DISSERTATION

SUBNATIONAL IMPACTS OF NAFTA'S ENVIRONMENTAL REGIME: A COMPARATIVE ANALYSIS OF CANADA, THE UNITED STATES, AND MEXICO

Submitted by

Pamela Duncan

Department of Political Science

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Colorado State University

Fort Collins, Colorado

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ABSTRACT OF DISSERTATION

SUBNATIONAL IMPACTS OF NAFTA'S ENVIRONMENTAL REGIME:
A COMPARATIVE ANALYSIS
OF CANADA, THE UNITED STATES, AND MEXICO

This dissertation presents a comparative analysis of the impacts of the North American Free Trade Agreement's (NAFTA) environmental regime on the states and provinces of the U.S., Canada and Mexico. It compares the federalism arrangements of the three NAFTA parties and analyzes the environmentally relevant aspects of the NAFTA text as well as its environmental side agreement, the North American Agreement on Environmental Cooperation (NAAEC).

The dissertation presents case studies of constraints presented to the states and provinces under the investment rules of NAFTA's Chapter Eleven and the citizen submissions process of Articles 14 and 15 of the NAAEC. It also examines potential opportunities presented to the states by the regime, especially the Commission for Environmental Cooperation (CEC).

The dissertation concludes that, despite significant variations in federalism arrangements among the NAFTA parties, the states and provinces face similar constraints under the environmental regime. In addition, the subnational governments have generally not availed themselves of the opportunities presented by the regime. Based on these

findings, the dissertation speculates that federalism may be losing relevance in the context of new international trade rules.

Pamela Marie Duncan
Political Science Department
Colorado State University
Fort Collins, CO 80523
Spring 2003

DEDICATION

This dissertation is dedicated to my mother, Barbara Adcock, a full and equal partner in this achievement, without whose unfailing support and faith it would never have been accomplished; to my daughter, Katy Looft, who brought me joy and balance throughout the process; to the memory of my father, Gene Lee Duncan, whose voice always encouraged me to keep going and reach farther; to my wonderful siblings, who cheered me on; and finally, to my dissertation adviser, Dr. Stephen Mumme, a brilliant and generous mentor and even better friend. Love and thanks to you all.

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CHAPTER ONE

Introduction

Within the scholarly field of comparative politics and government, the study of federalism has a long history, reflecting the ancient roots of federalism itself. Some scholars trace the history of federal forms and principles back to the Hellenic city-states of Greece and even farther, to the Israelite tribes of 3200 years ago (Elazar 1987, 115-153; Watts 1996, 2). Currently, a large percentage of the world's population and territory are governed through some type of federal arrangement, and such arrangements are increasing in number (Elazar 1987; Watts 1996, 3-5). As Fry (2001, 1) notes, of the roughly 190 nations in the world, about twenty-five are formal federations or confederations, representing over one-third of the world's population. Given federalism's enduring attraction as a form of government, consideration of federalism remains important to the understanding of contemporary political systems and processes.

Today, the world's federations exist within a new and rapidly changing international context. Trade liberalization, interdependence, and a growing number of international environmental agreements and regimes are dominant features of contemporary international relations. Within this context, subnational governments in federations—such as states and provinces—are increasingly impacted by foreign affairs (Fry 2001; Markell 2000; Eaton 1996; Schaefer 2000). Thus, as Gordon (2001, 3) points

out, the old "debate over federalism...is being fundamentally altered by globalization." Given wide variations among federal systems, there is little reason to assume that these new international forces will impact all federations in the same way.

This dissertation takes a comparative look at the impacts of new international trade and environmental rules on subnational governments within federal systems. It focuses on the North American Free Trade Agreement (NAFTA) between the U.S., Canada and Mexico. Implemented in 1994, NAFTA embodies a comprehensive international regime for trade and environment in North America. While all three parties to NAFTA are federations, they exhibit wide variations in centralization, environmental jurisdiction, and international involvement by subnational governments. This trade agreement thus provides an opportunity to examine how new developments in international relations can impact subnational governments and, at the same time, how such impacts may vary according to variations in federalism.

This introductory chapter provides an overview of the theoretical considerations underlying the dissertation. It begins with a survey of the most common themes found in the literature on federalism. This is followed by a look at recent developments in international affairs, including subnational involvement, interdependence, the growing connection between trade and environmental issues, and the recent increase in international environmental regimes. The North American Free Trade Agreement's history and development as such a regime is reviewed. The chapter concludes with elaboration of the research question that guides the dissertation, and a brief look at the attention which this topic has received thus far.

Federalism

A universal definition of federalism has eluded scholars throughout the long years of study and discussion of this form of government. As Gordon (2001, 15) notes, "(f)ederalism is a notoriously slippery concept." Literally hundreds of conceptions of federalism have been identified (Anton 1989, 3). Elazar (1987, 15-16) muses that the long history of this subject is in fact the problem: he argues that, as part of the classic terminology of political science, the terminology of federalism "suffers from historically changing uses over a long period of time, which have weakened the possibilities for a clear-cut definition....As a value concept, it does not have a once-and-for-all precise definition in the usual scientific sense..."

However, the literature on federalism does reveal some common threads that are helpful in arriving at a basic conception of the term. Riker (1964) perceives federalism as a bargain between officials of national and constituent governments for reasons of self-interest. Friedrich (1968, 6) similarly identifies the contractual nature of federalism, stating that a federal order exhibits features of "a compact between equals to act jointly on specific issues of public policy." This author also emphasizes autonomy, declaring (1968, 7-8): "In short, we have federalism only if a set of political communities coexist and interact as autonomous entities, united in a common order with an autonomy of its own." Almost a decade later, Elazar (1987, 5) echoed Friedrich's conception of a federal arrangement as "one of partnership, established and regulated by a covenant, whose internal relationships reflect the special kind of sharing that must prevail among the partners, based on a mutual recognition of the integrity of each partner and the attempt to

foster a special unity among them." Anton (1989, 3) and Watts (1996, 7) join Friedrich in focusing on the autonomy of governmental units as necessary to federalism. Finally, Elazar (1987, 5, 16) and Watts (1996, 31) both identify the combination of shared rule and self-rule as a defining characteristic of federal systems.

Thus, while there is no one concrete definition of federalism, we are guided to recognize federal systems by the existence of autonomous governments, united by some form of compact or bargain, in an arrangement that combines self-rule and shared rule. While this conception applies to sovereign nations with federal forms of government—such as the U.S., Canada and Mexico—it could also be used to describe certain international arrangements such as the European Union. The former category is called a "federal state" by Friedrich (1968); Elazar (1987) and Watts (1996) refer to it as a "federation." This type of federalism is the subject of this paper.

Elazar (1987, 7) defines a federation as a single "polity compounded of strong constituent entities and a strong general government, each possessing powers delegated to it by the people and empowered to deal directly with the citizenry in the exercise of those powers." Watts (1996, 7) also distinguishes federations from other federal systems by their power to deal directly with citizens and be elected directly by citizens. Both authors cite the importance for this type of government of a supreme written constitution, which is not unilaterally or otherwise easily amendable and which outlines the terms by which power is divided or shared (Elazar 1987, 157; Watts 1996, 7). Elazar adds that federations feature constitutionally fixed territorial divisions of power (Elazar 1987, 166-168). Other ways to differentiate federations from other federal systems are offered by

Friedrich (1968), who points out that common citizenship (Elazar's "polity") and the disallowance of secession generally characterize sovereign federal states.

Just as a definition of federalism is elusive, so is a grand theory. Sheldon Wolin, writing in Riker (1964, vii), pointed out several decades ago that "(a)lthough the problems connected with federalism have been of continuing concern to political scientists for more than a century, relatively few theoretical treatises of lasting significance have emerged." Friedrich (1968, 8) agreed a few years later. Elazar (1987, 38) argues that theoretical discussions of federalism are complicated by the very flexibility which is federalism's greatest strength. Anton also refers to this problem, with considerable impatience:

> Because scholars have studied a great many different things, or used different languages to study similar things, we are left with a mountain of details, but no widely accepted theory or theories that allow us to evaluate the significance of those details. Empirical studies of federalism, in short, are descriptively strong but theoretically weak.... (Anton 1989, 2)

This difficulty continued into the 1990s, as Watts (1996, 1) pointed out in noting that the basic notion of combining shared rule and self-rule "has been applied in different ways to fit different circumstances," leaving us with no single model of federation.

However, scholars have made a few attempts at theory-building over the years. For example, Riker (1964) generated hypotheses about the circumstances necessary to strike, and then maintain, the federal bargain. Donald Smiley (1977) attempted a distinction between "intrastate" and "interstate" federalism, which on close examination reveals itself as centralization versus decentralization. Morton Grodzins (1984) devoted much of his career to analyzing American federalism, resulting in his famous marble

cake/layer cake analogy. Thomas Anton (1989) conceptualized federal politics in the U.S. in the context of a "benefits coalition framework," focusing on government action at all levels as responses to different coalitions seeking benefits. Other analytic approaches have included fiscal federalism; a hierarchy model; and public choice (Anton 1989, 20-29). However, none of these frameworks has taken hold as a lasting theory of federalism. Some, such as Anton and Grodzins, suffer from a sole focus on one system; others have been dismissed as normative, abstract and empirically weak (Anton 1989, 29).

Comparative concepts within federalism

Lacking a theoretical basis, and acknowledging the difficulty of generating one, most scholars of federalism have focused on specific aspects of federal systems. Such components and concepts have been widely discussed, and several themes have emerged which are useful for purposes of comparison between federations. These will receive more attention in Chapter Two, in which they will be used to guide the comparison of three federal systems. However, a brief overview of themes in the federalism literature is instructive at this point.

First, a major portion of the federalism literature is focused on structural considerations such as constitutions, judicial review, separation of powers, and federal legislative arrangements. Early studies of federalism exhibit a preoccupation with constitutional questions, as Livingston (1967, 35) pointed out several decades ago:

> The questions are always of a legal nature. How much power? What vote is required (for amendment)? Upon what right may this or that action be based? Does it violate the constitutional distribution of powers? Does it violate the principle of federalism? The ordinary treatment of federalism is based upon a legalistic foundation and its problems are treated as problems of constitutional law.

Although, as we shall see, the focus of scholars has broadened considerably in the past few decades, most studies of federalism necessarily start with a look at constitutions. As discussed above, a supreme written constitution is generally considered one of the defining characteristics of federal systems. The formal distribution of authority, including the matters constitutionally designated as exclusively federal, exclusively state (or provincial), concurrent, and residual, is a logical starting place for analysis of a federation (Watts 1996).

Because constitutions are so important in federations, some scholars have argued for the significance of judicial review as well. In his list of the structural characteristics of federations, Watts (1996, 7) includes "an umpire...to rule on disputes between governments." He describes the common reliance on the courts to play a major adjudicating role within these systems (Watts 1996, 92-93). Elazar (1987, 183) refers to this as well, arguing that judicial review plays a crucial role in maintaining the federal principle.

Another structural consideration is whether the federation in question has a parliamentary form of government or separation of powers. Watts (1996, 76-81) and Elazar (1987, 207-208) both focus on this, noting that parliamentary institutions generate very different dynamics than those operating under the separation of powers principle, resulting in different consequences for federalism.

Finally among structural characteristics of federations, Watts (1996, 7) cites "provision for the designated representation of distinct regional views within the federal policy-making institutions, usually provided by the particular form of the federal second

chamber." The role of second chambers has long been a focus of federalism scholars. Riker (1964, 87-91) included a brief analysis of the U.S. Senate within his discussion of the federal institutions in this country, concluding that the Senate has never acted effectively as the voice of the states that it was meant to be. In his comparison of federal dynamics in Canada and the former Federal Republic of Germany, Michelmann (1986, 543) also takes a look at the role of second chambers in the two countries. Elazar (1987, 183-184) argues that these chambers can be "another device for maintaining federalism, offering the opportunity to protect constituent state interests and also give the states an effective role in the federal government." All of these scholars agree that the extent to which second chambers are effective in this role depends upon the quality of the linkage between the constituent governments and those elected to represent them; for example, Riker (1964) argues that the U.S. Senate would have been more effective if the state governments had ever had the power to recall Senators that failed to represent state interests.

A second general theme in the federalism literature is the notion of centralization versus decentralization. This is the underlying (if sometimes unspoken) question in most analyses of federal systems: To what extent are the respective levels of government in control, and over what spheres of responsibility? Grodzins (1984, 254) has referred to this as "the classic problem of a federal government: the distribution of power between the central and peripheral units."

Part of the answer is found in the structural considerations discussed above, which provide the legal and institutional contexts for distributions of authority within

federations. As Watts (1996, 66) points out, "the constitutional allocation of legislative jurisdiction is one major indicator of the scope of jurisdictional decentralization." He argues that, to understand the distribution of authority within a federation, we must examine both the scope of jurisdiction and the degree of autonomy: "Some federations allocate fewer responsibilities to their constituent states or provinces, but leave them with greater freedom and autonomy over the exercise of those responsibilities."

Riker (1964, 5-6) places federal systems on a continuum of centralization: at the *minimum* end, "the ruler(s) of the federation can make decisions in only one narrowly restricted category of action without obtaining the approval of the rulers of the constituent units;" at the *maximum*, the rulers of the federation "can make decisions without consulting the rulers of the member governments in all but one narrowly restricted category of action." He argues that most federal systems lie somewhere between the two extremes; the closer to the "maximum" a system lies, the more centralized it is.

