienna Strategy for Europe outlined the development of a European Employment Pact within the framework of the Luxembourg Process. The pact aimed to set up procedures for dialogue and policy formation. The Council Conclusion called for the reinforcement of the evaluation processes, and argued that “a broad and intensive dialogue between all the actors

³⁴⁸ Anonymous interview conducted in Brussels, 12 May, 2013. (MS_EMPL01).

³⁴⁹ Labor markets, in *Financial Times*, 30 April, 1998.

involved (...) [was] of prime importance”³⁵⁰. In general, the Employment Pact aimed to “bring together all the actors concerned with employment promotion (...) [and] the need for an integrated approach to macroeconomic and social questions” (Regent, 2003: 204). The pact was adopted during the Cologne European Council, and aimed to combine the Cologne process (macroeconomic dialogue ensuring non-inflationary growth), the Luxembourg process (further development and better implementation of coordinated employment strategy) and the Cardiff process (comprehensive structural reform and modernization). In March, 2000, member states agreed to institutionalize a new form of governance tool, the Open Method of Coordination (OMC) which involved fixing guidelines, establishing quantitative and qualitative indicators and benchmarks, translating them into national and regional policies and monitoring as mutual learning processes³⁵¹. With the OMC, “the European Council did not launch a new process (...) [rather] the former European ‘strategy’ was transformed into a proper ‘method’ of intervention” (Regent, 2003: 205). As a Commission official argued, “the OMC is a tool to deal with policy challenges at the EU level in areas of member states’ competences”³⁵². The OMC was supposed to function on the principle of subsidiarity. Even though there existed other “premature versions of OMC” (De la Porte and Pochet, 2002: 41) before, the significance of the Lisbon summit was in its discursive constitution of policy coordination. OMC made it possible to integrate policy areas without replacing national frameworks within a single European model.

The first evaluation of the EES came with mixed conclusions. While it “showed positive results – it was argued that the EU Member States increasingly focused on activating and preventative measures – it was criticized for being too complex, and thus failing to reach its full potential” (Weishaupt and Lack, 2011: 15). As in the early 2000s unemployment rates were falling, more consideration was given to employment rates (see e.g. Stockholm European Council conclusions, 2001; Barcelona, 2002; Brussels, 2003; etc.). Furthermore there was an increased demand coming from the European Council to simplify and make the Employment Strategy more efficient (see e.g. Brussels European Council, 2003). The 2003 Brussels European Council called upon the Commission to establish a European Employment Task Force that could have the most immediate and direct effect on the implementation of the employment strategy by the member states. This act demonstrated the changed role of the

³⁵⁰ Point 37 of the Vienna European Council, 11 and 12 December, 1998. http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00300-R1.EN8.htm

³⁵¹ Points 37-40 of the Lisbon European Council, 23 and 24 March, 2000. http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00100-r1.en0.htm

³⁵² Anonymous interview conducted in Brussels, 29 March, 2012. (CAB_ANDOR01)

European Commission within the area of employment. The Task Force presented its report in December, 2003 which underlined the need for speeding up reforms on employment. The European Council argued that four essential requirements needed to be met in the new Employment Strategy: (1) increasing the adaptability of workers and enterprises, (2) attracting more people to the labor market, (3) more and more effective investment in human capital, and (4) ensuring the effective implementation through better governance.

In 2005, the Lisbon strategy was reviewed and the results were considered to be rather mixed³⁵³. Therefore, the Council Conclusion asked member states to refocus on priorities on growth and employment. The result: “the European Employment Strategy was streamlined with economic policy, resulting in the Growth and Jobs Strategy” (Van Rie and Marx, 2012: 338) which signaled “a shift in favor of economic actors” (Weishaupt and Lack, 2011: 17) that was reflected in the institutional settings as well. This framework has been maintained in the Europe 2020 Strategy which was introduced in 2010.

In general, the period between the Delors White Paper and the Lisbon Treaty could be characterized as a rather ambiguous one from the perspective of intergovernmental relations. Although the Delors White Paper highlighted the complexity and sensitivity of the employment policy file, it was only partially acknowledged by the individual member states. Consequently, this period was still dominated by the principle of self-determination and autonomy. Even though member states started to realize the need for a common effort in the area of employment policy they wanted to keep the decision-making as informal as possible through intergovernmental methods. As autonomy was understood as independence of decision-making authority, which was reflected in the weak review results of the employment strategy, there was very little room for the partnership principle to emerge. The equality of actors was not yet established which was also reflected in the dominant narrative of the economic over the employment policy file. Loyalty was emerging, inasmuch as employment policy was made a common concern of the member states. However, the growing unemployment rates, and the negative feedback on national programs both suggest how fragile this commitment really was. As loyalty was only partly developed, the comity principle emerged in a restrained manner as well. Although unity was supported by the guidelines, diversity prevailed due to the dominance of the autonomy principle. On the other hand, unity in diversity was represented in the articles of the Amsterdam Treaty requiring individual reports from the member states on the principal measures they have taken to

³⁵³ Point 4 in European Council Conclusions, 22 and 23 March, 2005. http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/84335.pdf

implement their employment policies. Flexibility and open-endedness were adopted as principles in intergovernmental relations, although the role of deliberations was constrained since ‘national interests’ prevailed. In general, member states proved to be very cautious in transferring formal competences to the Union (see reference to respect of member state competences and explicit exclusion of harmonization of laws and regulations of the member states). One senior European official argued that “high unemployment does not call for supranational European solutions such as a Social Union to complement economic and monetary union”³⁵⁴.

One of the main reasons behind the formalization of the already existing procedures was to ensure legitimacy for Community-level action. However, the unconcealed aim was also to come up with alternative Community-level rule-making methods that would complement the use of directives and regulations which are of legislative nature. In fact, directives tended to provide frameworks rather than detailed prescriptions for the member states. Additionally, the employment strategy was supposed to increase the efficiency of labor market policies and thus advance the social dimension of Europe. As member states started to get more and more involved in the coordination of employment policies a different attitude has been adopted among them. “The fact that the EES is designed as an enduring process means that the nature of transactions between member states is different from that which applies in the case of the adoption of directives. In the latter instance, the diplomatic mode of interaction – where utilities are exchanged, involving trade-offs among a variety of issues, and where short-term political conjunctures are often decisive – tends to prevail; this is less so with the EES” (Goetschy, 1999: 132).

