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<Article>

# Testing the boundaries of subnational diplomacy: The international climate action of local and regional governments

Joana Setzer\*

## Abstract

In the past years a number of local and regional governments around the world have started to engage in a real international or 'paradiplomatic' climate agenda. While the multilevel governance (MLG) approach advanced the examination of the actors and levels involved in climate governance, there is within this body of literature a limited consideration of the legal capacity of non-state actors to act across scales. This article addresses this gap and examines the potential limitations imposed on subnational diplomacy by international and domestic legal orders. The article draws upon the case of Brazil where, despite the constitutional limitations for the involvement of subnational governments in international relations, paradiplomacy was termed 'federative diplomacy' and institutionalized within the Ministry of Foreign Affairs and within the Presidency of the Republic. The article shows that the diplomatic activity of local and regional governments is still constrained by international and domestic legal frameworks. If cities and regions are to help addressing the inadequacies of the international climate regime, then domestic and international legal frameworks will need to further accommodate subnational diplomatic activities.

**Keywords:** Subnational diplomacy; Paradiplomacy; Climate change; Multilevel governance; Transnational networks; Brazil

## 1. INTRODUCTION

Local and regional governments across the world have become key actors in global climate governance. These subnational governments adopt progressive climate change

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laws and policies<sup>1</sup> and establish their own emissions trading systems.<sup>2</sup> In addition, subnational governments are undertaking a real international agenda on climate change. Such a trend cannot be taken for granted. Governmental institutions are generally constituted to operate at specific jurisdictional levels, and they legislate and act within their respective territorial levels. Why then are local and regional governments engaging in the global governance of climate change? Some answers to this question have been given by the multilevel governance (MLG) literature. Researchers in this field explore the multiple jurisdictions in which climate governance occurs, and provide a number of explanations for why subnational governments get involved in climate action. This body of literature has advanced the understanding of some of the drivers and outcomes of subnational participation in climate governance, but it takes for granted the legal competence of subnational entities to undertake international relations. Further research is needed to understand the legal scope and limitations of subnational climate diplomacy.

This article examines the legal context in which subnational diplomacy takes place. It argues that despite the apparent fluidity involved in multilevel governance systems, a discussion of the expanding role of local and regional governments in international relations requires consideration of the legal basis for this expansion. The diplomatic activity of local and regional governments is still constrained by international and domestic legal frameworks. Ultimately, the limits to subnational diplomacy are defined by the type of activity undertaken and the domestic understanding of whether such activity interferes with national legislation or not. The article shows that, if cities and regions are to help addressing the inadequacies of the international climate regime, then domestic and international legal frameworks will need to further accommodate subnational diplomatic activities.

The paper draws upon the case of paradiplomatic activities undertaken by subnational governments in Brazil. Despite constitutional limitations on subnational governments' involvement in international relations, the diplomatic agendas carried out by Brazilian states and municipalities were termed 'federative diplomacy' and institutionalized

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<sup>1</sup> There are several investigations of subnational policies addressing climate change. For the United States (US) and Canada see H. Selin & S.D. VanDeveer, *Changing Climates in North American Politics: Institutions, Policymaking, and Multilevel Governance* (The MIT Press, 2009). For Australia, see J. Peel, L. Godden & R.J. Keenan, 'Climate Change Law in an Era of Multi-level Governance' (2012) 1(2) *Transnational Environmental Law*, pp. 245-80. For Europe, see H. Bulkeley, *Cities and Climate Change* (Routledge, 2013) and H. Bulkeley & K. Kern, 'Local Government and the Governing of Climate Change in Germany and the UK' (2006) 43(12) *Urban Studies*, pp. 2237-59. For a wider spectrum of climate action undertaken by cities around the world, see V.C. Broto & H. Bulkeley, 'A Survey of Urban Climate Change Experiments in 100 Cities' (2013) 23(1) *Global Environmental Change*, pp. 92-102; and T. Lee & C. Koski, 'Mitigating Global Warming in Global Cities: Comparing Participation and Climate Change Policies of C40 Cities' (2014) 16(5) *Journal of Comparative Policy Analysis: Research and Practice*, pp. 1-18. For a broader view of transnational climate governance see K.W. Abbott, 'Strengthening the Transnational Regime Complex for Climate Change' (2014) 3(1) *Transnational Environmental Law*, pp. 57-88.

<sup>2</sup> The first regional emissions trading systems were established in the US. The Regional Greenhouse Gas Initiative (RGGI) stimulated interest in regional emission trading systems, with two further regional schemes – the Midwestern Accord and the Western Climate Initiative (WCI) cap-and-trade schemes. More recently, Chinese provinces have established a pilot carbon emissions trading scheme. See L. Wu, H. Qian & J. Li, 'Advancing the Experiment to Reality: Perspectives on Shanghai Pilot Carbon Emissions Trading Scheme' (2014) 75(C) *Energy Policy*, pp. 22-30.

within the Ministry of Foreign Affairs and within the Presidency of the Republic. Drawing upon this case study, the article looks at the ways through which subnational governments are challenging pre-established legal competencies.

The article is divided into five sections. Following this introduction, Section 2 presents the MLG framework and the literature on multilevel climate governance, and some of its shortcomings in investigating subnational governments' international climate action. Section 3 examines the international and domestic legal limitations on subnational governments' international relations. Section 4 considers the case of Brazil and how the Presidency of the Republic and the Ministry of Foreign Affairs are dealing with the engagement of subnational governments in international relations. The article concludes with a summary of the findings and of its contributions.

## 2. MULTILEVEL GOVERNANCE AND CLIMATE CHANGE

Governance across different levels of social organization has attracted growing analytical attention in the past decades. In the 1960s, Vincent Ostrom, Charles M. Tiebout and Robert Warren formulated the concept of *polycentric* systems to study the governance of metropolitan areas.<sup>3</sup> The polycentric approach described the conditions and normative implications of diffusion of authority across multiple, overlapping and fluid jurisdictions. Expanding this approach to the climate realm, Elinor Ostrom argued that the international regime is one piece of a complex puzzle, and small scale governments can help build the trust and commitment needed to overcome collective action failures. A polycentric approach to climate change, therefore, encourages experimental efforts at multiple levels, as well as the development of methods for assessing the impacts of adopting particular strategies.<sup>4</sup>

In the international arena, the multilevel governance or MLG approach has been used to examine the dispersion of authority across multiple jurisdictions.<sup>5</sup> In their 2003 seminal work, Hooghe and Marks distinguished two coexistent types of MLG: Type I, represented as a vertical dimension, is based on federalist relationships between central government and subnational governments; Type II, represented as a horizontal dimension, is dominated by networks in which multiple independent, task-specific jurisdictions operate at numerous territorial scales. The first dimension emphasizes the

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<sup>3</sup> V. Ostrom, C.M. Tiebout & R. Warren, 'The Organization of Government in Metropolitan Areas: A Theoretical Inquiry' (1961) 55(4) *American Political Science Review*, pp. 831-42.

<sup>4</sup> E. Ostrom, 'Polycentric Systems for Coping with Collective Action and Global Environmental Change' (2010) 20(4) *Global Environmental Change*, pp. 550-7.