While legal and institutional context is important, the degree of centralization is often partially a result of political characteristics that transcend formal structure. For example, as Riker (1964, 128), Friedrich (1968, 70-74), and Watts (1996, 33, 67) point out, *administrative* authority over certain subjects may be very different from the *legislative* authority allocated by the constitution; this may occur through delegation or intergovernmental agreement, with no changes in the formal distribution of power. Other possible determinants of centralization include parties and processes, as discussed below.

For now, suffice it to say that centralization versus decentralization is a major focus of federalism studies.

A third theme found in this literature is an emphasis on the importance of parties in determining the nature and dynamics of federal relationships. Wrapping up his comparative study of federal systems, Riker (1964, 135-136) is adamant:

> Whatever the social conditions, if any, that sustain the federal bargain, there is one institutional condition that controls the nature of the bargain in all the instances here examined and in all others with which I am familiar. This is the structure of the party system...

Arguing a causal relationship, Riker asserts that a federation is centralized to the extent that nationally organized parties control the party organizations at the constituent levels. "This amounts to the assertion that the proximate cause of variations in the degree of centralization (or peripheralization) in the constitutional structure of federalism is the variation in the degree of party centralization." (Riker 1964, 129)

While declining to assert an actual causal relationship, Friedrich (1968, 47) observes in his comparative analysis an interaction between governmental structure and party organization, noting that they tend to parallel one another. Elazar (1987, 178) seems to agree with Riker when he observes that "studies have shown that the existence of a noncentralized party system is perhaps the most important single element in the maintenance of federal noncentralization." Conversely, he argues, centralized parties within federations directly result in centralized federal relationships (Elazar 1987, 217). In his examination of federations that have failed, Watts (1996, 112) identifies as a "key symptom" of pathology "the replacement in federal politics of political parties overarching regional interests by political parties which are primarily regional in their

focus." Clearly, party is a major aspect of federalism that requires a look beyond constitutions and other structural features.

A fourth theme in discussions of federalism is the importance of understanding federal processes. Explicitly breaking with the static, structuralist analyses of earlier scholars, Friedrich (1968) argues vigorously throughout his work that federalism is best understood as a process. Thus, he asserts, a federal system should be viewed in dynamic terms, as an evolving relationship between governments. Elazar (1987, 85) reiterates the need to emphasize both structure and process, "the necessity to organize governing constitutionally in a certain way and then live up to the constitutional demands..." He argues (1987, 67) that such processes are animated by a commitment to federal principles: "Only in polities whose processes of government reflect federal principles is the structure of federalism meaningful." Watts (1996, 14) also notes the distinction between constitutional form and operational reality, observing that "while knowledge about the structural character of a federal political system or a federation is important to gain an understanding of its character, equally important is the nature of its political processes..." He devotes an entire chapter of his comparative work to describing processes for intergovernmental relations (Watts 1996, 51-55).

All of these themes help to inform the subject of this dissertation, which is concerned with the roles of subnational governments in the context of international trade and environmental rules. Structural considerations are a particular concern in this context. A number of scholars, in discussing and comparing subnational roles in international affairs, have focused on constitutional authority. There is a general

consensus that, within federal systems, constitutions delegate primary responsibility for international relations to federal governments (Watts 1996; Kline 1986, 1999; Mumme 1984; Cooper 1993). Indeed, Elazar (1984, 2) cites exclusive federal control over foreign affairs as a major element of federal constitutions. Some studies have focused on other constitutional aspects, such as Canada's constitutional delegation of authority over natural resources to the provinces, to help explain why subnational governments are motivated to get involved in foreign affairs (Kline 1986; Michelmann 1986).

Other structural considerations show up in this context as well. For example, Kline (1999, 112, 119-120) provides an excellent illustration of how the separation of powers arrangement in the U.S. works as an obstacle to state participation in international agreements. Several scholars have also discussed and compared the roles of federal second chambers in providing a voice to subnational governments in foreign policy (Kline 1986, 509-510; Cooper 1986, 670; Michelmann 1986, 543-549).

As with most analyses of federalism, however, such structural aspects are merely a starting point. The other common themes, while less prominent, are also informative in studies of subnational roles in international affairs. In his discussion of centralization versus decentralization, Watts (1996, 66-70) cites the extent to which subnational units are bound by international treaties as an indication of legislative autonomy for those units. In his look at state and local influence over foreign policy in the U.S., Kline (1986, 530) mentions the lack of party discipline in Congress to help explain why legislators are more influenced by their home state or district than by their party leaders. Finally, processes are discussed throughout the literature to explain why and how subnational

governments get involved in international affairs, despite apparent constitutional restrictions. In particular, Kline (1986) and Cooper (1993) emphasize how political processes provide subnational governments with the power in this arena that they lack in constitutional terms.

The International Context

Because this dissertation is concerned with the roles of subnational governments in the context of international trade and environmental rules, we turn now from federalism to consideration of international affairs. Three recent developments in this realm are of particular concern: expanding subnational involvement in international affairs in response to interdependence; the increasingly recognized connection between international trade and environmental concerns; and the relatively recent development of numerous international environmental regimes.

Subnational involvement in international affairs

While subnational involvement in international affairs has increased recently—certainly in the three federations we will examine in this study—it should be noted at the outset that this is not a complete departure from historical norms. Historically, in the U.S. at least, states have always been somewhat involved in foreign relations. Riker (1964, 57-60) points out that while the constitution of 1787 appeared to overwhelmingly centralize control over military-diplomatic affairs, several decentralizing factors were at work early in U.S. history. Specifically, the states had some control over ambassadors and treaties through the Senate; state control of the militia was guaranteed by the Second Amendment; and federal authority over the army and navy was irrelevant

since neither existed at the time. In addition, as Kincaid (1984, 96-100) and Elazar (1984, 1-2) point out, early in our history the states were involved in border wars, conflicts with Native Americans, and westward expansion. As the new nation became settled and border issues faded, the states along the coasts became increasingly involved in immigration issues (Elazar 1984, 2).

Still, in the U.S. and the other modern federations modeled upon it, central governments have held the legal advantage in the area of international relations. In his Introduction to a special issue of *Publius* devoted to this topic, Elazar (1984, 1) wrote that

> a major element of the modern federal bargain has been the transfer of exclusive control over foreign affairs from the constituent polities to the framing government of the federation....This principle has been enunciated by international lawyers and the Supreme Court of the United States, among others. Federal government control of foreign affairs thereby became one of the handful of fundamental and unbreachable principles in the legal definition of federalism.

Later in that issue, Mumme (1984, 115) also noted the constitutional delegation of authority over foreign affairs to the central government in the U.S., arguing that states may influence foreign policy, but seldom function as prominent political actors in this arena. Kline (1986, 1999) has further pointed out the dominance of the U.S. national government in this respect, noting a dearth of state involvement from about the mid-nineteenth century until the latter part of the twentieth. Watts (1996) looks beyond the U.S. and finds this pattern in other federations as well. Examining the wide variations among federal systems, he finds that, in general, federal governments have had the major responsibility for defense and international relations (Watts 1996, 74).

Despite this, subnational governments within federations have become increasingly involved in international affairs during the past several decades. Duchacek (1987, xii) argues that the central monopoly in matters of external relations—once considered a "yardstick" of federalism—no longer applies in those issue-areas that do not directly involve matters of national status and security. By far the most significant international involvement by subnational governments has been in the form of foreign economic relations. In the last decades of the twentieth century, these governments have vigorously promoted local exports and sought to attract foreign investment. Most of the scholarly attention to this activity has been focused on the subnational governments of the U.S. and Canada, some of which have sponsored trade promotion trips by local officials and established permanent offices in foreign countries (Kline 1984, 1986, 1999; Kincaid 1984; Feldman and Feldman 1984; Fry 1988; Cooper 1986; Hocking 1986; Michelmann 1986; Watts 1996). As Elazar (1987, 259-260) points out, this activity by U.S. states is especially significant because the U.S. constitution makes foreign affairs so exclusively a federal responsibility. In Canada, where the constitution is more vague on such matters, provincial activity "represents one of the foremost examples of the new involvement of constituent states in foreign affairs..." (Elazar 1987, 260).

Economic interests motivate subnational governments to engage in other international efforts besides export promotion and attraction of foreign investment. Such efforts include protectionist measures such as "Buy Local" procurement programs; restrictions on foreign purchases of farmland; and taxation policies that impact foreign-based corporations (Kline 1984; Fry 1988; Cooper 1986). While some economic

activities—such as export promotion—often complement those of federal governments, others have been a source of conflict between the levels of government, especially where the federal level has sought to liberalize international trade. For example, "Buy Local" policies, as well as incentives to attract foreign investment, have been considered contradictory to federal-level "national treatment" policies; and certain state taxing measures have been the source of bitter complaints by U.S. trading partners (Kline 1984; Fry 1988).

While economic interests motivate the overwhelming majority of international involvement by subnational governments, these governments occasionally become involved in other foreign issues as well, such as human rights, boundary management and environmental concerns. Because much of these governments' power is economic in nature, economic measures are sometimes used to pursue these other goals. Kline (1999) has documented U.S. state actions against South Africa, Burma, and Swiss banks, effectively using state authority over purchasing and public investment to protest human rights policies and the treatment of Holocaust victims. The exercise of subnational powers over health and environmental standards, land use, and hazardous waste disposal has also overlapped into the international economic sphere, impacting imports that do not comply with state and provincial laws (Fry 1988; Cooper 1986). In addition, environmental concerns often lead subnational governments to engage in boundary management and international cooperation: for example, Mumme (1984) has documented the roles of the U.S. and Mexican states in matters including water quality and boundary demarcation along their common border. As Duchacek (1987, 1988) has

pointed out, these governments' goals in international relations may also involve tourism, commuting labor, and cultural exchanges.

It should be noted at this point that not all subnational governments within federations become internationally active. As one observer points out, the internationally active governments are primarily those within advanced industrial federations where the capacity exists to support such activity; constituent governments in less developed federal systems generally cannot and do not become involved in foreign policy (Fry 1988, 64). A notable exception is Mexico, where the northern states have a great deal of contact with their U.S. counterparts (Fry 1988, 64).

Indeed, an increase in subnational capacity is one of the major trends underlying the recent increase in foreign involvement by these governments. Comparing the international activity of the states and provinces of the U.S., Australia, and Canada, Hocking (1986, 490) observes:

> The intensity of international activity on the part of regions is also dependent on their capacity to become effective mediating and primary actors. There are not inconsiderable costs involved in maintaining the necessary bureaucratic resources and, particularly, in operating a network of overseas offices which may require less well endowed regions to rely more on national administrative and diplomatic services.

In his examination of American governors' recent involvement in international affairs, Kincaid (1984) argues that a major reason accounting for this involvement is the increased modernization and capacity of state governments. Feldman and Feldman (1984) reach similar conclusions in their comparative analysis of the international activities of the Canadian provinces, noting that some provinces become more active than others largely because they have the bureaucratic and fiscal wherewithal to do so.

The importance of interdependence

Scholars view this increasing international activity by subnational governments as a reflection of a new reality in international relations. It is considered a significant development, as this statement from Elazar (1988, xix) illustrates:

> The transformation of the international system from one in which politically sovereign states under international law were the only legitimate actors to one in which other entities, particularly the constituent states of federal systems, are also involved is one of the major developments of the post-World War II period.

Overwhelmingly, scholars point to the impacts of global interdependence, particularly economic interdependence, to explain the new subnational involvement in foreign affairs. Keohane and Nye (1977, 8), who developed the most complete early model of interdependence, define it as "*mutual* dependence. Interdependence in world politics refers to situations characterized by reciprocal effects among countries or among actors in different countries." Duchacek (1984, 15) provides a more simple definition: "Interdependence simply means a vulnerability to external, often quite distant, events and an imperative to act..."

According to Keohane and Nye, situations of interdependence exhibit three major characteristics. The first is the existence of multiple channels connecting societies, causing the domestic policies of different countries to increasingly impact one another. Thus, foreign economic policies will have domestic economic impacts. The second characteristic is an absence of hierarchy among issues: foreign affairs agendas have become larger and more diverse, and matters generally considered "low politics"—such as economic and environmental issues—are considered equally important as the traditional "high politics" issues of military security and national sovereignty. Keohane

and Nye point out that the first two characteristics of interdependence effectively blur the lines between domestic and foreign policy. The third characteristic is the minor role of military force: interdependent situations exhibit intense relationships between countries, in which force is not considered a valid instrument of policy. This is connected to the rising importance on the foreign policy agenda of economic and ecological goals, which cannot generally be achieved effectively through the use of force (Keohane and Nye 1977, 25-29).

These authors argued that interdependence is already deeply rooted in some issue areas and some relationships between countries, and they expected this phenomenon to spread in response to new technology, the rise of the welfare state, and the increasing economic and political costs of military force (Keohane and Nye 1977, 227-228). Manning (1977, 307) also noted the impacts of interdependence on world politics, warning that the new international agenda "will present the United States with extremely difficult political, moral, and economic issues," including global environmental concerns. He pointed out that most issues on the new agenda are likely to have immediate, profound impacts on domestic interests in the U.S. (Manning 1977, 308-309)

Scholars observing subnational involvement in international affairs since 1977 have generally identified interdependence as the most important cause of this involvement (Kline 1984, 1986, 1999; Duchacek 1984, 1988; Kincaid 1984; Latouche 1988; Fry 1988; Hocking 1986; Cooper 1986). After noting the federal-level dominance of foreign policy through much of U.S. history, Kline (1986, 507) declared:

> The catalyst for change in this scenario was the evolution of the United States economy into true global interdependence. In the 1970s foreign economic forces

> penetrated deeply into domestic economic life....At the same time the economic component of foreign policy achieved new importance internationally, intruding further into the 'high politics' of political and military concerns.