Even though member states refrained from creating a framework where centralized legislative decision-making would be dominant, they did start to coordinate in an area which was considered to fall under the sole jurisdiction of the member states for long. In fact, employment policy differed from previous social policy initiatives inasmuch as it touched upon issues that did not lie outside the core of national social policies but rather proved to be central to all member states. However, the framework outlined in the Amsterdam Treaty was likely to strengthen coordination as it balances Community-level guidelines with national employment policies. Coordination of employment policies, however, did not involve the possibility of sanctions, as we have seen in the case of macroeconomic policy coordination. Once again, the emphasis within employment governance is less on social regulation by

³⁵⁴ Row over ‘social union’, in *EUobserver.com*, 18 September, 2000.

legislation and more on efforts to improve the quality of national policy-making through coordination procedures. As it was argued, “the flexibility of soft law g[ave] the opportunity to Community institutions to stimulate these different actors by building on or around common objectives without directly setting legal obligations” (Regent, 2003: 198). Even though there was an explicit role mentioned in the monitoring and recommendation procedures for the European Commission, the sensitivity of the topic rendered its activities to be rather cautious. Nevertheless, this was a new role the Commission had to play: its main purpose was to structure the behavior of the different actors, to mediate through conflicts, and to a great extent to socialize the different actors to share common objectives.

6.3.) From the Lisbon Treaty through the Euro Plus Pact to the TSCG – the partial internalization of federal principles

As it was argued, the formal, constitutional framework in relation to employment policy did not change substantially after the Amsterdam Treaty. However, the adoption of the new treaty also signaled the reluctance of member states to transfer powers to the European level in the form of collective, legislative decision-making power. As for the Lisbon Treaty, Article 3 (3) of the TEU argued repeatedly that one of the basic aims of the European integration process was full employment. Article 2 of the TFEU once again claimed that member states should coordinate their economic and employment policies. Article 5, on the other hand merely formalized the shared jurisdiction over employment policies stressing that “The Union shall take measures to ensure coordination of employment policies of the Member States, in particular by defining guidelines for these policies” (Article 5 (2)). Once again, it has to be noted that the practice of coordination through these guidelines have already been mentioned in the European Council conclusions following the Amsterdam Treaty. Giving supplementary power to the Union over education and vocational training had also been incorporated within previous treaties. Among the general provision in the TFEU, Article 9 argued that in defining and implementing policies and activities, the Union shall always consider the requirement to promote high level of employment. The entire chapter on employment policy remained practically untouched during the period between the ratification of the Amsterdam and Lisbon Treaties. The ‘only’ difference between the two texts lies in the monitoring procedures. In the Lisbon Treaty there is no reference to a qualified majority within the Council that is necessary for guidelines and recommendations. Also Article 149 of the TFEU refers to ordinary

legislative procedures in the adoption of incentive measures to encourage cooperation between member states.

The financial and economic crisis highlighted once again just how fragile the existing framework for employment policy coordination was. However, as it was demonstrated before, the intergovernmental dominance in the coordination process of employment policies did not occur because of the crisis, as its roots can be traced back to the early 1990s. As one senior Commission official from the employment field argued, after the crisis “there was a need for a renewed approach to employment policy that went beyond the internal market idea...just because we have open borders, it will not resolve unemployment issues...clearly, there was a growing need for greater employment policy coordination among member states”³⁵⁵. As it was demonstrated before, the employment policy file was becoming extremely complex due to its interdependence with broader monetary and economic matters. This, in return, pushed member states towards open deliberations on employment policy coordination which manifested itself in the considerations given to the topic during European Council meetings by the heads of state and government. Also, the sensitivity of the topic pushed member states towards intergovernmental solutions which was reflected in the OMC which served as a new governance tool to coordinate employment policies according to the treaties. In March, 2010 the European Council proposed the adoption of the Europe 2020 strategy which aimed to address questions of employment and growth. The strategy was finalized during the European Council in June, where member states politically endorsed the Integrated Guidelines for economic and employment policies which were to serve as a basis for the annual growth surveys (AGS), the national reform programs (NRPs) and the country-specific recommendations (CSRs)³⁵⁶. However, the Council Conclusions stressed that “these recommendations (...) shall not alter Member States’ competences”³⁵⁷. As one Commission official from the employment field argued, “the integrated guidelines pushed the European Employment Strategy one step further than a traditional OMC”³⁵⁸. As a member state official argued, “the OMC got integrated into the [European] Semester which forced some discussion

³⁵⁵ Anonymous interview conducted in Brussels, 9 July, 2012. (CAB_ANDOR02)

³⁵⁶ Within the annual growth survey, the Commission sets out the EU priorities concerning growth and job creation. Based on the AGS, the European Council provides guidance to member states concerning national policies. In return, member states prepare stability / convergence programs on finances and national reform programs on measures taken towards growth. The Commission assesses these programs and provides country-specific recommendations which are discussed and can be endorsed within the European Council as recommendations.

³⁵⁷ Point 3 of the European Council Conclusions of 17 June, 2010. http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/115346.pdf

³⁵⁸ Anonymous interview conducted in Brussels, 29 March, 2012. (CAB_ANDOR01)

between the economic and employment departments and affected relations in Council formations as well”³⁵⁹. In general, it was argued by a Commission official that “the enforceability evolution that we have witnessed in economic policy has not been transposed to the employment area”³⁶⁰. Nevertheless, there were some institutional changes. As EPSCO started to focus more on the Country-Specific Recommendations (CSRs) “the role of the Employment Committee has increased...maybe not as much as the Economic Policy Committee’s or the Economic and Finance Committee’s, but it has increased...it deals with thematic reviews and it has a distinct role in the multilateral surveillance”³⁶¹.

In March, 2011 the Euro Plus Pact³⁶² was adopted by the heads of state and government of the Euro zone countries and a number of non-Euro zone countries. The Pact was based on an intergovernmental agreement within the framework of the OMC and among many things, it aimed to foster employment³⁶³. It established a framework within which the performance of member states would be analyzed based on indicators referring to long-term and youth unemployment rates and labor participation rates. In order to improve these indicators, the pact stressed the importance of three reform areas: flexicurity, life-long learning, and lowering taxes on labor. The intergovernmental nature of this coordination was buttressed by the fact that progress towards the common objectives was to be “politically monitored by the Heads of State or Government”³⁶⁴. Furthermore, under the competitiveness goal, wage indexation was to be analyzed more closely. As one member state official argued with regard to the Euro Plus Pact, “we entered into a grey zone...nobody was sure how far we can go without giving more power to the European level”³⁶⁵. The European Council meeting in December, 2011 reinforced the commitment to the Euro Plus Pact goals, and member states agreed that “the new economic governance must be supplemented by improved monitoring of employment and social policies, particularly those which can have an impact on macroeconomic stability and economic growth”³⁶⁶. As one Commission official argued, “once we have reached the point where Brussels can influence member states’ budgetary decisions, it will need a legitimizing argument...and since national budgets are built around the

³⁵⁹ Anonymous interview conducted in Brussels, 16 May, 2013. (MS_EMPL02).