<sup>5</sup> L. Hooghe & G. Marks, 'Unraveling the Central State, But How? Types of Multi-level Governance' (2003) 97(2) *The American Political Science Review*, pp. 233-43. See also: L. Hooghe & G. Marks, 'Contending Models of Governance in the European Union', in A. Cafruny & C. Lankowski (eds), *Europe's Ambiguous Unity: Conflict and Consensus in the Post-Maastricht Era* (Lynne Rienner, 1997), pp. 21-44; I. Bache & M. Flinders, *Multi-level Governance* (Oxford University Press, 2004); L. Hooghe, *Cohesion Policy and European Integration: Building Multi-Level Governance* (Oxford University Press, 2006); L. Hooghe & G. Marks, 'Types of Multi-level Governance', in H. Enderlein, S. Wälti & M. Zürn (eds), *Handbook on Multi-level Governance* (Edward Elgar, 2010), pp. 17-31; J. Pierre & B.G. Peters, *Governance, Politics and the State* (Macmillan, 2000).

links between administrative units; the second deals with interactions between public and private actors. In the same article, they argued that the dispersion of governance across multiple jurisdictions is more flexible and efficient than the concentration of governance in one jurisdiction.

The MLG theory encompasses fundamental aspects for understanding subnational diplomacy. The 'multilevel' aspect of the theory envisions subnational governments' capacity to open the centre-periphery gate and cross the domestic-foreign divide; the 'governance' part of the theory, in its turn, allows subnational governments to become part of daily international politics.<sup>6</sup> The MLG theory, thus, accepts the ideas that decision-making competencies are shared by actors at different levels<sup>7</sup> and that political spheres are interconnected.<sup>8</sup> This scenario allows subnational actors to operate both in national and supranational arenas, creating transnational associations in the process. Subnational actors also try to influence policy and decision making at the international level.<sup>9</sup> As a result, national governments do not monopolize links between actors, but are one among a variety of actors contesting decisions that are made at a variety of levels.

With the input of geographers, the spatial aspect of the MLG approach was further developed to reflect the movement of governmental authority upwards (to regional and international organizations), downwards (to subnational governments, including regions and cities), and outwards (to international corporations, non-governmental organizations (NGOs) and other private and quasi-private bodies). Empirically, the MLG approach was used to examine the implications of transnational interactions among world cities.<sup>10</sup>

Since the mid-1990s, scholars have also been using the MLG approach to understand current trends in the development of environmental and climate change governance.<sup>11</sup> Normatively, MLG has become a response to the mounting complexity and multilayered nature of environmental problems.<sup>12</sup> Analytically, the MLG approach helps to shed light on the various actors and scales involved in environmental and climate governance.<sup>13</sup> Consequently, environmental and climate governance is said to occur in an MLG process

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<sup>6</sup> S. Piattoni, *The Theory of Multi-level Governance: Conceptual, Empirical, and Normative Challenges* (Oxford University Press, 2000), p. 19.

<sup>7</sup> Hooghe & Marks (1997), n. 5 above.

<sup>8</sup> B. Kohler-Koch & F. Larat, *European Multi-level Governance: Contrasting Images in National Research* (Edward Elgar, 2009).

<sup>9</sup> Hooghe & Marks (2010), n. 5 above.

<sup>10</sup> E.g., Saskia Sassen explores the ways in which economic globalization and the emergence of new information and communication technologies have made world cities key nodes for cross-border networks and resource concentration. See S. Sassen, 'Locating Cities on Global Circuits' (2002) 14(1) *Environment and Urbanization*, pp. 13-30.

<sup>11</sup> See H. Bulkeley, 'Cities and the Governing of Climate Change' (2010) 35(1) *Annual Review of Environment and Resources*, pp. 229-53.

<sup>12</sup> See M. Buizer, B. Arts & K. Kok, 'Governance, Scale and the Environment: The Importance of Recognizing Knowledge Claims in Transdisciplinary Arenas' (2011) 16(1) *Ecology and Society*.

<sup>13</sup> Andonova and Mitchell identify a shift in the locus, agency, and scope of global environmental politics and governance across scales. L.B. Andonova & R.B. Mitchell, 'The Rescaling of Global Environmental Politics' (2010) 35(1) *Annual Review of Environment and Resources*, pp. 255-82. See also H. Bulkeley, 'Reconfiguring Environmental Governance: Towards a Politics of Scales and Networks' (2005) 24(8) *Political Geography*, pp. 875-902.

across multiple arenas of governance and at different scales, which includes large regions, subnational regions, municipalities and communities.<sup>14</sup>

Among the various actors and scales, local and regional governments are presented as a crucial scale for tackling global climate change. Cities are significant contributors to greenhouse gas (GHG) emissions. The Stern Review suggests that cities account for up to 78% of carbon emissions from human activities.<sup>15</sup> Regional governments present different characteristics. Their position between the local and the national levels puts them in a privileged place to deal with environmental issues. In relation to the national government, regional governments have a comparative advantage in terms of knowing the needs and realities of their citizens, having the technical knowledge of environmental issues, and being able to adapt general policies to specific circumstances. In relation to local authorities, subnational governments encompass both urban and nonurban realities, a larger population, and have more significant budgets and responsibilities.<sup>16</sup>

Transnational networks of cities are key components of MLG systems. Since the 1970s, subnational entities have joined together in transnational associations based upon common interests. These networks illustrate how cities can be 'involved with something that reaches beyond their own boundaries'.<sup>17</sup> In the climate realm, much of the attention surrounding local networks is associated with ICLEI – Local Governments for Sustainability<sup>18</sup> and the C40 Cities Climate Leadership Group.<sup>19</sup>

Transnational networks of regional governments in the climate sphere also exist, though so far they have received less academic attention. Happaerts, Van den Brande, and Bruyninckx studied two such networks: the Environmental Conference of the

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<sup>14</sup> See M. Betsill & H. Bulkeley, 'Cities and the Multilevel Governance of Global Climate Change' (2006) 12(2) *Global Governance*, pp. 141-59.

<sup>15</sup> N. Stern, *Stern Review: The Economics of Climate Change* (Cambridge University Press, 2007).

<sup>16</sup> On climate governance in the regional (state) level, see B.G. Rabe, 'Beyond Kyoto: Climate Change Policy in Multilevel Governance Systems' (2007) 20(3) *Governance*, pp. 423-44; Selin & VanDeveer, n. 1 above.

<sup>17</sup> P. Newell, P. Pattberg & H. Schroeder, 'Multiactor Governance and the Environment' (2012) 37(1) *Annual Review of Environment and Resources*, pp. 365-87, at 372.

<sup>18</sup> See online at: <http://www.iclei.org>.

<sup>19</sup> See online at: <http://www.c40.org>. For studies on the participation of cities in climate governance and transnational networks of cities, see: H. Bulkeley & M. Betsill, *Cities and Climate Change: Urban Sustainability and Global Environmental Governance* (Routledge, 2003), and M. Betsill & H. Bulkeley, 'Transnational Networks and Global Environmental Governance: The Cities for Climate Protection program' (2004) 48(2) *International Studies Quarterly*, pp. 471-93. See also N.J. Toly, 'Transnational Municipal Networks in Climate Politics: From Global Governance to Global Politics' (2008) 5(3) *Globalizations*, pp. 341-56, and A.R. Davies, 'Local Action for Climate Change: Transnational Networks and the Irish Experience' (2005) 10(1) *Local Environment*, pp. 21-40. For an account of the participation of cities from developing countries in such networks, see: C. Holgate, 'Factors and Actors in Climate Change Mitigation: A Tale of Two South African Cities' (2007) 12(5) *Local Environment*, pp. 471-84; P. Romero-Lankao, 'How Do Local Governments in Mexico City Manage Global Warming?' (2007) 12(5) *Local Environment*, pp. 519-35; J. Setzer, 'Subnational and Transnational Climate Change Governance: Evidence from the State and City of Sao Paulo, Brazil' Paper presented at the 5<sup>th</sup> World Bank Urban Research Symposium 'Cities and Climate Change: Responding to an Urgent Agenda', June 2009, Marseille (France), available online at: <http://tinyurl.com/SetzerWB2009>. It should be noted that ICLEI's CCP Programme was replaced in June 2012 by the Green Climate Cities Campaign. For studies on the C40 network, see: M. Acuto, *Global Cities, Governance and Diplomacy: The Urban Link* (Routledge, 2013).