Most observers trace subnational awareness of interdependence—in the United States at least—to the early 1970s. In particular, they cite the energy crisis of that period, as well as world recession and dramatic changes in international trade patterns that left local economies vulnerable to events and policies in other countries (Manning 1977; Kline 1984, 1986, 1999; Duchacek 1984, 1988; Hocking 1986; Cooper 1986).

As awareness of interdependence caused subnational governments to acknowledge vulnerability to international economic trends, these governments responded with a surge of activity to promote trade and investment and, in some cases, to protect local economies from foreign economic forces. This trend is aptly summarized by Kline (1999, 112): "With interdependence and the resultant meshing of the domestic and international economies, traditional and legitimate state responsibilities for their citizens' economic welfare have necessarily involved them in foreign economic relations."

Interdependence has also been an underlying factor in subnational activities on international border management and environmental issues. For example, Mumme (1988) documented the involvement of state and local officials in the U.S. and Mexico in managing hazardous wastes along their common border, concluding that the political processes in this instance were consistent with interdependence. Other examples are found in instances of transboundary environmental cooperation along the U.S./Mexico

and U.S./Canada borders in the context of interdependence (Jones, Duncan, and Mumme 1997).

As noted above, interdependence features a blurring of the lines between domestic and foreign policy. Some observers point out that this has caused foreign policy actions at the federal level to impinge on matters of subnational jurisdiction, creating further incentives to become internationally active. As Duchacek (1984, 17) observes,

> In federal systems in particular, leaders of subnational territorial communities have questioned the expansion of the national government's monopoly in the fields of diplomacy, foreign trade regulation, and defense into areas considered to be partly or fully within the domestic jurisdiction of the federal components.

Since World War II, national governments have entered into numerous international compacts dealing with such issues as human and labor rights, commodity prices, energy flows, and fishing limits—issues which, as Duchacek points out, disproportionately impact certain subnational segments (Duchacek 1984, 17). Hocking (1986, 479-480) also cites the expansion of the foreign policy agenda into areas of subnational jurisdiction, including environmental control, wildlife protection, and labor relations, as a major reason for their involvement. Overlapping jurisdictions in terms of foreign policy are especially noticeable in Canada, where the provinces retain control over natural resources and thus have a major voice in economic issues (Kline 1986, 532-535; Michelmann 1986, 548). As for the international activity of the U.S. states, Kline (1986, 508) argues: "In terms of legal jurisdiction, these actions were not really an expansion of state powers into the foreign policy area, but rather evidence that foreign policy was growing into areas of traditional state prerogatives."

The environment/trade connection

A growing body of literature is devoted to the link between environment and trade (Charnovitz 1993; Pearson 1982; Shrybman 1991; Esty and Geradin 1997; Zaelke, Orbuch, and Housman 1993; Wathen 1993; Esty 1993; McAlpine and LeDonne 1993; International Institute for Sustainable Development 2001a). Pearson (1982, 47) offered an early acknowledgment of this connection twenty years ago, presciently observing that "increasing environmental stress and greater economic interdependence mean that the international dimension of environmental problems will become more important..." Arguing from an economic perspective, Pearson observed that environmental externalities distort both domestic economies and international trade, and predicted that government attempts to correct these distortions through environmental controls will result in changing patterns of international trade and investment (Pearson 1982, 48-49).

Pearson's attention to this topic was about a decade ahead of most other observers; discussion of the trade and environment connection has intensified considerably in the last ten years. In the Introduction to their compilation of articles on this topic, Zaelke, Orbuch, and Housman (1993, xiii) note that, starting in about 1990,

> virtually everyone, free traders and environmentalists alike, was mad at something having to do with trade and environment. The trade and environment debate became the hot issue, and legions of experts set about the reconciliation of these two vital spheres of public policy.

Esty and Geradin (1997) neatly summarize the conflict between trade and environmental issues. Noting that both trade liberalization and environmental protection initiatives have increased in recent decades, they explain that these two policy areas

> increasingly intersect and often collide. Notably, free traders fear that environmental regulations will be used mischievously by protectionists to close markets. Environmental advocates, on the other hand, worry that under a liberalized trade regime, legitimate environmental programs will be labeled as unacceptable trade barriers or that open markets will create competitiveness pressures that make continued adherence to environmental standards difficult. (Esty and Geradin 1997, 266-267)

Most scholars trace the conflict between trade and the environment to specific events that occurred in the early 1990s. Among these events, one of the most significant was a case brought by the government of Mexico against the United States under the General Agreement on Tariffs and Trade (GATT). Mexico complained that the U.S. Marine Mammal Protection Act (MMPA) violated GATT by imposing an embargo on Mexican tuna caught using purse seine nets, which result in the needless killing of dolphins. In the late summer of 1991, a three-member GATT dispute panel agreed that the embargo provision of the MMPA was a violation of GATT law, constituting an unfair trade barrier that unilaterally discriminated against Mexico's "method of production" for catching tuna (Wathen 1993, 3; McAlpine and LeDonne 1993, 204). This decision has been deemed a "wake-up call for U.S. environmentalists who had never heard of GATT for what was perceived as an attempt to undermine U.S. environmental law." In the wake of the GATT tuna-dolphin dispute, the conflict between international trade rules and domestic environmental law became suddenly and sharply evident, drawing intense public attention (McAlpine and LeDonne 1993, 204).

At about the same time, other bilateral disputes demonstrated conflicts between trade and the environment as well. For example, Denmark passed a bottle law which prompted complaints from Germany, and Germany passed a packaging law that

prompted complaints from several other nations (Zaelke, Orbuch, and Housman 1993, xiii). In addition to these and similar disputes, the United Nations Conference on the Environment and Development (UNCED) in June 1992 highlighted the connection between the environment and trade. A major theme of UNCED was that economic growth must not come at the environment's expense; this inevitably led to intense discussion by UNCED delegates of the environmental impacts of liberalized trade (Esty 1993, 45; Charnovitz 1993, 486-487).

This dawning recognition of the trade and environment connection came as negotiations for several trade liberalization initiatives were underway, including the Uruguay Round of the GATT, expansion of the European Community (now the European Union), and the North American Free Trade Agreement. At the time, Shrybman (1991, 93-94) observed the consequences of this new awareness: "For the first time in the history of trade negotiations, governments are having to respond to concerns about the environmental consequences of trade policy objectives." Two years later, Wathen (1993, 3) noted the continuing conflict in the context of these recent trade initiatives:

> The ensuing struggle will invade all policy areas of domestic and international environmental protection. New changes in GATT and the formation of the North American Free Trade Agreement (NAFTA) could dictate U.S. environmental regulation of forest harvesting, wildlife trading, marine fishing, agriculture, pesticides, energy use, hazardous waste shipments, toxic chemicals, recycling, biotechnology, and food safety.

Thus, beginning about ten years ago, the trade community has reluctantly found itself considering environmental concerns, and the environmental community has become more educated in matters of international trade.

Several prominent issues have emerged in the course of this debate. One aspect of the discussion is the viewpoint that there is actually very little conflict between liberalized trade and environmental protection. Repetto (1993) maintains that trade and environmental goals are complementary in the sense that both seek the most efficient use of available resources. A more commonly cited argument is that expanded trade is, in fact, the best path to environmental protection. This viewpoint, which is popular within the trade community and was espoused by the first Bush administration during the debate over NAFTA, maintains that trade stimulates economic growth, which generates the wealth that makes environmental protection affordable. In addition, increasing economic welfare is expected to generate citizen demands for reversing environmental damage. While there is some evidence to support this argument, scholarly observers tend to be lukewarm in their acceptance of it, noting the conditions under which liberalized trade can and does cause environmental damage (Charnovitz 1993; Shrybman 1991; Wathen 1993; Jackson 1993). The consensus seems to be that the extent to which expanded trade will benefit or harm the environment depends primarily on the rules of the particular trade regime.

One of the most frequently raised issues in the trade and environment debate is concern over market access. As Shrybman (1991, 100) points out, a cornerstone of trade liberalization is limiting the right of governments to impose tariffs and other restrictions on imports. Environmental standards are often regarded by the free trade community as nontariff trade barriers, unfairly restricting access to domestic markets (Charnovitz 1993; Shrybman 1991; Pearson 1982; Esty and Geradin 1997). This problem is compounded

when exporters must comply with a variety of standards in different markets, increasing transaction costs for producers (Charnovitz 1993, 477-478; Pearson 1982, 50; Esty and Geradin 1997, 270). Environmentalists, for their part, fear that market access commitments will weaken or override domestic environmental programs by declaring them to be discriminatory or unnecessary obstacles to free trade. They point to the GATT tuna-dolphin dispute as a prime illustration of this concern (Esty and Geradin 1997, 270-271; DeSombre 1995, 53-54).

Competitiveness is another frequently raised issue in the trade and environment discussion. As DeSombre (1995, 54) points out, import restrictions often accompany domestic environmental measures partly to ease the concerns of local industries, which must abide by the measures and thus may be placed at a competitive disadvantage to producers in other countries. This concern is widespread among businesses located in countries with high environmental standards (Pearson 1982; Shrybman 1991; Esty and Geradin 1997).

A closely related issue is commonly referred to as the "race to the bottom." As Esty and Geradin (1997, 273) explain, competitiveness concerns may cause governments to avoid elevating environmental standards or even relax enforcement of current measures. Shrybman (1991) and Pearson (1982) note this as well, observing that the competitiveness issue creates both disincentives for countries to impose environmental standards and incentives for polluting industries to relocate to countries with less stringent regulations. Charnovitz (1993, 478) points out that the "race to the bottom" can also be a response to market access concerns, noting that trade agreements such as GATT

"may lead to the downward harmonization of health and safety standards. This can occur when the countries enjoying relatively high standards have a burden of demonstrating that those standards are not necessarily trade barriers."

A final issue that emerges in the trade and environment debate is the use of trade restrictions to enforce international environmental treaties. Free traders regard the trade sanctions in international environmental agreements, such as the Montreal Protocol, as undermining efforts to reduce nontariff barriers to trade (Esty 1993, 46). Charnovitz (1993, 477) points out that any trade measure which targets countries that do not participate in environmental treaties is apt to be in violation of the GATT's most-favored-nation principle. Shrybman (1991, 100-103) argues against eliminating import controls for trade liberalization purposes, saying that this would remove a major tool of governments to enforce international environmental covenants.

Clearly, the connection between trade and environment involves complex issues which cannot be easily resolved. As trade liberalization and environmental protection become more important on the international agenda, these issues will be of continuing and growing concern.

A proliferation of international environmental regimes

The third recent development on the international scene which concerns us here is the importance of international environmental regimes over the past several decades. Stephen Krasner (1983, 2) has offered the following definition of regimes:

> Regimes can be defined as sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations. Norms are standards of behavior defined in terms of rights and obligations. Rules are specific prescriptions or proscriptions for action.

> Decision-making procedures are prevailing practices for making and implementing collective choice.

Oran Young has referred to this formulation as a "common definition of the concept of regimes," marveling at the "apparent consensus" on the matter, despite continuing criticisms of this definition on conceptual grounds (Young 1989, 194-195).

List and Rittberger (1992) are among those authors adopting Krasner's definition, but add that the actual *behavior* of regime participants is another important aspect to consider. Young and Levy (1999) also emphasize that regime analysis must include examination of the regime's behavioral consequences; without such consequences, they argue, a set of norms, principles, rules, and procedures can hardly be considered a regime.

Some authors place international regimes within the larger class of "social institutions." Young (1989, 12-13) explains that social institutions include "practices consisting of recognized roles linked together by clusters of rules or conventions governing relations among the occupants of those roles." He was among the first to insist that regimes be viewed in the context of this larger category (Young 1983). Keohane, Haas, and Levy (1993, 4-5) define institutions as "persistent and connected sets of rules and practices that prescribe behavioral roles, constrain activity, and shape expectations." Such institutions, they explain, may take the form of regimes, organizations, or conventions. At the same time, Haggard and Simmons (1987, 496-496) caution that regimes should not be equated with the broader "institutions" category, since "(r)egimes aid the 'institutionalization' of portions of international life by regularizing

expectations, but some international institutions...are not bound to explicit rights and rules." (Haggard and Simmons 1987, 496)

According to Young (1989, 11), we "live in a world of international regimes." Within the scope of natural resources and environmental activity alone, such regimes include norms and rules governing whaling, polar bears, fur seals, Antarctica, migratory species, deep-seabed mining, and trade in endangered species (Young 1989); acid rain, the ozone layer, and pesticide use (Haas, Keohane, and Levy 1993); international fisheries, oil pollution, and protection of various bodies of water (Young and Levy 1999; Haas, Keohane, and Levy 1993); and transboundary air pollution (Young and Levy 1999). This is by no means an exhaustive list. Moreover, most of these regimes have been created within the past few decades. Coatney (1997, 2) notes that the U.S. has entered into 168 environmental agreements since 1972.