³⁶⁰ Anonymous interview conducted in Brussels, 15 July, 2012. (DG_EMPL01).

³⁶¹ Anonymous interview conducted in Brussels, 12 June, 2013. (MS_EMPL04).

³⁶² http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/119809.pdf

³⁶³ See Annex I, under the title ‘Our goals’ of the Conclusions of the heads of state or government of the Euro area of 11 March, 2011.

³⁶⁴ See Annex I, under the title ‘Concrete policy commitments and monitoring’ of the Conclusions of the heads of state or government of the Euro area of 11 March, 2011.

³⁶⁵ Anonymous interview conducted in Brussels, 5 June, 2013. (MS_EMPL03).

³⁶⁶ http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/126714.pdf, point 4.

coordination of different public policy chapters, a similar process has to take place at the European level as well”³⁶⁷. In fact, due to the integrated guidelines, many officials spoke about a growing tension inside the Commission between the economic and employment cabinets and the President’s cabinet as well. Nevertheless, as one Commission official argued, “there are slightly growing interactions between ECOFIN and EPSCO...even though they aim to divide CSRs and try not to interact, there are substantive overlaps which require a common effort”³⁶⁸.

In January, 2012 Herman Van Rompuy called an informal European Council together where the program of job-friendly growth was launched. It focused mainly on stimulating employment for the youth, and stressed the social dimension of the EMU. As it preceded the comprehensive Employment Package that was put out by the Commission in April, it showed nevertheless, that the Heads of State and Government considered the topic of unemployment at the highest level in Europe. In March, 2012, the Treaty on Stability, Coordination and Governance³⁶⁹ was adopted. Under Article 9, it was argued that member states which signed up to the treaty “shall take the necessary actions and measures in all the areas which are essential to the proper functioning of the euro area in pursuit of the objectives of fostering competitiveness, promoting employment, contributing further to the sustainability of public finances and reinforcing financial stability”. As a follow-up in June, 2012, the Compact for Growth and Jobs³⁷⁰ was adopted by the heads of government or state which reinforced their commitment to the Europe 2020 Strategy. Member states committed themselves to tackle unemployment and its social consequences effectively, with regard to National Job Plans as outlined within the European Semester with the help of the ESF. The Compact made provisions for youth employment programs and argued that “EU governance, including multilateral surveillance of employment policies, must be improved”³⁷¹.

The period after the ratification of the Lisbon Treaty brought certain changes within intergovernmental relations with regard to employment policy. As one senior Commission official argued, “in the area of employment and social policy we have entered into a period of transition (...) we have been arguing that within a reinforced economic governance structure,

³⁶⁷ Anonymous interview conducted in Brussels, 9 July, 2012. (CAB_ANDOR02)

³⁶⁸ Anonymous interview conducted in Brussels, 23 April, 2013. (CAB_ANDOR03)

³⁶⁹ http://european-council.europa.eu/media/639235/st00tscg26_en12.pdf

³⁷⁰ http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/131388.pdf Annex.

³⁷¹ http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/131388.pdf p. 13.

an employment and social governance framework has to materialize as well”³⁷². As member states still have not yet reached the total acknowledgement of the complexity of the employment issue, deliberative interactions are still rather confined, and therefore the adoption of the different federal principles remains still somewhat limited within this area. From the historical overview presented in the previous subchapters, it became clear that a formal re-allocation of competences concerning employment policy proved to be rather problematic, despite the increased need expressed in numerous European Council conclusions on the part of the member states to further coordinate their labor market policies.

Throughout the process, intergovernmental relations adapted to the new circumstances and allowed for the further internalization of the principles of partnership, loyalty, comity, unity in diversity, proportionality and flexibility, although they remained rather limited in their scope. Self-determination and autonomy is still the dominant principle underlying intergovernmental relations. As one Commission official argued with regard to the overall development in response to the crisis, “there are really no tangible results beyond the [European] Semester...there is still very much a competitive philosophy among member states”³⁷³. As a member state official put it, “employment came to the fore as the crisis dragged on...but still...only a few recognized the need for more coordination”³⁷⁴. Consequently, the partnership principle could develop only in a limited sense. As commitment to common concerns is rather limited, the principle of loyalty is compromised as well. This, in return has a negative impact on the comity principle which is also reflected in the low level of pragmatism. As one Commission official argued, “the four presidents came out with four issues in December, 2012, and those dossiers are still open...they’ve been dragging on forever”³⁷⁵. The CSRs aim to uphold the principle of unity in diversity, yet, the dominance of self-determination and the consideration of national interests without serious attention being paid to common concerns renders diversity dominant over unity. Proportionality is partly reflected in the different measures passed, as the formal division of powers among the different levels of government did not change (i.e. the Lisbon Treaty did not change), yet the roles and responsibilities have altered somewhat. Flexibility is ensured through the open-endedness of the process in its manifestation of intergovernmental agreements (see Euro Plus Pact, TSCG, Compact for Growth and Jobs) and European Council Conclusions, yet it remains very much understood within the context of independence.

³⁷² Anonymous interview conducted in Brussels, 9 July, 2012. (CAB_ANDOR02)

³⁷³ Anonymous interview conducted in Brussels, 23 April, 2013. (CAB_ANDOR03)

³⁷⁴ Anonymous interview conducted in Brussels, 16 May, 2013. (MS_EMPL02)

³⁷⁵ Anonymous interview conducted in Brussels, 29 April, 2014. (CAB_ANDOR03)

6.4.) An overview of the existing framework under the European Employment Strategy

The open-method of coordination as a governance tool in the field of employment policy resulted in a shift away from the traditional community method to alternative, intergovernmental modes of governance that was the price that had to be paid for any expansion of shared rule. It is important to stress at this point that the area of labor market policy development generally questions the efficiency of ‘command and control’ type of decision-making procedures. Instead, employment matters generally require spending capacities and guidelines, targets and indicators to advance positive developments in labor markets. As one Commission official argued, “there is not much the EU can do beyond being more prescriptive”³⁷⁶. Consequently, it could be argued that the changing nature of intergovernmental relations around the employment file resulted partly because of the nature of the policy solutions required. The important added-value of the OMC was that it promoted “cross-national deliberation and experimental learning” (Kilpatrick, 2006: 124-125) among the member states.