European Regions (ENCORE)<sup>20</sup> and the Network of Regional Governments for Sustainable Development (nrg4SD).<sup>21</sup> Their work suggests that while these networks represent regions vis-a-vis international organizations and influence multilateral decision-making, mostly they foster cooperation between subnational governments and stimulate policy learning.<sup>22</sup> The R20 Regions of Climate Action is another regional government network.<sup>23</sup> It was founded in 2010 by then Governor of California Arnold Schwarzenegger and other global leaders in cooperation with the United Nations (UN), aiming to promote local economic and environmental benefits.<sup>24</sup>

Some scholars suggest these transnational networks of subnational governments foster policy learning and change.<sup>25</sup> Others argue that transnational networks help local governments adopt GHG emission reduction strategies.<sup>26</sup> Others, still, ponder, the actual impact of these networks on members' actions has not yet been clearly established, and it is likely to be network specific.<sup>27</sup> More broadly, these networks are said to facilitate the bypass of nation-states, and to apply political and normative pressures from multiple levels and directions.<sup>28</sup>

Giving attention to the multiple horizontal and vertical interactions that promote coordination across levels of governance, the MLG approach successfully challenges the traditional state-centric focus of international relations literature. However, this lens still only offers a partial account of transnational interactions among subnational governments. In the first place, by trying to encompass the full myriad of political actors that operate across space, issues, organizational domains, and vertical and horizontal jurisdictional scales, the MLG literature provides an incomplete picture of the specific roles that subnational governments play in rescaling global environmental politics.<sup>29</sup>

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<sup>20</sup> See online at: <http://www.provincie.drenthe.nl/encoreweb>.

<sup>21</sup> See online at: <http://www.nrg4sd.org>.

<sup>22</sup> S. Happaerts, K. Van den Brande & H. Bruyninckx, 'Subnational Governments in Transnational Networks for Sustainable Development' (2011) 11(4) *International Environmental Agreements*, pp. 321-39.

<sup>23</sup> See online at: <http://regions20.org>.

<sup>24</sup> See H.M. Osofsky, 'Multiscalar Governance and Climate Change: Reflections on the Role of States and Cities at Copenhagen' (2010) 25 *Maryland Journal of International Law*, pp. 64-85.

<sup>25</sup> M. Betsill & H. Bulkeley, 'Looking Back and Thinking Ahead: A Decade of Cities and Climate Change Research' (2007) 12(5) *Local Environment*, pp. 447-56; E. Gustavsson, I. Elander & M. Lundmark, 'Multilevel Governance, Networking Cities, and the Geography of Climate Change Mitigation: Two Swedish Examples' (2009) 27(1) *Environment and Planning C: Government and Policy*, pp. 59-74; M.R. Krause, 'An Assessment of the Impact that Participation in Local Climate Networks Has on Cities' Implementation of Climate, Energy, and Transportation Policies' (2012) 29(5) *Review of Policy Research*, pp. 585-604; R. Lidskog & I. Elander, 'Addressing Climate Change Democratically: Multi-level Governance, Transnational Networks and Governmental Structures' (2010) 18(1) *Sustainable Development*, pp. 32-41.

<sup>26</sup> L.B. Andonova, 'The Climate Regime and Domestic Politics: The Case of Russia' (2008) 21(4) *Cambridge Review of International Affairs*, pp. 483-504; Selin & VanDeveer, n. 1 above.

<sup>27</sup> Krause, n. 24 above.

<sup>28</sup> Abbott, n.1 above.

<sup>29</sup> Indeed, subnational governments are involved in a large number of transnational interactions that go beyond the types of interactions that are generally considered by the MLG literature. When engaging in an international environmental agenda, subnational governments promote at least six forms of rescaling. A consideration of this wider and more nuanced picture of the rescaling processes promoted by subnational governments can be found in: J. Setzer, 'How Subnational Governments Are Rescaling Environmental

Additionally, the MLG perspective places most of its attention on cities and networks of cities, without giving sufficient attention to regional governments.

A richer and more complex picture of subnational governments' international agenda can be gained by exploring the concept of 'paradiplomacy'.<sup>30</sup> Since the late 1980s, scholars drawing on international relations and federalist theories have developed this concept to specifically investigate the international relations undertaken by regional, local or non-central governments<sup>31</sup>. These include having representations abroad, conducting trade missions, seeking foreign investment, and entering bilateral and multilateral relations with nation states and/or other subnational governments across borders.<sup>32</sup> More recently, with the growing importance of cities, attention is placed on 'city diplomacy'.<sup>33</sup> City diplomacy is defined as 'the institutions and processes by which cities, or local governments in general, engage in relations with actors on an international political stage with the aim of representing themselves and their interests to one another'.<sup>34</sup> It has been argued that city diplomacy is driving the emergence of an influential urban international agenda led by mayors of major metropolises.<sup>35</sup>

Secondly, the governance literature has made limited strides with regard to the legal and institutional basis for non-state actors' international climate action. Rescaling processes are often taken for granted, with little or no consideration of whether the actors have a legal basis for moving across levels of governance. For instance, are the representatives of subnational governments legally entitled to meet foreign dignitaries, to sign memoranda of understanding (MOUs) with other subnational governments across borders, or to establish emissions trading schemes? The paradiplomacy

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Governance: The Case of the Brazilian State of São Paulo' (2014), *Journal of Environmental Policy & Planning*, (available online 28 November 2014).

<sup>30</sup> There is a substantial debate on the adequacy of the term 'paradiplomacy'. Other terms suggested to describe the participation of subnational actors in the international arena are 'multilayered diplomacy' (B. Hocking, *Localizing Foreign Policy: Non-central Governments and Multilayered Diplomacy* (Palgrave Macmillan, 1993)), 'catalytic diplomacy' (B. Hocking, 'The Woods and the Trees: Catalytic Diplomacy and Canada's Trials as a Forestry Superpower' (1996) 5(3) *Environmental Politics*, pp. 448-75), and 'sub-state diplomacy' (N. Cornago, 'On the Normalization of Sub-state Diplomacy' (2010) 5(1-2) *The Hague Journal of Diplomacy*, pp. 11-36).

<sup>31</sup> F. Aldecoa & M. Keating (eds), *Paradiplomacy in Action: The Foreign Relations of Subnational Governments* (Frank Cass, 1999); I.D. Duchacek, 'Perforated Sovereignities: Towards a Typology of New Actors in International Relations', in H.J. Michelmann & P. Soldatos (eds), *Federalism and International Relations: The Role of Subnational Units* (Clarendon Press, 1990), pp. 1-33; A. Lecours, 'Paradiplomacy: Reflections on the Foreign Policy and International Relations of Regions' (2002) 7 *International Negotiation*, pp. 91-114.