Why the trend toward regimes? Young points out that international regimes are adopted in relation to activities that directly impact the interests of two or more members of the international community, but fall beyond the purview of sovereign states either because they take place outside their jurisdictional boundaries or cut across international lines (Young 1983, 93). In those situations, regimes arise in response to problems of coordination or collective action (Young 1983, 97; Young 1989, 5). As Keohane (1983, 150) notes, actors in world politics enter into regimes because they "believe that with such arrangements they will be able to make mutually beneficial agreements that would otherwise be difficult or impossible to attain." Thus, members of international society

have powerful incentives to accept the constraints of regimes in the interests of maximizing their own long-term benefits (Young 1989, 4).

Some observers note that international regimes are a useful tool to manage global and regional interdependence, and are thus necessary in the current international state of affairs (Keohane and Nye 1977; List and Rittberger 1992). As Young (1993, 161) declares: "We live in an era of rising international interdependencies that give rise to growing needs for institutions to manage human activities that would otherwise lead to harmful impacts on others."

Since interdependence serves as a major explanatory factor in the development of regimes, it is not surprising that environmental regimes have become more numerous as ecological interdependence has become more evident on the international level. Keohane and Nye (1977, 239-240) made a strong argument for international collective action on environmental issues: "When a collective good, such as the atmosphere or the oceans, is threatened with degradation by pollutants from many countries, action by one state alone is unlikely to solve the problem." Young (1989, 107-108) has also taken note of the realization "that human activities, in the aggregate, can produce dramatic impacts on natural systems and, in the process, affect the habitability of the planet for future generations." Because of this development, issues pertaining to natural resources and the environment have appeared prominently on the international agenda with "remarkable speed..." Given this new prominence of environmental issues, and given the role of international regimes in determining collective actions, Young further argues that "the

fact that we are now witnessing a growing interest in environmental regimes for natural resources and the environment seems entirely appropriate." (Young 1989, 107-108)

While regimes vary widely, some general aspects have been identified to characterize regimes. As Krasner (1983, 2-3) points out, regimes tend to be relatively enduring over time; they are more than temporary arrangements, and they do not change with every shift in power or with the changing interests of the participating states. Young (1989) has identified three key components that every regime possesses. At the center of every regime is what Young calls the "substantive component," the cluster of rights and rules that structure the opportunities available to actors and guide their actions. Every regime also possesses a "procedural component," which consists of recognized practices for handling social or collective choices. The third key aspect of every regime is the "implementation component," which is the mechanism that promotes compliance with the substantive and procedural components of the regime. Young notes that compliance mechanisms in international regimes are typically informal and underdeveloped (Young 1989, 15-21).

Examination of international regimes reveals wide variations in structure and function. Young (1989, 11) observes that regimes governing natural resources and the environment cover a wide spectrum in terms of functional scope (ranging from the narrow polar bear agreement to the broad arrangements for Antarctica and outer space); geographic domain (ranging from the narrow regime for fur seals in the North Pacific to the global regime for nuclear testing); and membership (ranging from two or three members to over a hundred). Keohane, Haas, and Levy (1993) also note wide variation

among regimes in terms of how their agendas are set, the types of policies they adopt, and the extent to which participating states support and conform to the regimes. In addition, Keohane and Nye (1977, 20) observe that the effectiveness of regimes "has varied from issue-area to issue-area and from time to time."

One important aspect in which international regimes vary significantly is the degree of formalization. A regime may be the product of a formal agreement, may evolve from other less formal agreements, or may be merely implicit; the existence or operation of a regime does not depend upon formalization (Keohane and Nye 1977, 20; Young 1989, 29). Similarly, regimes may or may not be accompanied by organizations. Some regimes may require organizational arrangements to implement them; others may not. Where organizational arrangements are needed, regimes may create new organizations or may depend upon existing ones (Young 1983, 93; Young 1989, 25-26, 36). Young (1989, 32) defines organizations as "material entities possessing physical locations (or seats), offices, personnel, equipment, and budgets. Equally important, organizations generally possess legal personality in the sense that they are authorized to enter into contracts, own property, sue and be sued, and so forth." Aspects that may determine whether, to what extent, and to what purpose an organization will become involved in a regime include the legal and constitutional mandates of the regime and the organization; the suitability of their scope, function, membership, and geographical reach; and political considerations such as the organization's relationship with less developed countries as opposed to industrialized nations (Young 1993, 148).

Due in part to interdependence, according to Young (1993, 146-147), we "live in an era marked by rapid growth in the number and variety of international organizations." Keohane and Nye (1977, 240) note that the number of international organizations more than tripled between 1945 and 1965. Examples of international organizations include the United Nations, the North Atlantic Treaty Organization, the Organization of American States, and the Organization of Petroleum Exporting Countries, as well as a wide variety of international nongovernmental organizations. These organizations are involved to varying degrees in one or more international regimes (Young 1989).

The emergence of organizations associated with international regimes raises questions of autonomy, decision rules, policy discretion, financing, staffing, physical facilities and location. As Young (1989, 27) points out, the "answers to all these questions can influence the impact a regime has on its members. It is therefore to be expected that such issues will be contested vigorously, not only at the outset but also during the whole period over which the regime is effective." Young notes that international organizations may become involved either as instruments of regime formation, or as products of the negotiations that form the regimes (Young 1993, 146). Common roles for international organizations within regimes include technical assistance and contributions of ideas, concepts, and definitions; a catalytic role, influencing how issues are framed and prioritized; coordination between multiple agencies; leadership; handling revenues and transfers of funds and/or technology; eliciting compliance; dispute resolution; and evaluating outcomes (Young 1993, 150-155).

In summary, increasing economic and environmental interdependence has given rise to a growing number of international regimes that guide members of the international community in a wide spectrum of issue areas. In particular, a large number of environmental regimes has emerged in the past several decades, some with organizational arrangements to carry out a variety of roles.

The North American Free Trade Agreement

We have examined three recent general developments in the sphere of international relations. Two of these—the international trade and environment connection, and the development of international environmental regimes—are exemplified in the North American Free Trade Agreement (NAFTA), under which a new regime is developing for trade and environment in North America. Canada, the United States, and Mexico formally entered into NAFTA on December 17, 1992. Its environmental side agreement, the North American Agreement on Environmental Cooperation (NAAEC), was negotiated in 1993 for the purpose of attracting environmental support and securing passage of NAFTA in the U.S. Congress. The Congress approved the NAFTA package in November 1993, and the agreement entered into force on January 1, 1994 (DiMento and Doughman 1998).

Several scholars have identified NAFTA as either a catalyst or a lightning rod for the trade and environment debate. As Mumme (1993, 205) observes, "NAFTA has served, in the words of National Wildlife Federation spokesperson Stuart Hudson, as the 'laboratory' for examining the global relationship between trade and environment and a 'crucible' for linking environmental conditionality to trade reform." Esty (1993, 47)

likewise argues that the connection was brought into "sharp relief" by the prospect of liberalized trade between the U.S., Canada and Mexico:

> Prior to the NAFTA debate, environmentalists had not perceived themselves as having much of a role in trade policy making. Similarly, the trade community had seen little threat from environmental programs and had developed little expertise in environmental matters. Thus, the emergence of NAFTA-related environmental issues during the 'fast track' debate in the spring of 1991 touched off a clash of cultures as the U.S. Trade Representative (USTR) and others in the trade world scrambled to address the new environmental issues, and the environmental community entered the unfamiliar territory of international trade.

Kirton (1997, 462) has likewise noted that, while environmental interdependencies had existed in North America for some time, "it was the prospect of NAFTA and its extensive trade and investment liberalization that spurred widespread demands for immediate action. The prospect arose that increased trade, investment, and resulting growth would create further stress on environmentally fragile areas..." Comparing the NAFTA negotiations to those surrounding the Canada-U.S. Free Trade Agreement (CUFTA) just a few years earlier, Johnson and Beaulieu (1996, 11) note that one major difference between the two is that NAFTA provided "a clearer link between trade rules and environmental protection."

As discussed above, several developments set the stage for the trade and environment conflict at the time that NAFTA was being negotiated in the early 1990s. These included several bilateral disputes, as well as the discussions that took place at UNCED. Nagging concerns about the environmental impacts of NAFTA intensified after the decision in the GATT tuna-dolphin dispute in the summer of 1991 (DiMento and Doughman 1998, 662), which seemed to confirm environmentalists' worst fears.

In addition, a major source of concern was the fact that this new trade agreement included Mexico, bringing a developing country into partnership "with rich industrialized countries having some of the world's most stringent environmental norms..." (Johnson and Beaulieu 1996, 20) A record of poor environmental performance by Mexico led to fears that increased Mexican industrial activity would cause spillover pollution in the U.S.; that the high environmental standards of the two other trading partners would be harmonized downward; and that Mexico would serve as a "pollution haven," with lax environmental enforcement attracting businesses and jobs south of the border (Esty 1993; DiMento and Doughman 1998).

As a result of these concerns, NAFTA was the target of a huge amount of attention and criticism by environmental groups, particularly in the United States. Environmental opposition to NAFTA became an issue in the 1992 presidential election, with candidate Bill Clinton vowing not to support the agreement without the addition of environmentally sensitive provisions. With Congressional approval required for passage of the agreement, and critics loudly voicing their concerns to members of Congress, it became obvious that environmental concessions would be necessary (Shrybman 1993; Mumme and Duncan 1996, 1997; Kirton 1997; Johnson and Beaulieu 1996; Hufbauer et al. 2000).

Thus it happened that, for the first time in the history of trade negotiations, environmental concerns became a part of the negotiation process. Representatives of the environmental community, brought in as advisers, made a number of recommendations in an attempt to make NAFTA more environmentally sensitive (Audley 1993). Although

some have expressed disappointment in the outcome of this process, the inclusion of environmental issues during the negotiation phase is considered a "milestone," a "watershed" in the debate about the trade-environment relationship (Shrybman 1993, 283-287). As a result, NAFTA, with its environmental side agreement, is considered the "greenest" trade agreement ever negotiated (Esty 1993; Kirton 1997; Johnson and Beaulieu 1996).

What emerged from the NAFTA negotiations was an international environmental regime for North America. The text of the main treaty reflects some environmental sensitivity. Exhortations in the Preamble call on the three parties to "promote sustainable development," to "strengthen the development and enforcement of environmental laws and regulations," and to pursue trade liberalization "in a manner consistent with environmental protection and conservation." (NAFTA, Preamble) Environmental concern is also reflected in Article 104, which recognizes existing international environmental and conservation agreements; Chapters Seven and Nine, which deal with standards; Article 1114, which discourages the creation of pollution havens; and Chapter Twenty, which covers dispute settlement.

When these provisions failed to satisfy environmentalists, the North American Agreement on Environmental Cooperation (NAAEC) was drafted and incorporated into NAFTA as a supplemental document. This is where the heart of the NAFTA environmental regime is found. The most significant aspect of the NAAEC is the creation of the Commission for Environmental Cooperation (CEC), a three-part entity based in Montreal. The CEC consists of a Council, a Secretariat, and a Joint Public

Advisory Committee. The Council, which is the Commission's governing body, is comprised of cabinet-level representatives of the three NAFTA parties, placing it at an extraordinarily high level of political authority. The Secretariat provides staff support to the Council; it is empowered to issue reports and, more significantly, to consider and act on allegations that a party is failing to effectively enforce its environmental law. Finally, the Joint Public Advisory Committee (JPAC) is a group of fifteen representatives—five from each of the NAFTA parties—that acts as a conduit between the CEC and the public, receiving reports from the Secretariat and providing technical, scientific and other advice to the Council.

The CEC is empowered to pursue the following objectives of the NAAEC:

- foster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations;
- promote sustainable development based on cooperation and mutually supportive environmental and economic policies;
- increase cooperation between the Parties to better conserve, protect, and enhance the environment, including wild flora and fauna;
- support the environmental goals and objectives of the NAAEC;
- avoid creating trade distortions or new trade barriers;
- strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices;
- enhance compliance with, and enforcement of, environmental laws and regulations;
- promote transparency and public participation in the development of environmental laws, regulations and policies;
- promote economically efficient and effective environmental measures; and
- promote pollution prevention policies and practices. (NAAEC, Article 1)

There is general agreement among scholars that the environmental provisions within NAFTA and NAAEC constitute a comprehensive regional environmental regime. Johnson and Beaulieu (1996, xv-xvi) comment that the three NAFTA parties negotiated

"a very broad-scoped agreement of environmental cooperation....By doing so, the Unites States, Canada, and Mexico set up an original and novel set of institutions designed to implement a new (and untried) set of continental law." Mumme and Duncan (1997, 48) note that

> the CEC represents an extraordinary switch from the pre-1994 approach to regional environmental management. It aims to strengthen the North American system for environmental cooperation by moving toward more integrated regional management with some centralized oversight and coordination, and by developing a regime for regional environmental protection that is comprehensive or near-comprehensive in its functions and is equipped with enhanced compliance mechanisms to shore up national and subnational commitments.

Examining the NAFTA environmental regime in the context of U.S.-Canada environmental governance, Kirton (1997, 461) observes that the CEC has emerged as a legitimate center of North American governance which is "beginning to have a real impact on environmental activities between and within the United States and Canada, and build a strong rules-based regime that constrains the actions of the member governments." DiMento and Doughman (1998, 741) likewise conclude that an "international common law of the environment has started to evolve in North America as a result of the Agreement." Kirton, Rugman, and Soloway (1999) review the NAFTA trade-environment regime as a domain in which to assess the basic tenets of regime theory; their examination of eighty-four cases of "environmental protectionism" in North America finds that the regime is effective in altering outcomes.