In general, the open-method of coordination was a rather informal tool in reallocating competences over employment policy matters. After all, it did not change the constitutional distribution of powers: member states’ competence over labor market matters was still very much preserved in the treaties. Yet, the exercise over these exclusive competences has changed somewhat. The OMC over employment policy involves five different levels that actually exercise great influence over member states’ competences. First, there is the development of Employment Guidelines. Even though it is prepared by the European Commission, they are decided upon by the Council (of employment ministers). Even though these guidelines are not binding (member states simply *shall* take them into account), member states are expected to take them into account in their employment policies.

At the second stage, individual member states are expected to report on the implementation of these guidelines in their National Reform Programs which makes cross-national comparison and evaluation possible and also allows for policy learning through the circulating around of best practices. These are summarized in an annual Joint Employment Report which is prepared by the Council and the Commission. This document is generally followed by country-specific recommendations (CSRs) proposed by the Commission and adopted by the Council which suggest policy initiatives specifically targeted to resolve

³⁷⁶ Anonymous interview conducted in Brussels, 23 April, 2013. (CAB_ANDOR03)

country-specific issues. This tool is often used to “name and shame” practices that are intended to put pressure on individual member states if they do not deliver on the targets they were meant to reach. The fifth element is a mutual learning process with the financial assistance of the European Commission.

In terms of the institutional development that surrounds the intergovernmental coordination of employment policies. The Employment, Social Policy, Health and Consumer Affairs Council (EPSCO) meets regularly over the year (in general four times) and its work is generally supported by the Employment Committee (EMCO) that acts as an advisory committee that provides its opinion on the Employment Guidelines, and National Reform Programs, agrees to the annual Joint Employment Report, helps prepare the CSRs. The European Parliament participates through its Committee on Employment and Social Affairs, while the Commission and the Council regularly consults with the Economic and Social Committee and the Committee of the Regions. It is clear that deliberation is an important part of the overall process, as each element of the OMC framework (see previous paragraph) requires close collaboration of the individual actors to reach agreement. Since employment policy remains the responsibility of member states, the EU’s contribution is very much confined to setting common objectives for all the member states, analyzing measures taken at national level and adopting non-binding recommendations to its member states.

The policy coordination in employment matters results in collaborative dynamics where the different levels of government aim to work out cross-jurisdictional policy problems in a way that build heavily upon intergovernmental dynamics. In fact, in order to avoid centralized legislative decision-making, the role of the Commission has been changed, some would argue reduced, to become the administrative arm of the intergovernmental bodies of the European Council and the Council. Similar to the Canadian case where Labor Market Development Agreements have been made between individual provinces and the federal government, the practice of CSRs makes the European practice a similar bilateral practice. However, within the EU, employment policy very much remains an important part of the political agenda at the highest level, meaning the European Council. This tendency was further strengthened due to the economic and financial crisis that broke out in 2008.

In general, it could be argued that “the OMC has made profound changes in governance arrangements, reframing employment policy from a national member state responsibility to also include a complementary European dimension” (Wood, 2009: 8). As one Commission official argued, “the OMC fits nicely with a quasi monetary union (...) employment policy is a perfect candidate as far as its involvement is concerned within the

economic governance framework, while the social dimension could rely on an OMC Plus, or a reinforced OMC”³⁷⁷.

6.5.) Conclusion

This chapter aimed to analyze how intergovernmental relations came to substitute collective legislative decisions in the area of employment policy and what changes it initiated on the character of intergovernmental relations. As it was argued, despite the many references made in the Treaty of Rome concerning employment matters, it did not become an area of common concern until the adoption of the Amsterdam Treaty in 1997. Within the first period, self-determination and autonomy were the main principles underlying employment policy. It was argued that responsibility over employment policy remained with the member states, and Community jurisdiction was confined in rather general clauses dealing with internal market affairs. Even the European Social Fund that was supposed to help employment among member states proved to be a limited tool due to its financial basis. As long as labor market affairs were considered to be an integral part of the social dimension of Europe and its economic aspects were denied or at least pushed to the background by the member states, any expansion of Community competences was unthinkable. Legislative decisions from this period were confined to employment protection directives, and little consideration was given to employment promotion measures.

However, as unemployment was rising in the early 1990s and economic and monetary governance was on the agenda of the European Council, soon, employment concerns arose as well. Starting with the Delors White Paper and through a set of consecutive summits, employment policy gained more and more attention from the leaders of member states. Slowly but surely, it was recognized by the individual actors that labor market issues were of “common concern” and combating unemployment had to be made a top priority of the European integration process. During these years leading up to the Lisbon Treaty, the complexity and sensitivity of the employment file was gradually acknowledged by member states. Even though the Amsterdam Treaty did have a separate chapter on employment where supplementary incentive measures coming from the Council to promote cooperation among member states were made possible, it was made explicitly clear that the competences of the member states had to be respected in this area. This way, the Amsterdam Treaty merely repeated and formalized all those intergovernmental practices that were proposed during the

³⁷⁷ Anonymous interview conducted in Brussels, 9 July, 2012. (CAB_ANDOR02)

Essen and subsequent European Council meetings. It was clear that member states were not interested in formal competence transfers which created incentives for changed practices of intergovernmentalism. Complexity and sensitivity of the matter increased uncertainty among the actors which generally rendered the issue to be dealt with at the highest political level through the European Council. During this period further federal principles emerged and developed in relation to employment policies. However due to the partial acknowledgment of the complexity and sensitivity of the issue, self-determination dominated intergovernmental relations as a principle and only allowed for a partial adoption of further federal principles. Employment policy problems generally require active measures delivered through targets, guidelines instead of 'command-and-control' type of decisions which increased the value of deliberation in policy-making processes.