<sup>32</sup> I. Aguirre, 'Making Sense of Paradiplomacy? An Intertextual Enquiry about a Concept in Search of a Definition' (1999) 9(1) *Regional & Federal Studies*, pp. 185-209; N. Cornago, 'Diplomacy and Paradiplomacy in the Redefinition of International Security: Dimensions of Conflict and Cooperation', in Aldecoa & Keating, *ibid.*, pp. 40-57; J. Kincaid, 'The American Governors in International Affairs' (1984) 14(4) *Publius: The Journal of Federalism*, pp. 95-114; S.L. McMillan, *The Involvement of State Governments in US Foreign Relations* (Palgrave Macmillan, 2012); H.J. Michelmann (ed.), *Foreign Relations in Federal Countries* (McGill-Queen's University Press, 2009).

<sup>33</sup> See Acuto, n. 19 above; see also R. Pluijm & J. Melissen, 'City Diplomacy: The Expanding Role of Cities in International Politics', in Netherlands Institute of International Relations (ed.), *Clingendael Diplomatic Studies Papers, Vol. 10* (Netherlands Institute of International Relations, 2007), pp. 5-36.

<sup>34</sup> Pluijm & Melissen, *ibid.*, at p. 6.

<sup>35</sup> Acuto, n. 19 above.

literature, however, thanks to its basis in federalist theory, does engage with some of the legal/constitutional limits of subnational governments' international agenda.<sup>36</sup>

Further consideration of the legal limits of subnational climate action and of subnational engagement in international relations appears in recent legal literature on climate change federalism.<sup>37</sup> Such legal considerations on subnational governments' capacity to engage in the global governance of climate change can be further integrated into the MLG theory, adding a legal perspective to this body of literature.

In summary, while the MLG literature has recently advanced the examination of the actors and levels involved in global environmental governance, two shortcomings have been identified. Firstly, this literature offers only a partial picture of the transnational interactions in which subnational governments are taking part. Secondly, there is limited consideration of the legal capacity of non-state actors to operate across scales. Addressing the second gap more directly, the next section examines the potential limitations imposed by international and domestic legal orders on subnational diplomacy.

### 3. THE LEGAL BASIS FOR SUBNATIONAL DIPLOMACY

Local and regional governments are increasingly active in the transnational climate change arena. Before examining the legal context in which subnational diplomacy is taking place, it is worth clarifying what types of activities are involved in subnational diplomacy. Although local and regional governments engage in a broad number of international activities,<sup>38</sup> I suggest that these activities fall within two main categories: *collaboration* and *coalition* initiatives.

In collaboration initiatives, local and regional governments collaborate with other subnational, national or international actors. In coalition initiatives, local and regional

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<sup>36</sup> M. Andrade e Barros, 'Outlooks for the Legal Framing of Paradiplomacy: The Case of Brazil' (2010) 7(3) *Federal Governance*, pp. 39-49; P. Bursens & J. Deforche, 'Going Beyond Paradiplomacy? Adding Historical Institutionalism to Account for Regional Foreign Policy Competences' (2010) 5 *The Hague Journal of Diplomacy*, pp. 151-71; N. Cornago, 'On the Normalization of Sub-state Diplomacy' (2010) 5(1-2) *The Hague Journal of Diplomacy*, pp. 11-36.

<sup>37</sup> K. Engel, 'Courts and Climate Policy: Now and in the Future', in B.G. Rabe (ed.), *Greenhouse Governance: Addressing Climate Change in America* (Brookings Institution Press, 2010), pp. 229-59; D.A. Farber, 'Climate Policy and the United States System of Divided Powers: Dealing with Carbon Leakage and Regulatory Linkage' (2014) 3(1) *Transnational Environmental Law*, pp. 31-55; D. Kysar & B.A. Meyler, 'Like a Nation State' (2008) 55 *UCLA Law Review*, pp. 1621-73; R.K. LaMotte, D.M. Williamson & L.A. Hopkins, 'Emissions Trading in the US: Legal Issues', in D. Freestone & C. Streck (eds), *Legal Aspects of Carbon Trading: Kyoto, Copenhagen, and Beyond* (Oxford University Press, 2009), pp. 391-423.

<sup>38</sup> Criekemans, e.g., suggests that the 'full spectrum' of diplomatic instruments that regions can utilize encompasses seven activities: (i) political representation abroad; (ii) treaty-making power; (iii) entering agreements of a formalized nature (political declarations of intent and/or cooperation agreements, transnational contracts, and cultural agreements and partnerships); (iv) developing programmes of assistance and sharing of know-how (bilateral or multilateral programmes, programmes on cross-boundary cooperation); (v) participating in multilateral frameworks and organizations (observing or participating in technical committees, becoming an associate member of multilateral organizations); (vi) participation in formal or informal networks; and (vii) developing a public diplomacy, both domestic and international. See D. Criekemans, 'Introduction' (2010) 5(1-2) *The Hague Journal of Diplomacy*, pp. 1-9.

governments exert pressure over national and international actors. Moreover, the climate agenda drives local and regional governments to establish further coalition initiatives, and therefore to have stronger diplomatic roles. Within collaborative initiatives, local and regional governments enter agreements and MOUs, join transnational networks that promote information-sharing, and establish market initiatives with other subnational actors across borders. Within the coalition initiatives, they exert pressure over national and foreign actors, both domestically (in the agenda-setting phase of climate negotiations), and internationally (participating in climate negotiation processes, through transnational networks or independently).

This typology parallels a previous division of transgovernmental behaviour suggested by Keohane and Nye, in 1974, to explain the relations between bureaucratic subunits of national governments (e.g. between environmental ministries from two countries).<sup>39</sup> According to Keohane and Nye, *transgovernmental coordination* relations are consistent with the targets and intentions of top leaders, whereas *transgovernmental coalition building* involves situations where subunits stand against their administrative structures.<sup>40</sup> The typology also relates to a recent theorization by Acuto, which identifies a two-track process through which cities engage in international relations. Acuto uses the example of the climate network C40 and argues that one track is represented by C40's technical efforts to curb climate change, similar to what I call collaboration initiatives. The second track has a 'cross-cutting lobby role', which consists mostly of city diplomacy, similar to what I call coalition initiatives.<sup>41</sup>

Both collaborative and coalition initiatives invite a crucial question: by engaging in subnational diplomacy, to what extent are local and regional governments exceeding their legal authority? As Blank suggests, the existence of two legal spheres makes the legal position of cities acting in the international political field ambiguous, to say the least.<sup>42</sup> National governments increasingly permit and even encourage local government involvement in foreign policy. Yet, national laws may hinder cities in their diplomatic activities. At the same time, while international legal rules increasingly extend to cities, cities may not hold legal personality in international law. Similarly, Farber ponders that states' attempts to deal with the transboundary implications of climate policies face doctrines that are 'particularly murky'.<sup>43</sup> The legal competence of local and regional governments to engage in international relations involves a consideration of the potential limitations imposed on subnational diplomacy by international and domestic legal orders. In the international legal sphere, local and regional governments hold no legal personality, whereas in the national sphere the legal rules applying to city diplomacy differ from country to country.<sup>44</sup>

### 3.1. International law

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<sup>39</sup> R.O. Keohane & J.S. Nye, 'Transgovernmental Relations and International Organizations' (1974) 27(1) *World Politics*, pp. 39-62.