Thus, within NAFTA we have a comprehensive and evolving international regime for trade and environment in North America. Because all three parties to NAFTA are federations, with wide variations in autonomy, environmental jurisdiction, and

international involvement by subnational governments, it is likely that this regime is driven to a great extent by federalism.

The Research Question

I have described, in general terms, an international landscape marked by three recent developments: increasing involvement by subnational governments in international affairs; a link between international trade and environmental issues; and environmental regimes adding an institutional layer to international relations. Given this new and evolving international situation, embodied by NAFTA, the research question driving this dissertation is: Where do the states and provinces of the U.S., Canada and Mexico come in to the NAFTA regime? More specifically, how does the regime impact their environmental roles and responsibilities, limitations and opportunities under NAFTA, and how do those impacts vary according to federal arrangements in each country?

This issue has received some attention from subnational governments themselves. Shortly after the agreement entered into force, an article appeared in *State Government News* which bluntly asked the question, "Will free trade under NAFTA come at the price of state sovereignty?" (Stumberg 1994, 10) The article argued that NAFTA could impact U.S. state responsibility over agriculture and food, noting that a "major debate rages over whether NAFTA's science and risk assessment standards will pre-empt state health laws. The NAFTA risk standard weighs the health risk against the producer's cost of meeting the standard." (Stumberg 1994, 12) In addition, pollution abatement measures, such as California's auto-emissions standards, could be attacked as not the

least trade-restrictive way to accomplish their objectives; and state procurement policies that promote recycling might be challenged under NAFTA procurement rules. NAFTA's emphasis on long-term uniformity of environmental standards is another concern, prompting observers to wonder whether this will exert pressure on subnational governments to lower their standards (Stumberg 1994, 12-13).

In a similar vein, Paul Orbuch and Thomas Singer, senior staff members for the Western Governors' Association, published an article which pondered the appropriate relationship between states and the federal government when international trade policy encroaches on traditional state roles in environmental protection, natural resource management, and consumer safety (Orbuch and Singer 1995). They expressed concern that U.S. states could get into trouble in the areas of standards, which often exceed national standards and could be challenged as barriers to free trade; and dispute resolution, which is handled by international trade bodies that have little sensitivity for federalism issues. Their concerns also include the new environmental institutions created by NAFTA, notably the CEC, whose responsibilities might intersect to some extent with those of the states. Echoing the article in *State Government News,* these authors worried that NAFTA's emphasis on harmonization of environmental standards could lead to pressure on states to lower theirs (Orbuch and Singer 1995, 122-123).

The prospect of NAFTA's intrusion into subnational affairs was sufficiently worrisome that state and provincial officials from all three countries came together at a conference to discuss the matter in November 1995. The conference was cosponsored by the U.S.-Mexican Policy Studies Program at the University of Texas at Austin; the

National Conference of State Legislators; the Office of the Texas Attorney General; the Western Governors' Association; and the Canadian Studies Conference Grant Program of the Canadian Embassy to the United States (Eaton 1996). It featured panels on various aspects of trade relating to federalism in the three countries. At the conference, subnational officials expressed considerable uncertainty and concern about the implications of NAFTA for state and provincial governments. For example, David Morel, International Issues Manager in the Office of the British Columbia Premier, noted that NAFTA requires

> federal governments to enforce their international obligations on subnational governments....The practical effect is that subnational governments will be forced to comply with international trade agreements through domestic legal action or economic pressure. (Eaton 1996, 18)

In addition, Helmut Mach, Executive Director of International Economic Relations for the province of Alberta, pointed out that the provinces and states may well find their environmental enforcement practices under scrutiny under the citizen submissions procedure established by the NAAEC (Eaton 1996, 59).

Experience under the General Agreement on Tariffs and Trade shows that these are not idle concerns. Orbuch and Singer provide no less than four recent examples of subnational health and environmental measures in the U.S. and Canada that were challenged under GATT (Orbuch and Singer 1995, 128-129). Perhaps the most notorious case is the so-called *Beer II* decision of 1992, in which Canada challenged state alcohol tax and licensing laws in the United States. The government of Canada claimed U.S. discrimination against beer imports, arguing that variations in state standards constituted a "disguised restriction" on international trade (Charnovitz 1993, 502; Stumberg 1994,

11-12). In its own defense, the U.S. government invoked its federal system as a limitation on its duty to bring subnational laws into compliance with GATT (Cooper 1993, 154). The GATT panel disagreed, saying that the federal government has measures available under the U.S. constitution to compel subnational compliance, and is thus required to do so (Cooper 1993, 155-156; Charnovitz 1993, 506). The potential consequences of this decision for U.S. federalism has been gravely noted by observers: Charnovitz (1993, 508-509) states that

> the *Beer II* panel infers that the GATT may have 'already overruled' state laws. Consequently, the adoption of the *Beer II* panel report by the GATT Council is a direct challenge to state environmental regulations. If the GATT Council rules that a state law is inconsistent with the General Agreement, then interested parties may be able to gain an injunction...

Stumberg (1994, 12) notes that the panel's decision "ruled that GATT supersedes the U.S. Constitution, which explicitly reserves state power to regulate alcohol under the 21st Amendment." In addition, Maryland legislator Kenneth Montague Jr. points out that the decision "challenged the very concept of federalism, which we thought we were operating under. Beer II challenged the most important power of any government—the power to tax." (Eaton 1996, 29-30)

This does not bode well for subnational authority under NAFTA, especially when one compares the language of the two agreements. GATT's language on subnational compliance is found in Article XXIV: 12, which requires that central governments "take such reasonable measures as may be available" to ensure compliance by regional and local authorities. In comparison, NAFTA's Article 105 uses stronger language, requiring that the three parties take "all necessary measures" to compel observance of most parts of

the agreement by state and provincial governments. As Johnson and Beaulieu (1996, 103) have pointed out, if the milder language of GATT could lead to the type of decision made in the *Beer II* case, "then a NAFTA panel is all the more likely to ascribe the same meaning to the expression 'all necessary measures.'" Subnational officials, then, are understandably concerned about their roles and responsibilities under the NAFTA regime.

On the other hand, some tenets of regime theory lead to speculation that the new environmental rules and institutions under NAFTA may have a more positive, enabling effect on the states and provinces. An examination of writings on regimes reveals two ways in which this might happen. First, the NAFTA environmental institutions may provide a forum for subnational governments which did not exist before NAFTA. Some regime theorists have found that international organizations in particular often serve as bargaining forums and create a context for domestic actors to communicate with one another, exchange information, form coalitions, influence policy agendas, and thus affect outcomes in international politics (Keohane and Nye 1974, 1977; Keohane, Haas, and Levy 1993; Levy, Keohane, and Haas 1993). Observers have noted the potential for a new political forum in the NAFTA institutions, and have argued vigorously for broad subnational rights to participate (Orbuch and Singer 1995).

The second way in which NAFTA's institutions may enable the subnational governments is by increasing their capacity through transfers of information, skill, and technology (Keohane, Haas, and Levy 1993). According to Levy, Keohane, and Haas (1993, 404), these measures are important to the effectiveness of international regimes

because, once the regime is established, "the burden of action shifts to...(domestic) responses, which are often inhibited by low political, legal and administrative capacity." The inclusion of Mexico in the NAFTA regime makes capacity building especially crucial, since "the more an issue involves policy implementation in less developed countries, the more important is national capacity building." (Levy, Keohane, and Haas 1993, 408)

Dissertation Objective and Organization

The objective of this dissertation is to provide an initial look at the impacts of the new international order on federalism, and how those impacts may vary according to federal arrangements. Toward that end, this study will focus specifically on the environmental provisions of NAFTA and the NAAEC, especially the CEC, and their impacts upon the states and provinces within the U.S., Canada and Mexico. Because the NAFTA environmental regime is relatively new, this dissertation will be somewhat projective in nature; however, the regime does offer some interesting insights as an initial look.

The research will focus on aspects of the NAFTA environmental regime which have presented constraints—potentially limiting the options of the subnational governments—as well as aspects which may enable those governments, offering opportunities in the environmental policy realm. The parts of the regime which have presented the most potential for constraint on the states and provinces are Chapter 11 of the NAFTA text—the chapter establishing investment rules—and the Article 14/15 submissions process established in the NAAEC. The enabling aspect of the regime lies

in the opportunities and assistance offered by the CEC. I expect to find notable variations in how the NAFTA environmental regime impacts the states and provinces in each country, based on variations in their federalism arrangements.

The following chapter will provide a general description and comparative assessment of federalism within the U.S., Canada and Mexico, and will examine variations among these three countries in terms of state and provincial international activity and jurisdiction over environmental policy. Chapter Three will explain the details of the environmental regime under NAFTA and the NAAEC. Chapters Four, Five, and Six will present the case studies, drawn from the first eight years of the NAFTA regime's operation. Chapter Four will examine the investment rules in NAFTA's Chapter Eleven, and three cases of investment disputes—the Metalclad case, the Methanex case, and the case of Sun Belt Water—pertaining to subnational policies. Chapter Five of the dissertation will focus on the Article 14/15 submissions process and the submissions to date which have targeted subnational enforcement practices. Chapter Six will examine the potential for the regime to provide opportunities to the states and provinces, especially through the services offered by the CEC. In Chapter Seven, I will offer conclusions on what the NAFTA environmental regime can tell us about federalism, and variations in federalism, in the current state of international affairs.

CHAPTER TWO

Introduction

The United States, Canada and Mexico are all commonly classified as "federations." Recall from Chapter One that scholars have specified several criteria by which to identify federations. These characteristics include the existence of a general government and constituent entities, each of which deals directly with citizens and is subject to election by citizens; a supreme written constitution, which cannot be unilaterally amended, that outlines the division of power among levels of government; a fixed territorial basis for the division of power; and the disallowance of secession (Elazar 1987; Watts 1996; Friedrich 1968).

Do the three parties to NAFTA satisfy these criteria? The United States, the first modern federation which provided the basic model for all subsequent federations, undoubtedly does. The national government and the 50 state governments all have jurisdiction over numerous aspects of citizens' lives, and with the exception of the Presidency, officials at both levels are directly elected. The national constitution is "the Supreme Law of the Land," and can only be amended by extraordinary measures involving both the national Congress and the state legislatures. Power is constitutionally divided between the national government and state governments that rule over fixed territories.

Finally, the Civil War settled the question of whether secession from the union would be allowed.

Canada also displays the characteristics of a federation, with the notable exception that the secession issue continues to resurface with respect to Quebec. To date, national and provincial leaders have skillfully managed pragmatic accommodation and compromise, thus keeping secession at bay. The secessionist Parti Quebecois has held two popular referenda within Quebec on whether to leave the Canadian federation, and both have failed. While secession by Quebec does not appear likely in the foreseeable future, the Francophone nationalism of this province ensures that the issue will not fade; at this point, the disallowance of secession should not be considered a "given."

As for Mexico, until recently its classification as a "federation" according to the criteria above has been questionable. In particular, although all levels of government deal directly with citizens, and officials are directly elected by citizens, at least until recently the accountability to citizens implied by such arrangements has been absent. Through most of Mexico's modern history, elected officials at all levels of government have been more accountable to party superiors than to citizens, largely due to over seventy years of one-party rule by the hierarchical Institutional Revolutionary Party (PRI) (Fagen and Tuohy 1972). This situation ended in the summer of 2000, when the National Action Party (PAN) captured the presidency with the election of Vicente Fox but failed to win a majority of seats in the Mexican Congress. The end of one-party rule will hopefully result in greater accountability of all Mexican governments to their citizens.

Scholars tend to overlook Mexico's historic idiosyncracies and place the country in the "federation" category anyway, since it exhibits more characteristics of a federal system than of a unitary one. As Mahler (1995, 331) notes,

> Mexico is a federal political system, including thirty-one states and one federal district, each of which has some policy jurisdiction....Each state has its own constitution and has the right to pass its own laws, within some clearly defined parameters.

Elazar (1987) and Watts (1996) also both classify Mexico, along with the U.S. and Canada, as federations.

This chapter will provide a comparative overview of the federal arrangements of these three countries. The comparison will briefly focus on the most commonly examined aspects of federalism as identified in Chapter One, including structural considerations such as constitutions, judicial review, separation of powers, and federal second chambers; political parties; federal processes; and relative degrees of centralization. I will then narrow the focus somewhat to serve the purposes of this dissertation, explaining where jurisdiction over environmental policy lies within each country's federal framework, and briefly examining the roles of subnational governments in international affairs. Based on this comparative look at federalism within the three parties to NAFTA, I will conclude the chapter with my expectations as to how the NAFTA environmental regime will impact the subnational governments of the U.S., Canada and Mexico.

Federalism in the United States

Structural considerations

Observers seem to agree that the United States is the birthplace of the modern federation. By combining a close union with significant autonomy of the component

states, the framers of the U.S. constitution developed an innovative form of federalism which has been widely emulated (Friedrich 1968; Elazar 1987; Riker 1964; Watts 1996). As Watts (1996, 20) points out, "(v)irtually all subsequently attempted federations have taken some account of the constitutional design and operation of the United States in developing their own federal structures."