Once the Amsterdam Treaty came into force, it was becoming clearer and clearer that no formal changes or amendments would be made to the existing 'constitutional framework'. In fact, as it was argued, the Amsterdam Treaty itself is to be considered as rather simply a formalization of the status quo. It was more of an acknowledgement that intergovernmental procedures should prevail over centralized legislative decision-making. This has had a major effect on the institutional setup created around employment policy measures. The role of the European Commission has been reduced from a legislation initiator to an administrative arm of the Council and the European Council. The role of the European Council has increased which was demonstrated by the relevance of its conclusions reflecting on employment matters whereas the Council was increasingly responsible for monitoring and adopting recommendations. Beyond EPSCO, the role of its supporting institution, the EMCO has changed accordingly as well. It was argued that between the Delors White Paper and the Lisbon Treaty, the complexity and sensitivity of the employment area was only partially acknowledged by the member states which resulted in partial adoption of federal principles which nevertheless manifested themselves in intergovernmental relations.

This process has been further strengthened by the economic and financial crisis. However, as compared to economic governance, the employment file did not see a similar evolution. As member states still consider self-determination and autonomy the dominant principle driving intergovernmental interactions in this policy area, there is little room for substantive deliberative exchanges that would allow for the full adoption of federal principles underlying collaborative federalism. As a consequence, as one Commission official argued, the area is in the state of transition at the moment.

7.) CONCLUSION

This study was set out to enhance academic knowledge on the character of intergovernmental relations and their role in coordinating constituent unit competences within federal political systems without formal transfers of legislative jurisdictions. The empirical relevance of the topic has been underlined by the fact that the distribution of powers among the different orders of government is all the more difficult, and sub-federal units increasingly face the dilemma between the need for system-wide policy solutions and the demand to respect decision-making authority of the constituent units. This dilemma influenced political developments in areas such as inter-provincial trade in Canada or fiscal policy coordination in the EU, and it is expected to manifest itself in other policy fields as well that would confront constituent units with the same tension.

Despite the common feature of the dilemma outlined above across different multi-level systems the general theoretical literature is still lacking a comprehensive approach with a comparative edge that would aim to answer vital questions with regard to intergovernmental relations and the changing character thereof in relation to specific policy challenges. Most analyses focus on micro- and macro-structural elements (i.e. the constitutional framework and the legislative-executive relationship of either the federal or the constituent unit level) and do not consider the relevance of processes, while policy-centered approaches fail to reach a level of abstraction where comparisons become possible and systemic conclusions can be drawn. The dissertation sought to address this theoretical problem by advancing a policy-centered yet systemic approach which aimed to answer the following questions. Under which conditions and how do intergovernmental relations come to substitute formal transfers of competences and subsequent collective, legislative decisions to settle policy challenges that involve the coordination of constituent unit competences? What impact does this process have on the character of intergovernmental relations and on the actual allocation of powers within the policy area concerned?

Taking the essential federal nature of the policy dilemma constituent units faced, the dissertation sought to map out how federal principles emerged, developed and influenced intergovernmental relations within areas under constituent unit jurisdictions. In answering the research questions the dissertation further explored the concept of 'executive federalism', revised the meaning of 'collaborative federalism', and has identified the complexity and sensitivity of policy challenges as having a great impact on the character of intergovernmental relations.

The chapter will unfold as follows. First the major empirical findings will be synthesized with regard to the research questions formulated at the beginning of the study. This part will connect the major points with the supporting examples used within the case studies. The subsequent part will provide the contribution and implications of these synthesized empirical findings in relation to existing theories. It will be demonstrated how the theoretical framework advanced within this study contributes to the literature and how it fits within the established understandings. The aim of this section is also to underline the reasons for differences and similarities *vis-à-vis* the works of others in the area. The third sub-chapter then turns towards the institutional implications of the findings of the research. It will establish the main theoretical understanding upon which the research has been based and highlight how it could influence the debate on institutional development of intergovernmental relations. The subsequent section will highlight elements that could further enhance the value of the conducted research. In a bullet-point format with brief explanations possible additional aspects of the study will be outlined with regard to future research plans. This part will be followed by a short discussion on the various limitations which were encountered during the research and how those shortcomings could be overcome in later studies. Last, but not least some final remarks will be made.

7.1.) Empirical findings

The main empirical findings of the research have been summarized in the respective empirical chapters: on inter-provincial trade and labor market development in the Canadian context and on economic governance and employment policy in the European Union. However, it is important to synthesize these empirical findings with regard to the research questions posed at the beginning of this study.

1.) Under which conditions do intergovernmental relations come to substitute formal competence transfers and subsequent collective, legislative decisions in policy challenges that require the coordination of areas under constituent unit jurisdictions?

The study proposed a policy-centered approach and argued that the nature of the policy challenge, more specifically the complexity and sensitivity of a policy question has an essential impact on the character of intergovernmental relations. While complexity of a policy challenge, understood as horizontal and vertical interdependence, encourages constituent units to open discussions on possible coordination, the sensitivity of the area, meaning the involvement of a constituent unit jurisdiction, is expected to make them skeptical towards formal competence transfers and therefore pushes them towards intergovernmental arrangements. With regard to the first question the case studies have provided ample evidence that the nature of the policy challenge has greatly influenced the character of intergovernmental relations and contributed greatly to their substituting formal transfers of power and subsequent collective, legislative decisions. In each empirical chapter, it was demonstrated how the complexity and sensitivity of the policy challenge was gradually acknowledged by the constituent units. However, it is noteworthy that there was a certain variation across the cases with regard to the timeframe this process required. In general, Canada responded quicker: the complexity and sensitivity of inter-provincial trade was acknowledged over a few years by the provinces, whereas labor market development issues required slightly more time. In comparison, it took EU member states almost thirty years to see the same development in the area of economic governance, and a similarly long and still ongoing process can be witnessed in employment matters. This variation across cases and policy areas could suggest that the level of regulatory complexity (i.e. how difficult regulatory decisions concerning cross-jurisdictional policy matters come about) has an impact on the timeframe of collaborative developments. The existing institutional and procedural structure could also be responsible for such variation, as it brings complex policy challenges faster to the table of decision-makers.

On the other hand, in each case there were certain ‘commission documents’ (see Macdonald Commission Report, and Delors Commission Report and White Paper respectively) that brought important issues to the agenda. Additionally, in each case the process which led to the understanding of complexity and sensitivity of the policy topics involved some kind of external events. The inter-provincial trade issue in Canada was

precipitated by the NAFTA negotiations while the financial and economic crisis impacted on the understanding of economic governance in the EU. Furthermore, in both contexts rising unemployment rates led to the acknowledgement of the complex and sensitive character of policy decisions around labor market development. This would also explain why similar developments did not take place in the area of energy policy, for instance. Even though, there is a growing complexity and sensitivity of the issue, as it involves many different policy areas falling under the jurisdiction of the different orders of government (e.g. trade, natural resources, environmental issues, defense and security policy, economic policy), no crisis has pushed constituent units to acknowledge these characteristics in relation to the policy question. As long as constituent units manage to downplay the relevance of these features, similar intergovernmental developments are less likely to emerge.