<sup>40</sup> *Ibid.*

<sup>41</sup> M. Acuto, 'The New Climate Leaders?' (2013b) *Review of International Studies*, pp. 1-23.

<sup>42</sup> Y. Blank, 'Federalism, Subsidiarity, and the Role of Local Governments in an Age of Global Multilevel Governance' (2009) 37(2) *Fordham Urban Law Journal*, pp. 509-558.

<sup>43</sup> Farber, n. 37 above.

<sup>44</sup> This idea is also presented in Pluijm & Melissen, n. 33 above.

In the first place, the sources of international law do not recognize subnational governments as possessing legal personality. In international law, only national governments are international lawmakers.<sup>45</sup> Subnational governments are treated as mere subdivisions of states and have neither legal standing nor independent presence in formal international institutions.<sup>46</sup> The international initiatives and agreements they establish with other subnational governments, or with a foreign national government and/or an international organization, do not fall under the Vienna Convention on the Law of Treaties (VCLT).<sup>47</sup> Subnational initiatives lack the binding character of treaties or customary international law among nation-states. The initiatives they establish across borders are, therefore, soft law, namely guidelines, recommendations, coordinating measures and other instruments which are not formally binding.<sup>48</sup> Consequently, the agreements that subnational governments sign are limited by their voluntary nature. Subnational diplomacy, then, has no international legal relevance.

Nevertheless, as Raustiala says, soft law instruments create a loose and adaptable framework in which information, ideas, and resources are shared: they are non-binding as a legal matter, but highly effective and flexible in practice.<sup>49</sup> For example, in the past decades, subnational governments have established policies to enhance corporate transparency and reporting in the environmental arena.<sup>50</sup> Their efforts to address climate change have achieved goals similar to those imposed by the Kyoto Protocol.<sup>51</sup> As Levit puts it, lawmaking in an era of globalization is a bottom-up process, 'a soft, unpredictably organic process that generates hard, legal results'.<sup>52</sup>

Moreover, subnational governments are pressuring the UN to provide a clearer position on what role they should have in international environmental negotiations and in the implementation of multilateral environmental agreements. With the adoption of Decision 1/CP.16 of the Cancun Agreements, the Conference of the Parties (COP) to the

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<sup>45</sup> J.L. Goldsmith & E.A. Posner, *The Limits of International Law* (Oxford University Press, 2007).

<sup>46</sup>Pluijm & Melissen, n. 33 above.

<sup>47</sup> Vienna (Austria), 23 May 1969, in force 27 Jan 1980, available at:

[http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf).

<sup>48</sup> V. Heyvaert, 'Governing Climate Change: Towards a New Paradigm for Risk Regulation' (2011) 74(6) *The Modern Law Review*, pp. 817-44; J.J. Kirton & M.J. Trebilcock (eds), *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment, and Social Governance* (Ashgate, 2004); Osofsky, n. 24 above.

<sup>49</sup> K. Raustiala, 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law' (2002) 43(1) *Virginia Journal of International Law*, pp. 1-92.

<sup>50</sup> H. Bulkeley, 'Cities and the Governing of Climate Change' (2010) 35(1) *Annual Review of Environment and Resources*, pp. 229-53; J. Byrne, et al., 'American Policy Conflict in the Greenhouse: Divergent Trends in Federal, Regional, State, and Local Green Energy and Climate Change Policy' (2007) 35(9) *Energy Policy*, pp. 4555-73; K. Engel & B.Y. Orbach, 'Micro-motives and State and Local Climate Change Initiatives' (2008) 119(2) *Harvard Law & Policy Review*, pp. 119-38; C.R. Sunstein, 'The Complex Climate Change Incentives of China and the United States', University of Chicago Law & Economics Online Working Paper No. 352, available at: <http://ssrn.com/abstract=1008598>.

<sup>51</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol), Kyoto (Japan), 11 Dec. 1997, in force 16 Feb. 2005, available at: [http://unfccc.int/kyoto\\_protocol/items/2830.php](http://unfccc.int/kyoto_protocol/items/2830.php).

<sup>52</sup> J.K. Levit, 'Bottom-up International Lawmaking: Reflections on the New Haven School of International Law' (2007) 32 *Yale Journal of International Law*, pp. 393-420, at 395.

UN Framework Convention on Climate Change (UNFCCC)<sup>53</sup> recognized the need to engage a broad range of stakeholders, including subnational governments, for effective action on all aspects of climate change. Transnational networks of subnational governments contribute to this picture. City networks, such as the C40, aim to impact directly other spheres of global governance by influencing the dynamics of both international and domestic public mechanisms (e.g. organizing international meetings, lobbying central governments, and participating in international fora). In this new diplomatic scenario, local and regional governments started calling for the introduction of a new category of 'governmental stakeholders' among the accredited observers to the UN system.<sup>54</sup>

### 3.2. Domestic legal order

In the second place, subnational governments' legitimacy to act internationally depends on the domestic legal order. What subnational governments can do internationally is limited by the constitutional competencies that they have been granted within their national contexts.<sup>55</sup> From this angle, there are three possibilities: the national government explicitly recognizes subnational government's international relations; paradiplomacy is constitutionally and/or legally forbidden; or the national constitution and the domestic legislation are silent on this possibility.

Few countries have legislated explicitly on the international capabilities of subnational governments. Since 1992, France has allowed subnational governments to engage in international cooperation, and since 2007, it allows them to enter cooperation or development agreements with other subnational governments worldwide.<sup>56</sup> In 1993, Belgium adopted the *in foro interno in foro externo* principle, which allows subnational governments to conduct international relations in policy subjects for which they are internally competent. Belgium also accepts representatives from subnational governments in national delegations for international meetings. Within South America, Argentina explicitly granted foreign policy powers to its subunits. The constitutional reform of 1994 introduced a 'paradiplomacy clause', which became a legal corollary of international relations of Argentinian provinces.<sup>57</sup>

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<sup>53</sup> New York (NY) US, 9 May 1992, in force 21 Mar. 1994, available at: <http://unfccc.int>. Decision 1/CP.16, The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, UN Doc. FCCC/CP/2010/7/Add.1, 15 March 2011, available at: <http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf>.

<sup>54</sup> Nrg4SD, Subnational governments: key actors in the Rio+20 process *nrg4SD Input to the Rio +20 Process October 2011 – Reviewed April 2012*, available at: <http://tinyurl.com/Nrg4SD-Rio-20>.

<sup>55</sup> Happaerts, Van den Brande & Bruyninckx, n. 22 above.

<sup>56</sup> M. Duran, 'French Regions as Diplomatic Actors: The Case of Provence-Alpes-Cote d'Azur' (2011) 9(4) *French Politics*, pp. 339-63.

<sup>57</sup> A. Kleiman & G.M.A. Rodrigues (eds), *The MERCOSUR Committee of Municipalities, States, Provinces and Departments: Process of Creation and Perspectives* (2007), Fifth Annual Conference of the Euro-Latin Study Network on Integration and Trade, Barcelona, Spain, 26-27 October 2007 available at: <http://www10.iadb.org/intal/intalcdi/PE/2012/11120a16.pdf>; T.L. Prazeres, 'Por uma atuação constitucionalmente viável das unidades federadas brasileiras ante os processos de integração regional', in T. Vigevani, et al. (eds), *A dimensão subnacional e as relações internacionais* (EDUC, 2004), pp. 283-312.