In terms of federalism, the most prominent feature of the U.S. Constitution is

> the arrangement whereby the constitution lists subject matters under federal authority–most of which are concurrent and some of which are made exclusively federal by prohibiting the states from legislating on them–and leaves the unspecified residual matters to the states. (Watts 1996, 20)

The constitutional basis for federal authority lies primarily in Article I, Section 8, which enumerates a list of federal powers, including tax collection, regulating interstate and international commerce, and providing for the national defense. As noted by Watts above, some of these powers--such as the authority to collect taxes--are held concurrently with the states. Others are expressly denied to the states by Article I, Section 10. Under this section, for example, states may not enter into treaties or alliances; a state may not lay tariffs on imports, "except what may be absolutely necessary for executing its inspection Laws"; and states may not engage in war.

Federal powers are provided by other parts of the constitution as well. Article II, Section 2 vests significant power over defense in the President as Commander-in-Chief, and gives the President the authority to enter into treaties with the approval of two-thirds of the Senate. Article IV, Section 3 provides for exclusive federal jurisdiction over federally owned property. According to Article VI, the constitution, laws and treaties of

the federal government "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." This provision, known as the Supremacy Clause, allows the federal government to preempt state laws when there is a conflict with federal laws or treaties.

Some constitutional provisions provide specific state powers. For example, Article I, Section 4 grants states the authority to manage federal elections, and the Eleventh Amendment provides a guarantee of sovereign state immunity from private lawsuits in federal courts. However, by far the most prominent and most hotly debated constitutional source of state power is the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." In leaving residual powers to the states, this provision, at least on its surface, states that anything *not* otherwise mentioned elsewhere in the constitution falls under state authority. Because the actual list of specified federal powers is quite limited, this grant of residual power has been seen as a substantial source of state authority. Traditionally interpreted as encompassing expansive powers over the day-to-day welfare of state residents, state authority under the Tenth Amendment has generally included jurisdiction over education, intrastate commerce, public safety, health, and land use.

However, these constitutional provisions do not create airtight spheres of state and federal responsibility. As Grodzins (1984, 88) observes, "the statute and case books do not contain neat packages of law covering a given area that can be labeled 'all federal' or

'all state.'" Anton (1989, 8-9), looking at federalism as a system of rules for allocating public responsibilities among governmental units, points out that "the most notable characteristic of our system is that the allocation rules are ambiguous." This ambiguity lies in the language of the constitution itself. Article I, Section 8, which contains the list apparently delimiting federal authority, also grants Congress the power to provide for "the general Welfare of the United States;" it concludes by authorizing Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers..." These two provisions–the "general welfare" and "necessary and proper" clauses of the constitution–conferred on the national government "implied powers...free reign to undertake whatever policies, in whatever areas, it deems worthy of national attention." (Anton 1989, 9) The Tenth Amendment, by leaving state powers undefined, has added to the ambiguity (Anton 1989, 9). Thus, as Grodzins (1984, 88) observes, "The typical situation is that bodies of state and federal law cover the same field of regulation or substantive service."

The lack of constitutional clarity over "who does what" within the federal system has emphasized the ongoing importance of judicial review. According to Elazar (1987, 183), the United States provides the leading model of judicial review, wherein federal systems turn to constitutional courts to help resolve difficult jurisdictional issues. Judicial review has been a primary arena for resolving federalism questions since the first time the U.S. Supreme Court served as the "umpire" between the state and federal governments in *McCulloch* v. *Maryland* in 1819. Through most of the twentieth century, judicial interpretation steadily expanded federal powers (Grodzins 1984). Both Friedrich (1968,

18) and Watts (1996, 35) have noted this paradox: although the constitution specifically assigned apparently limited powers to the federal government, and the residual powers were meant to be sources of expansive authority for the states, the courts have read the maximum "implied powers" into the specified areas of federal jurisdiction.

However, in the past decade this trend has reversed itself. Beginning in the early 1990s, the Supreme Court has repeatedly issued decisions limiting the relative power of the federal government vis a vis the states. As Schram and Weissert (1999, 20) observe, federalism issues have become a major preoccupation of the Court:

> At an increasing rate over the last decade, the U.S. Supreme Court under Chief Justice William Rehnquist has issued some of its most dramatic decisions on the distribution of powers between the federal government and the states....Dozens of federalism cases have been filling the dockets of the lower courts, and more and more of these cases are being taken up by the high Court, even as the Court's total number of cases continues to decline. Each case, by itself, is not that significant for remaking federal-state relations. Yet, the cumulative effect is beginning to have an impact.

Under a 5-4 "states' rights" majority consisting of Rehnquist and Justices Anthony Kennedy, Sandra Day O'Connor, Antonin Scalia, and Clarence Thomas, numerous decisions over the past few years have limited the federal power to regulate interstate commerce; buttressed state sovereignty under the Tenth Amendment; and expanded the sovereign immunity of states from litigation under the Eleventh Amendment (Schram and Weissert 1999; Weissert and Schram 2000). The continuing significance of judicial review was noted by Weissert and Schram (2000, 15-16) in their annual report on the state of American federalism: "Once again, as has become common in recent years, the most important federalism developments occurred this past year in the chambers of the U.S. Supreme Court." Because the constitution does not provide any final answers to

federalism questions, this debate is expected to continue in the courts (Anton 1989, 16; Schram and Weissert 1999 34).

Federalism in the United States exists alongside separation of powers. As Watts (1996, 81) observes, the separation of powers arrangement is not inconsequential for intergovernmental relations:

> In the U.S.A. the presidential-congressional system at the federal level and the parallel separation of powers between governors and legislatures in the states has meant the dispersal of power within each tier of government. This has made necessary multiple channels of federal-state relations involving executives, officials, legislators and agencies interacting not only with their opposite numbers but in a web of criss-crossing relationships...

Kline (1999) provides an illustration of the consequences of separation of powers for state-federal relations, citing a recent General Agreement on Tariffs and Trade (GATT) agreement on multilateral trade covering government procurement policies. While prior international agreements on procurement did not apply to the state governments, under the new agreement the U.S. consented to include state procurement practices, but only for those states that voluntarily complied. Consent letters were submitted by 37 governors; however, under separation of powers, it is doubtful that such consent actually binds those states to the GATT agreement without the approval of state legislatures (Kline 1999, 112).

Under separation of powers, Congress–with its key role in crafting national policy–provides an important arena for lobbying by state governments. States have a major stake in focusing pressure on Congressional committees and subcommittees, which develop and approve a wide variety of grant and other programs that impact state and local

governments. Moreover, state efforts in Congress often succeed because, as will be discussed below, members are elected by state- and locally-based constituencies (Kline 1986; Watts 1996).

Our final structural consideration is the role of the U.S. Senate. As noted in Chapter One, observers have paid close attention to national second chambers within federal systems. Watts (1996, 84) points out that bicameralism took hold in "the first modern federation, the United States" with the compromise reached at the Constitutional Convention to have one house based on population and the other based on equal representation of the states. Since that time, most federations have adopted bicameralism; however, there has been enormous variation in the composition of second chambers, their powers and roles, and how members are selected. The primary role of most federal second chambers is legislative, reviewing federal legislation in terms of regional and minority interests. Where there is separation of powers between the executive and the legislature, "normally the two federal legislative houses have had equal powers..." (Watts 1996, 88) In the U.S., the Senate has carried out primarily legislative duties alongside the House of Representatives, and has retained additional powers relating to ratification of appointments and treaties (Watts 1996, 88).

As Riker (1964, 22) has noted, the framers of the American constitution sought ratification by providing state governments with a voice in federal policy through the Senate. However, he adds that states were never truly represented in the Senate–even when Senators were chosen by state legislatures–because the Constitution did not include provisions for state legislatures to recall Senators. Thus, even when state legislatures

regularly instructed Senators how to vote, without the threat of recall these instructions were often ignored (Riker 1964, 87-91). Kline (1986, 509) points out that state government influence over the Senate was further diminished in 1913 by the Seventeenth Amendment, which provided for direct popular election of Senators and bypassed state legislatures altogether. Elazar (1987, 184), looking at second chambers in comparative perspective, agrees that the U.S. Senate is among the least effective of these for purposes of federalism, since its members are not required to represent states per se.

The role of political parties in U.S. federalism

The American party system has been widely characterized as unique, decentralized, devoid of party unity or responsibility, even chaotic (Riker 1964; Grodzins 1984; Elazar 1987; Anton 1989). The root of this situation lies in the electoral system established under the U.S. constitution. Elections for national office are all locally based: members of Congress are elected from states and home districts, and the President is chosen through the electoral college, an indirect system based on state representation. In addition, as mentioned above, the constitution provides for state authority over running elections. Thus, while the offices up for election may be national, the elections themselves are entirely operated at the state and local level. Locally based elections translate into locally based parties (Riker 1964; Grodzins 1984). The nationwide two-party system is thus built on coalitions of state parties; this results in a lack of unity on the national level (Riker 1964; Elazar 1987; Anton 1989).

The nature of the party system has important consequences for federalism in the United States. As Grodzins (1984, 260) concludes: "The lack of party solidarity

fundamentally establishes the marble cake of shared functions that characterizes the American federal system." Because the national parties must depend upon the strength and vitality of state and local organizations, the decentralized party system provides state and local governments with a political strength that acts as a balance against centralizing forces. National legislators, ever mindful of the local and state organizations and constituencies that elected them, are obliged to look out for local interests, sometimes in opposition to their own party leaders (Grodzins 1984). As Riker (1964, 101) concludes, since national leaders are unable to control their state-level partisans, "this decentralized party system is the main protector of the integrity of the states in our federalism."

Federal processes in the U.S.

Elazar (1987, 184) argues that federalism is made operationally effective through intergovernmental partnership. In the U.S., he observes, "this partnership is based on a well-nigh universal sharing of functions among governments on all planes, involving a complex of deep-seated governmental and political arrangements designed to recognize and accommodate national and local interests..." Grodzins (1984, 289) declares: "This sharing is the hallmark of modern American federalism." Three decades ago, Reagan (1972) argued that federalism, as a constitutional division of authority between the national and state governments, is dead. Rather, he said, federalism in the U.S. is manifested as "intergovernmental relations," or a sharing of functions between the levels of government. That same year, Elazar (1972, 47) observed the same phenomenon through a somewhat different lens, arguing that the "highly institutionalized system of

federal-state cooperation that has developed has become part of the nation's constitutional tradition."

This system of sharing has its basis in the modern welfare state (Keating 1999, 8). The central government expanded significantly in the twentieth century, largely in response to increasing demands by voters for government benefits. However, this federal expansion did not come at the expense of the states: on the contrary, state governments have remained strong and active, due to their influence on federal program development and because of the way in which federal programs have worked to empower state institutions (Keating 1999, 13; Grodzins 1984, 316-320). As Anton (1989, 43) notes: "As the national government enunciated new social goals through new programs, the vehicle for achieving these goals increasingly became cooperative agreements with state and local governments." With more programs becoming intergovernmental, the levels of government wielded more influence on one another; as a result, "(a)lthough each level of American government can act independently in some areas, many government benefits in the United States are a product of joint interactions among two or more levels and are thus properly regarded as 'federal' benefits." (Anton 1989, 70-71) In sum, federal processes in the U.S. take the form of "cooperative federalism," in which both levels of government are involved in the welfare state (Friedrich 1968, 27).

The primary mechanism for intergovernmental sharing in the United States is an extensive system of federal grant programs. With the establishment of the national income tax under the Sixteenth Amendment in 1913, the national government became dominant in collecting revenues and spending public funds; this resulted in development of a device for

transferring funds to the state and local levels to achieve national purposes (Reagan 1972; Grodzins 1984). Through the grant method, the federal government–by virtue of its superior resources and concern for the general welfare of all citizens–assumes at least partial responsibility for expenditures, and primary responsibility for establishing minimum standards. For their part, the state and local governments–by virtue of their advantage in determining and meeting local needs–assume primary responsibility for administration of programs (Grodzins 1984, 61). Some observers have found that this division of responsibilities makes for a circular, cooperative policy process that distributes authority and responsibility among governments in a reasonable and equitable manner (Grodzins 1984; Peterson, Rabe, and Wong 1986). Others have bemoaned a "crisis of fiscal federalism," in which the federal government has the greater power to collect revenues while the state and local governments bear responsibility for providing most of the public services–a situation that may leave the states overly dependent on the federal government (Reagan 1972).

According to Watts (1996, 44-45), the extent of subnational dependence on federal funds largely depends upon whether federal grants are conditional. Among federations, the U.S. has the highest proportion of conditional grants, representing over eighty percent of intergovernmental transfers (Watts 1996, 44-45). As Anton (1989, 185-186) explains, conditions can take several forms. They include "crosscutting requirements," general policy provisions that are applied to all grant programs (such as the prohibition on racial discrimination that accompanies all federal funds); "crossover sanctions," which impose a financial penalty on one program based on defects in another

(such as withdrawing highway funds if air quality standards are not met); and "partial preemption," in which the national government assumes program responsibilities from states or localities that fail to satisfactorily implement national policies. According to Grodzins (1984, 69), "The right to suspend or withhold national grants is the most formidable power possessed by the national government to insure that operations are conducted in accordance with the requirements laid down by Congress." However, federal funds are seldom withdrawn in practice, because federal agencies generally lack the capacity to engage in preemption and Congress may consider even a bad program better than no program (Anton 1989, 210; Grodzins 1984, 70-71).