2.) How do intergovernmental relations come to substitute formal competence transfers and subsequent collective, legislative decisions in policy challenges that require the coordination of areas under the jurisdiction of constituent units?

The thesis argued that once the complexity and sensitivity of the policy challenge was endorsed by the constituent units they enter into open intergovernmental discussions. As argued before, complexity makes them more open to deliberations while sensitivity pushes them towards intergovernmental arrangements. Since they face an essentially federal dilemma where system-wide solutions need to endorse the decision-making authority of constituent units, it has been proposed that federal principles are adopted in areas falling under the jurisdiction of constituent units, which would impact on the character of intergovernmental interactions and consequently intergovernmental institutions. With the exception of the EU employment case, which did not contradict the proposed framework, all other cases have confirmed the theory.

At the beginning, the study did not differentiate between the federal principles with regard to the different phases of the development of intergovernmental relations. However, the empirical cases suggest that there is a temporal division of labor among them. The principle of autonomy dominates intergovernmental exchanges before constituent units acknowledge the complexity and sensitivity of a policy challenge in full, while partnership is most relevant during intergovernmental deliberations leading to the intergovernmental agreements which reflect the principles of proportionality and flexibility to the greatest extent.

It was argued that the principle of self-determination and autonomy understood as the independent pursuance of 'national interests' came to reflect on common goals as well, therefore embedding constituent unit preferences within a more interdependent context. Partnership was adopted to ensure a non-hegemonic environment which was also mirrored in the consensus-oriented decision-making procedures as well. Loyalty and comity always worked in pair, as one could not ensure the emergence of federal dynamics without the other. Loyalty was always manifested in the openness of actors to commit themselves to the needs of the greater federal system, whereas comity ensured that the federal level would guarantee the fair play which was often represented in its readiness to compromise on different matters.

With the exception of the internal trade case in Canada where the partnership principle came to dominate the process at a very early stage, the other cases saw a rather gradual and arduous evolution, where the dominance of self-determination was not easy to deconstruct. The EU economic governance file was a perfect example where a half-hearted acknowledgement of the complexity of the issue caused the autonomy principle to overshadow the development of partnership. This, in fact, is still very much the case with the EU employment policy field. As far as the Canadian labor market development case is concerned, interestingly enough, the partnership principle was ensured rather indirectly through bilateral agreements.

Once open discussions led to the dominance of partnership, which was often made hard by existing institutions and processes as interviewees argued, the situation reached its next level where federal principles with a structural element got to prevail. While partnership, loyalty and comity helped initiate and guarantee the continuation of discussions, proportionality, mutuality and flexibility were relevant from the perspective of final arrangements. In fact, these principles distinguish collaborative federalism from cooperative federalism as proportionality instead of subsidiarity, and flexibility instead of formality came to dominate the final settlement. Instead of focusing on who shall be responsible for a certain policy decision, the question is to what extent this responsibility can be shared with others irrespective of the formal jurisdictional boundaries. Consequently, open-endedness becomes a virtue of the newly established system, which was reflected in the individual agreements. In fact, each case favored intergovernmental agreements to some degree (i.e. AIT, LMDAs in Canada, whereas the Euro Plus Pact, the TSCG and the Compact for Growth and Jobs in the EU).

3.) How does this process influence the character of intergovernmental relations?

Beyond the fact that intergovernmental relations came to reflect federal principles that would distinguish it from both competitive and cooperative patterns of interaction, there was one important empirical finding that was indicated by each of the case studies and which derives partly from the conceptual and theoretical framework that this study proposed. Namely, intergovernmental relations that correspond with collaborative dynamics tend to be more proactive than reactive in nature. This is partly due to the politicization of the issues involved, which was indicated by the involvement of the highest political levels, and the increased need for regulatory governance with surveillance mechanisms. As the complexity and sensitivity of a policy matter is acknowledged by constituent units they want to be pro-actively engaged with decisions which leads to constant assessments.

Another important development with regard to the character of intergovernmental relations is the institutionalization of new intergovernmental formats which nevertheless aim to reflect the newly adopted federal principles. In the Canadian case, formal ministerial fora have been established (e.g. Committee of Ministers on Internal Trade, Forum of Labor Market Ministers) and there is a greater involvement of the premiers as well which was previously guaranteed through the Annual Premiers Conferences and now with the Council of the Federation. As for the EU, ministerial councils were already in existence (ECOFIN, EPSCO with the EFC, and the EMCO). However, their working methods have changed considerably. As a financial counselor from a member state argued, “ECOFIN has become fundamentally a supervisory policy meeting”³⁷⁸, which made actors put more emphasis on informal formats, as Puetter (2012) argued. This is also present in the Canadian context, as one former negotiator to the AIT argued, “Ministerial meetings actually started with private ministerial dinners the day before which was followed by a breakfast session with the chief negotiators...only after did the full session start with all the advisors”³⁷⁹. However, the relevance of these intergovernmental institutions tends to fade over time in Canada. As a former LMDA negotiator argued, “FLMM meetings are less and less frequent...there is more activity at the bureaucratic level now”³⁸⁰.

Last, but not least, the changing character of intergovernmental relations also affected the inter-institutional balance within both entities. As for the European Union, the growing

³⁷⁸ Anonymous interview conducted in Brussels, 23 July, 2013. (MS_EFC01)

³⁷⁹ Anonymous interview conducted in Toronto, 29 January, 2013. (PROV_LD02)

³⁸⁰ Anonymous interview conducted in Ottawa, 4 December, 2012. (PROV_LD10)

reliance on intergovernmental procedures pushed the European Commission somewhat to the background, making it effectively “not only a civil service but also a ‘surveillance police’”³⁸¹, as one member state official argued. In both contexts, despite the great reliance on intergovernmental mechanisms, the supranational / federal bodies also came to play an important role. Whereas in the EU surveillance through the Country-Specific Recommendations (CSRs) gives the Commission some power, the federal government in Canada is empowered through its ‘power of the purse’. Once again, these are not legislative decision-making powers, but they do attach great responsibilities and roles to the federal level.