Yet in a number of countries, the national government retains the exclusive power to establish treaties or international relations with foreign governments. As a result, attempts to forge interstate and international cooperation to address regional or global environmental problems face legal questions. In the United States (US) context, for instance, states do not have the power to enter into treaties. The US Supreme Court has already invalidated climate state laws that presented 'a risk of disruption or embarrassment in foreign affairs'.<sup>58</sup> The same can occur in relation to subnational attempts to forge interstate and international climate cooperation.<sup>59</sup> Efforts to create such coalitions encounter constitutional challenges, as the federal government retains the exclusive power to establish treaties or international relations with foreign governments. The reason behind this is that in international relations, the federal government is expected to present a single or unified national position.<sup>60</sup> When subnational diplomacy action is questioned, this is based on the US constitutional Treaty Clause (only the President has the power, with the advice and consent of the Senate, to make treaties), the Compact Clause (which prohibits states from entering into agreements or compacts with other states or foreign powers except with consent from Congress), the Foreign Commerce Clause (Congress regulates commerce with foreign nations), and the foreign affairs pre-emption doctrine (the federal government is the ultimate authority on foreign policy).<sup>61</sup>

Despite this constitutional situation, the facts on the ground are at least challenging the conventional wisdom that subnational governments cannot enter into treaties. Just recently, the US state of California completed its first joint carbon emissions trade with the Canadian Province of Quebec.<sup>62</sup> The two governments linked their cap-and-trade programmes on 1 January 2014, enabling the mutual acceptance of compliance instruments issued by each jurisdiction, and allowing the jurisdictions to hold joint auctions of GHG allowances. The first joint auction was held in November 2014, with the next joint auction scheduled for the end of February 2015.<sup>63</sup> California has also held talks with the European Union (EU) about programme linkage.<sup>64</sup> These developments are worth noting because of the constitutional issues they raise regarding the role of US states in foreign relations, and also because of the sheer size of California's economy

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<sup>58</sup> LaMotte, Williamson & Hopkins, n. 37 above, at p. 409.

<sup>59</sup> Kysar & Meyler, n. 37 above; B.K. Sovacool, 'The Best of Both Worlds: Environmental Federalism and the Need for Federal Action on Renewable Energy and Climate Change' (2008) 27 *Stanford Environmental Law Journal*, pp. 397-476.

<sup>60</sup> D. Farber, 'Climate Change, Federalism, and the Constitution' (2008) 50(3) *Arizona Law Review*, pp. 879-924; C. Rose, 'Federalism and Climate Change: The Role of the States in a Future Federal Regime - An Introduction' (2008) 50(3) *Arizona Law Review*, pp. 673-679.

<sup>61</sup> The Treaty Clause is contained in Article II, Section 2, Clause 2 of the US Constitution. The Compact Clause is a provision in Article I, Section 10, Clause 3, of the US Constitution. The Foreign Commerce Clause is found in part of Article I, Section 8, Clause 3 of the US Constitution,

<sup>62</sup> California Environmental Protection Agency, cap-and-trade program, available at: <http://www.arb.ca.gov/>

<sup>63</sup> California Environmental Protection Agency, 'Auction and Reserve Sale Information', last updated 23 Feb. 2015, available at: <http://www.arb.ca.gov/cc/capandtrade/auction/auction.htm>.

<sup>64</sup> See, e.g., 'EU Plans to Link Emissions Trading Scheme with California', *The Guardian*, 7 Apr. 2011, available at: <http://www.theguardian.com/environment/2011/apr/07/eu-emissions-trading-california>; and L. Zetterberg, 'Linking the Emissions Trading Systems in EU and California' (CEPS, 2012), available at: <http://www.ceps.eu/system/files/article/2012/10/Linking%20the%20Emission%20Trading%20Systems%20in%20EU%20and%20California.pdf>.

and carbon emissions, as well as the fact that California has often been a 'first-mover' among US states on matters of environmental policy.

Moreover, the US State Department coordinates the interaction between states and cities with foreign authorities and attempts to limit those that might interfere with national policy while implicitly recognizing the legitimacy of others. Within the US State Department, the Office of the Special Representative for Global Intergovernmental Affairs engages with transnational networks of subnational governments, such as Sister Cities International,<sup>65</sup> United Cities and Local Governments (UCLG),<sup>66</sup> the C40,<sup>67</sup> and the R20,<sup>68</sup> to further the global needs of state and local officials.<sup>69</sup>

Most commonly, there is an absence of national legal rules, or at least a weak domestic legal basis, with respect to subnational diplomacy. Despite this relatively weak legal basis, *de jure* principles can be tweaked by *de facto* practices.<sup>70</sup> A key issue is whether the subnational action falls within an area of traditional state competence. If subnational actions violate the national government's responsibilities for national security, defence, foreign affairs, or external borrowing, their involvement in international relations can be challenged before legal courts.

Worth noticing, some variation is expected depending on whether the relation with a foreign authority is established by a local or a regional government. Indeed, the role of cities generally differs from that of other subnational units such as states and provinces. Cities engage more directly with the needs of citizens in a closer way, and generally have competences over local problems such as planning and waste management, while regional governments usually represent larger constituencies and have powers in fields that are connected with their territory. Also, it may be more difficult for the central government to monitor the diplomatic activities of local governments, in part because of their number and because their initiatives do not always require formal legal arrangements.

In summary, legal problems arise when subnational governments undertake international diplomatic activities which deliberately or inadvertently challenge, the central government: that is, when subnational governments' actions interfere with the ability of the federal government to speak with 'one voice' on foreign affairs. The next pages examine Brazil's position in relation to the international activities undertaken by its federated units.

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<sup>65</sup> See online at: <http://www.sister-cities.org>.

<sup>66</sup> See online at: <http://www.uclg.org>.

<sup>67</sup> N. 19 above.

<sup>68</sup> N. 24 above.

<sup>69</sup> US State Department, Office of the Special Representative for Global Intergovernmental Affairs, available at: <http://www.state.gov/s/srgia/resources/index.htm>.

<sup>70</sup> I. Kelman, et al., 'Island Disaster Paradiplomacy in the Commonwealth' (2006) 95(386) *The Commonwealth Journal of International Affairs*, pp. 561-74, at 565.

#### 4. SUBNATIONAL DIPLOMACY IN BRAZIL

Brazil is a federal republic formed by the union of states, municipalities, and the Federal District. The legislative, executive, and judicial branches compose the Brazilian government. The Brazilian legal system does not provide for international actions undertaken by subnational entities. On the contrary, the 1988 Constitution establishes that only the Brazilian federal government has the power to direct international relations.<sup>71</sup> For instance, the section about the organization of the state establishes that the federal government is the sole sphere responsible for maintaining relations with foreign states and participating in international organizations.<sup>72</sup> Among the prerogatives of the president of the republic is the relationship with foreign states<sup>73</sup> and the signature of international treaties, conventions and other acts, subject to approval of the National Congress.<sup>74</sup> Subnational governments, despite being autonomous legal entities within the framework of public domestic law, are not included within the category of subjects of public international law, and there is no legal provision allowing states to direct international relations. The Supplementary Bill of Law No. 140, of December 2011, confirms this by stating that the federal government should promote the country's environmental policy in the international sphere.<sup>75</sup> Brazilian scholars recognize that there is a 'clear inconsistency' in Brazil: despite the lack of legal competence, subnational diplomacy does take place and in some cases is quite significant.<sup>76</sup>

In spite of the lawlessness implicit in subnational diplomacy, Brazilian subnational governments tend not to act contrary to the country's foreign policy. Brazilian paradiplomacy is seen as a result of the decentralized federative architecture approved by the new constitutional system.<sup>77</sup> If there was a real threat to federalism, the federal government could amend the constitution either to forbid subnational diplomacy or to extend to subnational governments the competence to enter treaties. In 2005, the Federal Deputy and diplomat Andre Costa presented proposition of a so-called PEC (Proposal of Amendment to the Constitution) to explicitly authorize subnational diplomacy. However, the PEC was rejected on the justification that the constitution does not forbid subnational governments from establishing international agreements within their sphere of competence.<sup>78</sup> Behind this rejection also lies the idea that the

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<sup>71</sup> Brazilian Federal Constitution, articles 21, I, and 24, VII and VIII.