Federal-state collaboration takes other forms besides grant programs. One of the most problematic, from the state point of view, is the unfunded mandate: a direct order issued by the federal government, backed by penalties but with no supportive funds attached (Anton 1989, 184). On the more positive side, federal and state agencies, finding themselves in close proximity in the regulatory field, frequently cooperate through joint proceedings, hearings and conferences; lend personnel back and forth; and establish joint boards and regional commissions (Grodzins 1984, 75; Elazar 1987, 208).

Meanwhile, states have not surrendered the initiative. Recent calls for more flexibility on the federal government's part have resulted in approaches that enhance state creativity. For example, programs in education funding and Medicaid allow states to waive certain federal requirements and establish their own programs with federal funds. As Schram and Weissert (1999, 7-8) point out, this has encouraged state innovation in implementing these programs: "Part of the popularity of waivers is that they encourage

states to serve as laboratories for social experiments while maintaining some federal control and accountability." States are also taking the initiative in developing policies in areas where Washington has been unable or unwilling to act, such as campaign finance reform, prescription drugs, and regulation of managed care (Schram and Weissert 1999, 17; Weissert and Schram 2000, 10-11).

A look at federal processes in the U.S. reveals a federal system that is in a constant state of flux. Anton (1989, 231) notes that

> shared authority combined with political autonomy leads to a system in which relationships among governments are permanently unstable. Because authority is shared for a wide range of functions, governments constantly intrude into one another's policy space....With each intrusion, existing relationships between governments can be called into question and new coalitions formed to maintain or change those relationships.

According to Friedrich (1968, 8), the "very vitality of American federalism is the result of its continuing adaptation to changing circumstances."

In summary, federalism in the United States is highly dynamic. Although the constitution establishes exclusive, concurrent and residual powers for both the federal and the state levels of government, the ambiguity of this document invites continuous interpretation and debate. Federalism arrangements at any given time are products of judicial review, state lobbying in Congress, party politics, and cooperative processes–all of which are themselves subject to change.

Federalism in Canada

Structural considerations

The Canadian federation was formed in 1867 under the British North America (BNA) Act, now renamed the Constitution Act of 1867. Originally encompassing four provinces, the Canadian federation now includes ten provinces and three territories. Its founders intended a highly centralized system, with powers stacked in favor of the federal government (Friedrich 1968, 119; Elazar 1987, 155). For example, under the Constitution Act of 1867, the provincial lieutenant governors are appointed by and responsible to the federal government; these officials may refuse to sign provincial legislation, or refer such legislation to the federal Cabinet, which can disallow it (White, Wagenberg, and Nelson 1994, 56). Under the constitutional doctrine of federal paramountcy, when a federal law and a provincial law are both valid but inconsistent with each other, the provincial law is rendered inoperative to the extent of the inconsistency (Luz 2000/2001, 24). In addition, the federal government may assume provincial programs by declaring them to be for the general advantage of Canada or two or more provinces (the "declaratory power") (White, Wagenberg, and Nelson 1994, 56). It may also spend federal funds on matters outside its jurisdiction (White, Wagenberg, and Nelson 1994, 56). Thus, on paper, Canada looks like a relatively centralized federation (Russell 1990).

The Canadian constitution differs substantially from the U.S. constitution in its assignment of powers to the federal and subnational governments. It features comparatively long lists of exclusively federal and exclusively provincial powers; areas of concurrent jurisdiction are somewhat limited. Also in contrast to the U.S., Canada's

constitution assigns the residual powers to the federal government (Watts 1996). This was intended to make the central government strong in relation to the provinces (Riker 1964, 116); however, as Watts (1996, 35) notes, because Canada's constitution sets out exhaustive lists of exclusive and concurrent powers, the residual power is less significant there than in the U.S., where these lists are less extensive.

Section 91 of the Constitution Act of 1867 gives the federal government jurisdiction over most of the policy areas that were considered important at that time, including defense, regulation of trade and commerce, finance, transportation, and criminal law. Provincial powers are listed in Section 92 and include social welfare, municipal institutions, property and civil rights, and "Generally all Matters of a merely local or private Nature in the Province." In addition, provincial legislatures have exclusive jurisdiction over most aspects of natural resource management, including exploration for non-renewable natural resources; taxation of non-renewable, forestry and energy resources; development, conservation and management of non-renewable natural resources and forestry resources; and (under subsequent amendments to the Constitution Act of 1867) development, conservation and management of sites and facilities in the province for the generation and production of electricity (Constitution Act, 1867, Articles 92 and 92A).

As for the export of such resources, Section 92A of the Constitution Act specifies that the federal and provincial governments share jurisdiction. Other constitutional areas of concurrent jurisdiction are agriculture, immigration, and old age pensions and benefits (Constitution Act, 1867, Sections 94A, 95). When conflicts occur in most areas of

concurrent jurisdiction, federal law prevails over provincial law; the exception to this is jurisdiction over old age pensions, where provincial law prevails (Watts 1996, 34). In addition, both levels of government have taxing authority (Constitution Act, 1867, Sections 91, 92).

After decades of discussion centering on constitutional reform and patriation, the Constitution Act of 1982 was added to the Canadian constitution. This addition included a Charter of Rights and Freedoms containing guarantees of fundamental liberties, democratic rights, mobility rights, legal rights, equality rights, and rights relating to official languages and education. Section 32 of the Charter specifies that the document applies to provincial governments as well as the central government. However, under Section 33, Parliament or a provincial legislature may pass legislation contrary to the provisions in Sections 2 and 7 through 15. These sections of the Charter contain guarantees such as freedom of religion, expression, assembly and association, as well as rights to due process and equal protection. Under Section 33, any such contrary laws passed at either the federal or provincial level would lapse after five years, unless passed again. According to White, Wagenberg, and Nelson (1994, 51), this "notwithstanding clause" of the Charter generated a significant amount of opposition. However, it was inserted into the Charter "to allay the fears of provincial premiers" who wished to retain the authority to pass legislation deemed to be in the public interest, regardless of the Charter's provisions (White, Wagenberg, and Nelson 1994, 45).

In addition to the Charter of Rights and Freedoms, the Constitution Act of 1982 committed the government of Canada to making equalization payments to provinces, "to

ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation." (Constitution Act, 1982, Section 36) It also established a somewhat complicated amending formula involving, in most cases, passage by both houses of the federal Parliament and an extraordinary majority of the provinces; amendments involving official languages or the basic composition of the Canadian government require unanimity among the provinces (Constitution Act, 1982, Sections 38-49). In addition, the Act included a declaration that the "Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is...of no force or effect" (Constitution Act, 1982, Section 52).

The constitutional changes of 1982 left many unsatisfied. As mentioned above, many opposed the notwithstanding clause in the Charter of Rights and Freedoms. Moreover, the province of Quebec–outraged over the loss of its traditional veto over most constitutional amendments–rejected the amending formula and other parts of the Constitution Act, and refused to acknowledge its legitimacy or applicability to Quebec (Russell 1992, 128; Report of the Commission on the Political and Constitutional Future of Quebec 1991). Other sources of dissatisfaction included opposition by indigenous peoples; a demand by provinces for a major revision of the distribution of powers; and disappointment in the lack of Senate reform. As a result, discussions of constitutional reform continued after 1982, highlighted by the Meech Lake Accord of 1987, which failed to be ratified within a three-year deadline; and the Charlottetown Accord, which was rejected in a national referendum in October 1992 (White, Wagenberg, and Nelson 1994,

51). Although the failure of these two efforts were discouraging to constitutional reformers, ongoing dissatisfaction with the current constitution makes it likely that the discussions will continue.

White, Wagenberg, and Nelson (1994, 38) note that Canada's original constitution provided for "a judiciary to settle disputes between governments, as well as to dispense justice to individuals..." Section 101 of the Constitution Act of 1867 permitted, but did not require, the central government to establish a Supreme Court for Canada. Although such a court was in fact established in 1875, until 1949 the court of final appeal was the Judicial Committee of the Privy Council of the United Kingdom (JCPC).

In the early days of Canadian federation, when the central government was dominant, the provinces turned to the JCPC to settle questions of federalism. This body's decisions altered the balance of legislative powers assigned to the federal and provincial governments, strengthening the legislative authority of the provinces and weakening that of the federal government (White, Wagenberg, and Nelson 1994, 57, 222). Riker (1964, 117) explains that the JCPC "systematically curtailed the authority of the central government, modeling the Canadian federation after the United States rather than after the indigenous plans as expressed in the British North America Act." This history of judicial review resulted in the ironic development that many functions deemed the responsibility of the central government in the U.S. were handed over to the provinces in Canada. As in the U.S., the courts have not interpreted the residual powers as the great source of authority that they were meant to be (Watts 1996, 35; Fry 1988).

Today, the Supreme Court of Canada serves as the final adjudicator of constitutional issues. The constitutional reform debate of the early 1980s, and the adoption of the Charter of Rights and Freedoms, have provided the basis for a greater role by the Supreme Court (White, Wagenberg, and Nelson 1994, 222). For example, Quebec's claim that the Constitution Act of 1982 did not apply to that province was settled by a Supreme Court decision to the contrary (Russell 1992).

However, judicial review is generally not as important for settling federalism questions in Canada as in the United States. As White, Wagenberg, and Nelson (1994, 221) point out, "traditionally the courts have remained in the background of the constitutional process. The main reason that the role of the judiciary has been overshadowed is the concept of parliamentary supremacy." The notion of parliamentary supremacy has contributed to a tradition of constitutional questions being settled through political means, such as federal-provincial conferences, rather than by judicial decisions (White, Wagenberg, and Nelson 1994, 42-43).

The Canadian federation was the first to combine federalism with a parliamentary system, thus creating an alternative to the U.S. model (Elazar 1987, 41-42). Watts (1996, 22) notes:

> The most innovative feature of the federation was that...Canada was the first federation to incorporate a system of parliamentary responsible government in which the executive and the legislature are fused....The majoritarian character of the parliamentary federal institutions has had a significant impact on the dynamics of federal politics in Canada.

In Canada, where the parliamentary form exists at both levels of government, executive predominance in intergovernmental relations has become the norm. Ever more

complex relationships between the federal and provincial governments have resulted in ongoing, often intense negotiations between federal and provincial leaders. This situation, in which intergovernmental issues are resolved through negotiation, debate and compromise among executives at federal-provincial conferences, has been dubbed "executive federalism" by observers (White, Wagenberg, and Nelson 1994, 37; Watts 1996, 81).

Another contrast to the United States is found in the Canadian Senate. Unlike the U.S. Senate, where each state–large or small–is equally represented by two Senators, the Canadian Senate bases representation upon regional groups of provinces, with twenty-four seats in the Senate for each region. Ontario and Quebec, the two largest and most populous provinces, are each regions unto themselves, thus having twenty-four Senate seats each. British Columbia, Alberta, Saskatchewan, and Manitoba comprise another region, with twenty-four seats between them. New Brunswick, Nova Scotia, and Prince Edward Island have twenty-four regional seats, and Newfoundland has six for itself. In addition, the Territories are allocated one Senate seat each. Inequality among the provinces in the number of Senate seats has raised serious questions about the quality of provincial representation in this chamber (Watts 1996, 88; White, Wagenberg, and Nelson 1994, 217; Smith 1990).

Rather than being elected from their provinces or regions, Senators are appointed by the Governor General on the advice of the Prime Minister (Smith 1990). This method of selection presents another problem for the Senate's role in representing the provinces; Michelmann (1986, 548) bluntly states that the "Canadian Senate does not effectively

represent the provinces because its members are appointed by the prime minister and, as a consequence, lack political clout." Riker (1964, 117) is even more harsh, declaring that because they are appointed by the federal government,

> the Senators have never had a sense of representing provinces and the Canadian Senate has never been regarded as a bulwark of states' rights. (Indeed, since it has generally been used to give pensions to elderly politicians, the Canadian Senate has never counted for much of anything.)

Observers of Canadian politics agree that the Senate is lacking in legitimacy, which renders it mostly powerless (White, Wagenberg, and Nelson 1994, 216-217; Duchacek 1984, 26). Looking at the matter from a comparative perspective, Watts (1996, 88-89) concludes: "What is clear is that, of all the federal second chambers, the Canadian Senate has the least public legitimacy." He reminds us that, because Canada has a parliamentary system, the House of Commons–which controls the executive–is much more powerful than the Senate. Lacking in legitimacy and power, the Senate generally acquiesces with legislation passed in the House of Commons with occasional refinements of language and details (White, Wagenberg, and Nelson 1994, 217-218).

Elazar (1987, 184) refers to the Canadian Senate as "decorative" and argues that it "does not even pretend to perform a serious federalist function." Because the Senate is ineffective for purposes of provincial representation, the provinces have had to look elsewhere for national articulation of their interests. Provinces look to the federal Cabinet and their own provincial governments for a strong voice. This need for provincial self-assertion on the national scene has been identified as one cause of continuing intense

regionalism within Canadian politics (Michelmann 1986, 543; White, Wagenberg, and Nelson 1994, 38).

The role of political parties in Canadian federalism

We turn now from structural considerations of federalism in Canada to the role of political parties–a focus which, according to White, Wagenberg, and Nelson (1994, 67), is necessary for understanding:

> ...any attempt to interpret federalism in a mechanistic, institutional way would of necessity neglect the effect that active political parties have on any system of government. The existence of provincial or, at best, regional political parties has intensified the inherent tension between the federal and provincial authorities.