4.) What impact does this process have on the overall allocation of powers?

Even though intergovernmental relations came to substitute for formal transfers of legislative competences, collaborative interactions did have an impact on the allocation of powers. However, not in the traditional sense most federal theories would describe. As it was argued, there was a change of emphasis from subsidiarity to proportionality, in other words from the question of who does what to the question of to what extent? Even though in a rather informal way (through intergovernmental agreements), but the roles and responsibilities of the different orders of government are nicely laid out in each case. In Canada both the AIT and the LMDAs pay considerable attention to the topic. The same goes for the case of economic governance in the EU. However, the labor file is a bit different on that account, inasmuch as “the enforceability evolution that we have witnessed in economic policy has not been transposed to the employment area”³⁸², as one Commission official argued.

In general, it was demonstrated that in each case the powers of the different orders of government with regard to their own jurisdiction have been constrained by the newly established framework despite the lack of formal transfers of legislative competences. Whereas in the Canadian case of internal trade, the powers of both the provinces and the federal government have been limited, in the labor market area, more ‘restrictions’ have been initiated against the federal order of government. As far as the EU economic governance dossier is concerned, member states’ powers have become more narrowed, while central institutions gained some responsibilities, even if not in the form of legislative capacities. Interestingly enough, even though intergovernmental institutions and procedures gained

³⁸¹ Anonymous interview conducted in Brussels, 23 July, 2013. (MS_EFC01)

³⁸² Anonymous interview conducted in Brussels, 15 July, 2012. (DG_EMPL01).

relevance in response to the financial and economic crisis, it also increased the responsibilities of the European Commission. Once again, the only case lagging behind is the EU employment chapter that did not see similar developments.

7.2.) Theoretical implications

The empirical findings of the thesis have a number of theoretical implications. The study acknowledged the two-tier approach to intergovernmental relations within federal studies, inasmuch as it drew a line between policy-centered and structural theories (see Bolleyer, 2009). However, it demonstrated that policy-centered approaches do not necessarily need to lead to sporadic reviews which fail to provide with a sufficient level of abstraction that would allow for comparative case studies. Instead, it was proposed that with the growing relevance of a federal dilemma (Jachtenfuchs and Kraft-Kasack, 2013) in different policy areas, systemic features of policy challenges can result in structural changes that could and should be analyzed from a comparative perspective. It is essentially the common challenge these systems face, and the responses they give to these challenges that connects different polities together. It was demonstrated that even though Canada and the EU could not be compared through their constitutional frameworks, there were other features of the two systems that could serve as a basis for comparison. In fact, from a comparative federalism perspective, the thesis relates to calls for further comparative studies between the EU and Canada (e.g. Fossum, 2009). However, such an empirical comparison has a great impact on a more abstract, theoretical level as well.

Theoretically, a comparison across different political systems would mean that one needs to open concepts and theoretical frameworks so as to be able to compare different cases. In fact, one of the most relevant theoretical added-values of this research is its attempt to bring two different bodies of literature closer together in order to be able to revise the conceptual and theoretical frameworks which were not capable of explaining the latest developments concerning intergovernmental relations. In general, bringing two different areas together can have a positive impact on each, as different aspects of a certain theory can enrich the framework used in another.

As it was demonstrated, thinking in federal terms of the policy challenges the EU is increasingly facing could further enhance ‘new governance’ as well as ‘new intergovernmentalist’ approaches. As ‘new governance’ approaches emphasize the importance of policy learning and coordination through which certain principles are diffused

among the actors, yet they fail to elaborate on the nature of these principles. As policy challenges can best be understood as a reflection of the federal dilemma of self-rule and shared rule, the theoretical framework advanced by this study would enhance ‘new governance’ approaches by arguing that essentially federal principles emerge and develop through these policy learning processes that will lead to rather informal arrangements that lack a clear command-and-control character. By bringing the federalist and ‘new governance’ literatures closer together, the focus of the latter could also change from ‘effectiveness’ to legitimacy concerns (i.e. informal intergovernmental mechanisms are not used because they are more effective but rather it is based on a deliberate choice to avoid more formal methods) and therefore alter its perception of the relation between hard and soft law. Bridging comparative federalist and EU integration literatures could also impact on the ‘new intergovernmentalist’ literature. As the empirical cases on the EU suggest, focusing on the emergence of *federal* principles in the deliberative processes could serve as a further specification of the idea of ‘deliberative intergovernmentalism’ (Puetter, 2012) as well that would describe the process of intergovernmental change in a more elaborated fashion. In general, the findings of the thesis suggest that as the relevance of the federal dilemma increases with regard to the different policy areas within the EU, it is all the more essential to incorporate the *federal idea* within the different approaches to EU integration.

On the other hand, as it was demonstrated, the ‘deliberative turn’ (Neyer, 2006) within European integration studies could be effectively integrated within a comparative federalist framework that could lead to a revision of concepts and theories. As it was shown, it could enhance a procedural understanding of federalism through which the processes of change could be better assessed. After all, federal systems are dynamic polities that are in a constant disequilibrium, and therefore the procedures of competence allocation should be more closely studied. In fact, the ‘deliberative’ and ‘governance perspectives turn the focus of federalism away from studying constitutional structures towards political dynamics.

In sum, the findings of the thesis have confirmed the added value of bridging the comparative federalist and EU integration and governance literatures. Instead of looking at the formal, constitutional structures which render the two systems essentially different, a policy centered approach allows for the cross-fertilization of the different theoretical frameworks.

In general federal theoretical terms, the thesis corresponds with both Sbragia (2004) and Burgess (2009) in highlighting the importance of intergovernmental relations within federal political systems. However, it also provides answers to how and under which conditions they came to matter. Furthermore, with stressing the procedural element of

federalism which relates the study to Nicolaidis (2001), the findings also confirm Hueglin's (2000) proposed tendency of a move away from constitutional to treaty-based federalism. With this, the framework advanced within the thesis aims to update the classical understandings that considered federalism as an essentially normative concept which reflected the idea of 'self-rule and shared rule' (Elazar, 1979), inasmuch as it further theorizes on the role of intergovernmental relations within 'shared rule'. As opposed to Cameron and Simeon (2002), this thesis conceptualized collaborative federalism as a distinct form of federalism that corresponded with a particular character of intergovernmental relations which was based on a unique combination of specific federal principles.