<sup>72</sup> *Ibid*, Art. 21, item I.

<sup>73</sup> *Ibid*, Article 84, Item VII.

<sup>74</sup> *Ibid*, Article 84, Item VIII.

<sup>75</sup> Supplementary Bill of Law No. 140, of December 2011, Article 7, III.

<sup>76</sup> T. Vigevani, 'The Legal and Institutional Framework for the International Management of Subnational Government Players in Brazil' (2004) 8(21) *Integration & Trade*, pp. 25-43, at 30.

<sup>77</sup> C.R.S. Milani & M.C.M. Ribeiro, 'International Relations and the Paradiplomacy of Brazilian Cities: Crafting the Concept of Local International Management' (2011) 8 *Brazilian Administration Review*, pp. 21-36; R. Tavares, 'As relações internacionais do estado de São Paulo' (2012) 20(4) *Revista Política Externa*, pp. 169-84.

<sup>78</sup> N. Lopes, (2005). Manifestation over the Draft Law No. 475/2005, which proposed the addition of a paragraph to Article 23 of the Federal Constitution, to allow states, the Federal District, and municipalities

constitution could not be amended on this subject as federalism is an entrenched clause, or, a constitutional clause that prohibits any bill making alterations. By refusing to amend the constitution or enact other specific legislation, the Brazilian government arguably consented to evolving subnational diplomacy without explicitly sanctioning it.

Gradually, the federal government undertook initiatives at the federal level to institutionalize subnational governments' international relations. One of the first measures taken in this process of institutionalization was to rename paradiplomacy 'federative diplomacy', a term that expressed the intention to decentralise the country's diplomacy.<sup>79</sup> That is, rather than a diplomacy that runs in parallel with Brazilian diplomacy, the term chosen by the federal government emphasizes the decentralization of diplomacy as a trend deriving from the government's foreign relations.

The next step was to create a space for this federative diplomacy within the Ministry of Foreign Affairs. In 1997, under President Fernando Henrique Cardoso's mandate, a Federative Relations Advisory Board (ARF – *Assessoria de Relações Federativas*) was created and regional representation offices were established in different states. ARF's objective was to advise states and municipalities on their foreign relations. In 2003, under President Luiz Inácio Lula da Silva (Lula), the ARF was replaced by a Special Advisory Board for Federative and Parliamentary Affairs (AFEPA – *Assessoria Especial de Assuntos Federativos e Parlamentares*). AFEPA became responsible for promoting coordination between the Ministry of Foreign Affairs, the National Assembly and the subnational governments (states and municipalities) together with their respective legislative assemblies, helping them to develop their international relations.

President Lula also created, in the same year, a Division for Federative Affairs (SAF – *Subchefia de Assuntos Federativos*), linked to the Presidential Office. This Division was assigned to help implement a broader policy of redefining the federative pact and to promote and support 'federative international cooperation' involving states and municipalities.<sup>80</sup> This includes initiatives involving the Organization of American States (OAS), the Southern Common Market (Mercosur/Mercosul), cooperation with Italian and French regions, and other international affairs established by subnational governments.<sup>81</sup>

The creation of a federative advisory body within the Ministry of Foreign Affairs and of a federative international cooperation division within the Presidency confirmed Brazilian subnational governments' legitimacy to engage in diplomacy. Both AFEPA and SAF recognize the transnational initiatives promoted by states and municipalities and aim to support them in this agenda. Both bodies participate in subnational governments' initiatives in an informal way; there are no legal requirements or specific guidelines establishing when and how the Ministry of Foreign Affairs and the Presidency should be involved in subnational governments' international relations. The

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to promote acts and enter agreements with foreign entities. Chamber of Deputies, Commission of Justice and Citizenship, PRL1CCJC/PEC457/2005.

<sup>79</sup> C. Brigadão, *Relações internacionais federativas no Brasil: Estados e municípios* (Gramma 2005).

<sup>80</sup> Decree 6,207, of 16 Sept. 2007. Art. 7 establishes the attributions of the Division for Federative Affairs. It revokes Decree 5,526, of 26 Aug. 2005, which in turn revoked Decree 4,968, of 30 Jan. 2004.

<sup>81</sup> SAF, 'A cooperação internacional federativa da Subchefia de Assuntos Federativos', available at: <http://www.portalfederativo.gov.br/bin/view/Inicio/CooperacaoInternacionalFederativa>.

response of cities and states was positive. By 2008, over 70% of the municipalities with more than 500,000 inhabitants had some form of paradiplomatic activity<sup>82</sup>, and by 2012 almost all state administrations maintained an international agenda and an international relations structure.<sup>83</sup>

Notwithstanding the efforts to adapt to the paradiplomatic reality and institutional apparatus that was created in the past 15 years, there are still a number of challenges to subnational international initiatives. The position of the federal government remains unclear<sup>84</sup>, and its relationship with subnational governments is not always harmonious. In addition to the legal domestic constraints mentioned above, there are also *political* and *institutional* challenges.

The political challenges are related to the dissolution of the diplomatic monopoly over foreign affairs. Brazilian scholars writing on domestic public law still maintain that the federal government is sovereign and is the only entity entitled to establish international relations.<sup>85</sup> The Foreign Ministry's legal advisory board recently reiterated that 'the federal government is the absolute master of acting and undertaking decision-making functions in the field of international relations'.<sup>86</sup> The institutional challenges are related to internal barriers that subnational governments face when trying to undertake international relations. For instance, subnational governments might encounter resistance from the national government and not find adequate channels for establishing dialogue and consensus building with diplomats.

These political and institutional challenges are related to weak guidance on the practice of subnational international relations and a lack of criteria for monitoring the implementation and success of internationalization processes.<sup>87</sup> As a result, subnational international strategies are developed without focus or strategic or long term planning. The state of São Paulo is trying to change this pattern with its International Relations Plan for 2011-2014,<sup>88</sup> which establishes three general goals that guide the state's international activities, as well as 16 priorities and 54 goals, including foreign investment and loan targets and ways to boost foreign-language education in the state. This was the first instance in Brazil, and arguably one of the first in the world, of a subnational government establishing a comprehensive plan to act internationally.

Such challenges can also be observed in recent climate initiatives in which Brazilian subnational governments are engaged. For example, in November 2008, four Brazilian states from the Amazon region (Amazonas, Amapá, Mato Grosso, and Pará), together with two Indonesian provinces (Aceh and Papua) and three US states (California, Illinois, and Wisconsin), signed an MOU to establish the first state-to-state subnational

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<sup>82</sup> Milani & Ribeiron, n. 77 above.