In general, the findings of the thesis have the following implications for the theory of federalism: 1.) focus more on policy challenges and move beyond the analysis of constitutions; 2.) focus more on intergovernmental relations and their role in 'shared rule'; 3.) focus more on the principles and values of federalism as they influence intergovernmental relations; 4.) use a more constructivist approach to understand the emergence and development of these principles and their impact on the overall institutional and procedural structures of federal political systems.

7.3.) Institutional and policy implications

As the thesis is more concerned with institutional development than with substantive policy decisions, a brief assessment of the institutional implications of the findings needs to be provided with the policy implications as well.

Policy-wise, the empirical findings suggest that those policy areas are more likely to develop collaborative intergovernmental interactions that have a potential to present constituent units with a complex and sensitive challenge. In general, it could be argued that comprehensive, horizontal policy reviews and assessments could increase the probability of collaboration. Further elements of an economic union are possible future cases: from taxation policy through energy issues to social security and pension. Additionally, those areas will be most affected with collaborative development, which are more likely to be confronted with external or internal shocks.

As far as the institutions are concerned, it could be argued that collaborative patterns of intergovernmental interaction can be facilitated by a framework that helps highlight both the complexity and sensitivity of a given policy challenge in a more effective way. As it was demonstrated, commission reports on the growing interdependence of a particular dossier

could generate a greater understanding of the complexity and sensitivity of an issue. At this point the legitimacy of these institutions may come to matter to a great extent. There are signs of both intergovernmental (e.g. Council of the Federation in Canada, Van Rompuy Task Force in the EU) and supranational (e.g. Royal Commissions, and European Commission) developments in this respect. This thesis would suggest that the growing sensitivity of certain areas would continue to reinforce the active participation of the highest political levels in assessment processes that would further strengthen the role of intergovernmental institutions in collaborative processes. This intergovernmental format could increase a sense of ownership of certain policy files which was highlighted as a facilitating factor during the AIT negotiations in the different tables, and it was also called for by different interviewees in the EU.

Turning to the second stage of the collaborative framework, it is suggested by the empirical findings that institutional design which encourages open discussions could make the adoption of federal principles in separate constituent unit jurisdictions less difficult and less controversial. Also, as flexibility and open-endedness are important principles adopted in the collaborative scheme, institution-building in the future may reflect those by strengthening the informal formats. Both the request for more open forums and the move towards informal institutions suggest a rather unwanted consequence: the transparency and legitimacy of decisions may be put under extreme stress. As in-camera meetings proliferate to be able to deal with cross-jurisdictional challenges in a comprehensive and efficient way, how can the overall system still guarantee the legitimacy and transparency of decisions? It is an important and rather difficult task to design institutions and processes that can avoid the collision between the principles of federalism and democracy. Furthermore, the consequences could be interesting with regard to the legislative-executive relationship in parliamentary systems. How can the legislative branch react to these dynamics? Can it counterbalance these tendencies?

Last, but not least, informal arrangements may have a great impact on the constitutional framework as we know it. The empirical findings suggest that the more complex and sensitive policy challenges there are, the more informal the arrangements will be and formality will be substituted with flexibility.

7.4.) Recommendation for future research

- Taking the policy and institutional implications of the thesis, it is recommended that the analysis of intergovernmental developments in other policy area be conducted to further

fine-tune the theoretical framework that has been proposed by this thesis.

- There could be further theorizing on the acknowledgement of the complexity and sensitivity of a common policy challenge which could explain temporal variations of the adoption of federal principles.
- An additional research could focus on the role of intergovernmental policy review and evaluation bodies and explain their emergence and possible proliferation in the future which could further specify the theoretical framework of collaborative federalism as well.
- As argued in the previous part, further research could address the complex relation between federal and democratic principles with regard to intergovernmental developments.
- The involvement of further federal cases could also enrich the theoretical framework. Unfortunately the involvement of other federal cases such as Switzerland or Australia was not feasible within this PhD project, but it could be further pursued in later studies.

7.5.) Limitation of the study

The thesis encountered a number of limitations that needed to be dealt with. First and foremost, as the research has built extensively on personal interviews, it was inevitable that the author encountered some difficulties. Taking the scope of the empirical cases (28 countries in the EU and 10 provinces in Canada) difficult choices have had to be made in terms of case selection which was also often overruled by on-the-spot experience of non-availability. In general, the aim was to provide a balanced sample of cases, however, in some instances that balance was hard to preserve. Nevertheless, taken the nature of the study, this shall not have distorted the overall findings.

The Canadian cases presented the author with an interesting challenge: taken the time that has passed since the AIT and the first LMDAs, it was at first rather difficult to reach interviewees that were involved with either of these projects. Nevertheless, the first conference participation opened up a great network of people which led to an extensive number of contacts and consequently sufficient data as well. The time dilemma actually worked in the author's favor inasmuch as interviewees were more open to express their thoughts with regard to the events they shaped and they also had a more comprehensive and objective approach. As far as the EU cases were concerned, such a luxury could not be afforded. Taken the actuality of both the economic governance and the labor market files, interviewees were easily identified. However, taken their strong connections to contemporary

events, they proved to be more uneasy (which was reflected in their strong insistence on anonymity) and less open (which often required reformulation of questions). As far as the official documents and speeches were concerned, Canada proved to be a more difficult case but several research trips made it possible to collect the most relevant and available data.

Although the main source of data was the interview material that was collected, the findings could have been further supported by a more in-depth analysis of parliamentary debates. Nevertheless, such an analysis which would have had to involve both constituent unit and federal legislative bodies was not entirely feasible within this thesis. Consequently, the use of this source has been limited based on availability and language considerations.

7.6.) Conclusion

Antony Birch, a Canadian scholar of federalism, once argued that “the definition of federalism should be reworded so as not to suggest that intergovernmental cooperation (...) [were] exceptions to the federal *principle*” (Burgess, 2006: 33)³⁸³. Nicolas Sarkozy, the former French President called for a new model of ‘intergovernmental federalism’³⁸⁴. Neither further elaborated on their statements, yet the proliferation of empirical cases suggests that there is a growing need to better understand the phenomenon they describe. This thesis is only a first step towards that goal, but it aims to generate a productive debate, nevertheless.

³⁸³ Emphasis added by the author.

³⁸⁴ <http://www.lefigaro.fr/conjoncture/2011/12/01/04016-20111201ARTFIG00749-nicolas-sarkozy-trace-les-pistes-pour-sortir-de-la-crise.php>

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