<sup>83</sup> 25 out of the 27 state governments, according to Tavares, n. 77 above.

<sup>84</sup> M. Andrade e Barros, *A atuação internacional dos governos subnacionais* (Del Rey, 2010).

<sup>85</sup> C.R. Bastos, *Curso de direito constitucional* (Malheiros Editores, 2010); C.R. Husek, *Direito internacional público* (LTR, 2010); M.D. Varela, *Direito internacional público* (Saraiva, 2009).

<sup>86</sup> A.P.C. Medeiros, 'Legal Opinion on the Legal Limits of the Agreement Entered by the City of Rio de Janeiro With an International Entity (1999)', in A.P. Cachapuz de Medeiros (ed.), *Pareceres dos Consultores Jurídicos do Itamaraty*, Vol. IX, 1990-2000 (Fundação Alexandre de Gusmão 2009), pp. 227-31, at 230.

<sup>87</sup> See Andrade e Barros, n. 84 above.

<sup>88</sup> Decree 57.932, of 2 Apr. 2012, available at: <http://www.al.sp.gov.br/repositorio/legislacao/decreto/2012/decreto-57932-02.04.2012.html>.

agreement focused on Reducing Emissions from Deforestation and Degradation (REDD+) programmes.<sup>89</sup> This MOU resulted in the Governors' Climate and Forests Taskforce (GCF), a subnational collaboration between 19 states and provinces from Brazil, Indonesia, Mexico, Nigeria, Peru, Spain, and the US.<sup>90</sup>

In the months preceding the December 2009 UNFCCC COP-15 in Copenhagen (Denmark), the Amazonian states of the taskforce adopted a position that was not aligned with the strategy defended by the Brazilian government. In this case, a conflicting interaction between subnational governments and the central government became clear. Not only did they want to influence the national government, but they were also advocating an 'Amazonian states position', which consisted of supporting REDD and avoided deforestation mechanisms. This approach, however, was beyond what the negotiators could accept. President Lula, SAF, AFEPA, and the national negotiators met the Governors on several occasions until they formed a 'Brazilian position' that could be taken to COP-15 in Copenhagen.

A central condition for a harmonious relationship between diplomats and subnational governments is that the different levels of government should not assume divergent positions. As acknowledged by Min. Carlos Eduardo de Ribas Guedes, the head of the Special Advisory Office for Federative and Parliamentary Affairs of the Ministry of External Relations:

"when subnational governments have a different opinion and try to influence our position, as in COP-15, the coordination meeting allows us to agree on common grounds. We certainly acknowledge that there might be disagreement between the different levels of government, but divergent opinions should not reach the international community: there is only one national position and it will be voiced by the diplomats."<sup>91</sup>

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<sup>89</sup> REDD+ is a mechanism for encouraging forest conservation and cultivation in developing countries using funding from the developed world. REDD+ assigns financial value to carbon stored within forest resources, to make local preservation efforts eligible for foreign financing, including voluntary investment and offset credits generated through foreign carbon markets. The REDD+ terminology and concept originate from a 2005 proposal to the UN by the governments of Papua New Guinea and Costa Rica, in response to the Kyoto's Protocol lack of mechanism to reduce deforestation emissions. The "+" in REDD+ indicates the last category of strategies, which includes conservation, sustainable management of forests, and enhancement of forest carbon stocks. For more information on REDD+ and the California REDD+ experience, see "The Ongoing Political History of California's Initiative to Include Jurisdictional REDD+ Offsets within its Cap-and-Trade System", J. Lueders, C. Horowitz, A. Carlson, S.B. Hecht and E.A. Parson, Center for Global Development Working Paper 386 (November 2014), available at: <http://www.cgdev.org/publication/california-redd-experience-ongoing-political-history-californias-initiative-include>.

<sup>90</sup> The GCF has been working since 2009 to advance jurisdictional programmes to reduce emissions from deforestation and land use, and to link these activities to emerging GHG compliance regimes and other pay-for-performance opportunities. Based on their experience in the GCF, in 2010 the states of California (US), Acre (Brazil), and Chiapas (Mexico) signed a separate MOU. Their aim was to cooperate more closely on the technical, legal, and institutional design issues associated with the effort to link state REDD+ programmes with California's cap-and-trade programme. See the working group report "California, Acre and Chiapas: Partnering to Reduce Emissions from Tropical Deforestation", ed. Evan Johnson (July 2013), available at:

[http://www.unredd.net/index.php?option=com\\_docman&task=doc\\_download&gid=9893&Itemid=53](http://www.unredd.net/index.php?option=com_docman&task=doc_download&gid=9893&Itemid=53). On the California-Acre process, see also: E. Roessing Neto, 'Linking Subnational Climate Change Policies: A Commentary on the California-Acre Process' (forthcoming 2015) *Transnational Environmental Law*.

<sup>91</sup> Transcript of an interview with the author, Dec. 2010.

All in all, the institutionalization of subnational governments' international agendas is not necessarily an endorsement of subnational diplomacy. To a certain extent, federative diplomacy is a way for the federal government to control – rather than to give independence to – subnational governments' international agenda. So the main question is still whether subnational governments can act independently of the central government. That is, even if the national government genuinely believes in the idea of federative diplomacy, it envisions a decentralization via the Ministry of Foreign Affairs, not bypassing it. Consequently, the margin for conflict increases when subnational governments undertake an international agenda that goes against the national government's position. Federative diplomacy therefore attends to subnational governments' demand for their own international agenda, but it incorporates their interests into the country's foreign policy without allowing *direct* action to be undertaken by the federated units.

## 5. CONCLUSION

This article analyzed one aspect of subnational governments' engagement in the multilevel governance of climate change: their legal competence to undertake an international agenda. It first showed that the linkages established within environmental politics occur across scales (vertically and horizontally). Taking into consideration the concept of paradiplomacy, and the recent legal scholarly work on climate change federalism, the article suggested that the MLG literature still offers an incomplete picture of the legal capacity of non-state actors to operate across scales.

By engaging in collaborative and coalition activities in the realm of climate change, subnational governments are moving across jurisdictional levels, breaking the fixed issue-areas and territories in which they traditionally operate. However, there are legal limitations when subnational governments move across scales. In public international law, subnational governments' international agreements are *soft law*. In terms of the domestic legal order, subnational foreign-affairs activities depend on constitutional limitations established by each country. The international and the domestic legal orders therefore establish boundaries to subnational governments' international relations, which have to be taken into consideration when examining their rescaling roles.

In Brazil, the federal constitution does not provide for international actions undertaken by subnational governments. Institutionalization within the federal government was a way to recognize subnational diplomacy without granting *carte blanche*. The national government recognized the desire of subnational governments for greater participation in diplomacy and demonstrated its willingness to comply by establishing an institutional framework for federative diplomacy. This combined the national primary role in foreign affairs with growing subnational participation. However, rather than giving independence to subnational governments, the institutionalization of 'federative diplomacy' can be seen as a means by which the federal government expands its control over the international agenda.

Although subnational governments lack legal personality in international law, and despite limitations within national law, the legal ground on which subnational

diplomacy is based might be shifting. Climate change has offered subnational governments an opportunity to act across borders, and transnational networks are facilitating this process. The challenge that remains is how to reconcile central governments' monopoly over international relations with the subnational interest, avoiding ambiguous situations where the legality of subnational diplomacy can be contested.