The Canadian party system is dominated by strong parties at the provincial level. Provincial parties contest elections revolving around provincial issues, and politicians tend to be firmly rooted in their provinces (Michelmann 1986, 542). Meanwhile, in any given election there are usually no more than one or two national parties, and as Elazar (1987, 179-180) observes, these tend to be fragmented:

> The noncentralized party system in Canada has developed through fragmentation of the parties along regional or provincial lines. The one or two parties that function on a nationwide basis are subject to great shifts in electoral support from election to election. Moreover, they are divided internally along provincial lines with each provincial organization more or less autonomous...and, at the same time, individual provinces are frequently dominated by regional parties that send only a few representatives to the national legislature. Very often, the party victorious in national elections is the only one able to expand its provincial electoral bases to momentarily national proportions.

As a consequence of regional fragmentation, Canada's national parties struggle to develop a national message and a national agenda (Smith 1990). Watts (1996, 103) also notes a tendency for parties operating at the federal level to become primarily regional, "so

that there are no federal political parties serving as effective inter-regional bridges." Watts considers this a "danger signal" for the stability of Canadian federation.

This dual system, in which both national and provincial parties are active, has significant consequences for Canadian federalism. Provincial leaders rely on strong local parties–which participate as "splinter" parties on the national scene–to negotiate federal subsidies for the provinces. In a situation where a national party controls the national government, and different provincial parties control the provincial governments, national leaders cannot depend upon the provinces to follow their lead. Indeed, the dual system of political parties, according to Riker (1964, 118-119), "is what chiefly peripheralizes the Canadian system." A particular challenge is posed by the Parti Quebecois, with its openly secessionist agenda. White, Wagenberg, and Nelson (1994, 67) argue that "Canadian federalism will obviously be in jeopardy any time the Parti Quebecois is the government of Quebec, and is in a position to thwart the types of accommodations that have been possible so far in Canadian federalism."

Federal processes in Canada

Canada provides a prime example of the difference between federalism as institutionalized on paper and federalism as operationalized through federal processes. As Watts (1996, 22) observes, "Despite its originally centralized form, a century and a quarter of pressures to recognize duality and regionalism have made Canada a relatively decentralized federation both legislatively and administratively." Distinctive patterns of economic and political development in different parts of the country have resulted in regionalism that is "a more crucial political factor in Canada than it is in many other

countries." (White, Wagenberg, and Nelson 1994, 21) This has been particularly true in the prairie region of the West, where feelings of alienation from the national government have grown out of the region's historic isolation and unique economic development (White, Wagenberg, and Nelson 1994, 24-25). Accommodation of the historic and ongoing Anglo-French dualism within Canada has been another key to operationalizing federalism there: Friedrich (1968, 119) argues that "Canadian federalism...rests upon an implicit compact between an alliance of these two cultures."

As noted above, the provinces lack formal representation in federal decision making because the Senate lacks legitimacy and the party system is fragmented along regional lines. The provinces' search for a voice in federal policy, combined with a parliamentary form of government and the need for accommodation, has led to the dominance of "executive federalism" in intergovernmental relations (Watts 1996, 111). Executive federalism is manifested through federal-provincial conferences, in which politicians and bureaucrats from both levels of government come together to discuss specific issues. White, Wagenberg, and Nelson (1994, 64-65) note:

> The chief instrument that has emerged since World War II to facilitate the operation of Canadian federalism has been the federal-provincial conference....If compromise is to be reached at all in matters of common concern, it will be from the interplay of views that becomes apparent during these top-level talks.

Elazar (1987, 207-208) points to these meetings as an example of collegial decision-making, in which representatives of governments come together in a single body to make collective policy decisions. Arguing from a more negative viewpoint, Lipset (1990, 199) expresses concern over federal-provincial conferences as extraparliamentary,

unelected legislative policy-making bodies that are "representative of political units, not the electorate."

As in the United States, fiscal issues are a primary topic of intergovernmental negotiations in Canada. While the federal government is authorized to generate revenues "by any Mode or System of Taxation" under the Constitution Act of 1867, provinces may only raise funds through "direct taxation" such as the income tax, some sales taxes, and (under the Constitution Act of 1982) taxation of natural resources. The federal government holds the advantage in gathering revenues, largely because it started imposing income taxes first; since only so much taxation can be imposed on citizens, the provinces are limited in the amount of additional taxes they can require (White, Wagenberg, and Nelson 1994, 59). As provincial responsibilities have grown with industrialization and urbanization, they have found it difficult to raise sufficient revenues to support those obligations. This dilemma is complicated by inequities among the provinces in economic bases (White, Wagenberg, and Nelson 1994, 59-64).

Thus, federal and provincial leaders are continuously engaged in discussions of how to finance the provinces adequately. The current policy is a combination of unconditional and conditional grants. Unconditional grants primarily take the form of equalization payments to the poorer provinces, to help make up for their lack of an adequate tax base. White, Wagenberg, and Nelson (1994, 64) point out that, as a result, "the poorer provinces, especially in the Atlantic area, have substantial proportions of their expenditures funded by equalization grants." Equalization is so important to these provinces that they succeeded in having it formalized in the Constitution Act of 1982.

Conditional grant programs in Canada are similar to those in the United States: the federal government pays a percentage of the provincial expenditure in a given policy area, on the condition that each province accept certain national standards. Canadian provinces may opt in or stay out of conditional grant programs where such programs deal with subjects falling under their jurisdiction. Poor provinces have little choice but to accept, and wealthier provinces generally opt in to satisfy the demands and expectations of their citizens. Only Quebec has generally resisted conditional grant programs. Thus, the federal spending power has enabled the federal government to pursue national standards in areas falling under provincial jurisdiction (White, Wagenberg, and Nelson 1994, 59-63).

Although the provincial governments usually opt in to conditional grant programs, "(w)hat bothers them most about this situation is that the federal government creates circumstances in which provincial authorities find it difficult to set their own priorities." (White, Wagenberg, and Nelson 1994, 63) This complaint echoes the concerns of state governments in the United States. However, revisiting Watts' criterion of conditionality as a measurement of subnational dependence on the federal government, the difference between the U.S. and Canada is striking: while over eighty percent of intergovernmental transfers in the United States take the form of conditional grants, in Canada the proportion is between four percent and twelve percent, depending upon how some grants are classified (Watts 1996, 44-45).

In summary, to understand Canadian federalism it is important to recognize, as Watts (1996, 14) puts it, the "distinction between constitutional form and operational reality." While the constitution seemed to establish a fairly centralized union, instead

Canada has become "a loose federation of highly independent provinces whose leaders negotiate as equals with the federal government on most policy issues." (Elazar 1987, 155) Federalism in Canada is best understood in the context of ongoing compromise and pragmatic accommodation: as White, Wagenberg, and Nelson (1994, 43) observe,

> In the last half of the twentieth century, political rapport between governments has depended far more on the ability of the prime minister and his associates to negotiate with the premiers and their advisors in various provinces than on constitutional provisions....Canadian political leaders...tended to adopt a pragmatic approach to politics that stretched the meaning of even the most specific sections of the written Constitution.

While some observers express concern over the continuing lack of national integration in Canada, others point to the Canadian federation's ability to accommodate diversity as the secret to its success: Wagenberg et al. (1990, 34) declare: "While there is no denying that fundamental diversities based on territory...are a continuing reality in Canada, there is also no doubt that the ability to find periodic accommodations has created a stable, federal and democratic state." Keating (1999, 11-12) similarly holds up Canada as an example of how federalism can accommodate diversity, as long as there exist among the players some common values and a commitment to making federalism work.

Federalism in Mexico

Mexican federalism has been largely ignored, for the simple reason that until recently almost all Mexican politics has been national. In the 1950s, August Spain noted that scholarly opinion "has tended to discount the importance of federal features of the Mexican governmental system, or even to deny their reality..." (Spain 1956, 620) Writing four decades later, Rodriguez (1997, 22) observed again that Mexican federalism has not

been studied much, as intergovernmental relations have been shaped by centralization: "With only a few exceptions, scholars have concerned themselves more with policy formulation at the national level and disregarded the other governmental units." However, with Mexico in a period of profound transition, exemplified by the end of seventy years of one-party rule, federalism in Mexico is gaining scholarly attention which is bound to increase as these historic political developments play out.

Structural considerations

The current Mexican constitution dates back to 1917. At first glance, it appears to set out a governmental structure similar to the United States: a presidential system, with separation of powers between the executive, legislative and judicial branches; and a federal arrangement with autonomous powers at the subnational level (Cornelius, in Almond and Powell 1996, 505). However, closer examination reveals substantial differences between these two systems.

First, while the U.S. constitution addresses only one subnational level of government–the states–the Mexican constitution recognizes two tiers: the states and the municipalities. Article 115 establishes state governments "with the free Municipality as the basis of their territorial division and political and administrative organization..." (Constitution of Mexico, Article 115: I) This interweaving of state and local governments requires that studies of Mexican federalism (unlike those of federalism in the U.S. and Canada) address developments at both the state and municipal levels.

The second, and arguably more significant, difference between the U.S. and Mexico is that the Mexican constitution establishes a highly centralized government. As

Spain (1956, 625) notes, "By comparison with the United States, the delegation of authority to the national government is far-reaching..." While Article 40 states that Mexico is a federal republic, "composed of free and sovereign States in all that concerns their internal government," Article 41 declares immediately thereafter that state constitutions "shall in no event contravene the stipulations of the Federal Pact." This does not appear much different from the Supremacy Clause in the U.S. constitution, until one looks further to find significant national powers relative to those of the states and municipalities. Article 76 empowers the president, acting through the Senate, to declare that the constitutional powers of a state have disappeared and to appoint a provisional governor–actions which have, in fact, been taken on a number of occasions (Spain 1956, 625-626; Mahler 1995, 332; Rodriguez 1997, 23). Additional presidential powers are stated in Article 89, as discussed below.

The structure and conduct of state and municipal governments are highly circumscribed by Article 115, which lays out specific stipulations regarding local governing bodies, terms in office, and methods of election, including a prohibition on consecutive reelection. In addition, Article 117 forbids states, among other things, to enter into alliances with other states or with foreign powers; it also prohibits states from incurring debts in foreign currencies and/or with foreign creditors (1917 Constitution of Mexico, as amended).

The Mexican constitution provides for national authority over a wide range of policy areas, including foreign affairs; civil liberties; education; public property and eminent domain; land reform; electrical power; public borrowing; interstate commerce;

mining; labor law; declaration of war; maintenance of armed forces; immigration; public health; communications; coining money; federal crimes; and (in a provision reminiscent of the "necessary and proper" clause of the U.S. Constitution) the power to "enact all laws that may be necessary to enforce the foregoing powers, and all others granted by this Constitution to the branches of the Union." (1917 Constitution of Mexico, as amended, Article 73) The list of policy areas under state jurisdiction is much less extensive, and includes real and personal property, civil law, and professional degrees and licensing (1917 Constitution of Mexico, as amended, Article 121). However, as in the United States, the Mexican constitution grants residual powers to the states, under Article 124: "The powers not expressly granted by this Constitution to federal officials are understood to be reserved to the States." Considering the long list of powers bestowed upon federal officials, especially the president under Article 89, this grant of residual power may reasonably be regarded as considerably less expansive than it is in the United States.

Mexico's judiciary is structurally similar to that of the United States, featuring local, state and national levels, with a national court of appeals and a supreme court (Camp 1999, 171). However, judicial review, as it has been described in the United States and Canada, does not exist in Mexico. This can be explained by two aspects of the Mexican judicial system. First, Mexico's legal system is very dissimilar from those of the other two North American countries. The U.S. and Canadian legal systems are both derived from the British common law, which is based on precedent; the Mexican legal system is derived from the more rigid Napoleonic codes (Bennett and Herzog 2000, 979; Herzog 2000, 150). Thus, as Camp (1999 171) observes,

> Legislating through judicial precedent is not a viable procedure in Mexico. For the supreme court to establish a binding precedent, it must repeatedly reach identical conclusions about precisely the same issues. This rarely, if ever, occurs.

Second, judicial review requires independence of the judicial branch from the legislative and executive branches. Camp (1999, 171) notes that "(a)lthough the supreme court has some independence, justices do not sit for life, and their appointments have been political." The Mexican supreme court is composed of eleven justices who serve terms of up to fifteen years. They are appointed by the president, with the approval of two-thirds of the Senate; in addition, justices are subject to removal by the president (Mahler 1995, 330; Camp 1999, 171). Under these conditions–especially until recently, when the Senate was virtually ruled by the presidency through a one-party system–the judicial branch lacks the independence necessary for judicial review. Indeed, Rodriguez (1997, 146) declares that "the judiciary, until very recently, was entirely captive and dominated by the executive." Whereas in the U.S. and Canada the courts provide an important arena for deciding questions of federalism, in Mexico the supreme court typically limits its decisions to matters involving individual persons and not constitutional issues (Camp 1999, 171).

With regard to separation of powers, again, on paper the Mexican system looks very similar to the United States; however, in practice "the influence of checks and balances as understood in the United States has been minimal." (Rodriguez 1997, 17) Mexico has traditionally been characterized as a highly centralized system, with power concentrated in the office of the presidency; the terms "*presidencialismo*" and even "presidential dictatorship" have been commonly used to describe Mexican government (Peschard-Sverdup 2000, ix; Mahler 1995, 330).

Presidential power in Mexico derives from both constitutional and extra-constitutional sources. Under Article 89 of the Constitution, the president is empowered to control the military, issue executive decrees, and appoint and remove government officials (1917 Constitution of Mexico, as amended; Mahler 1995, 330-333). In addition, unlike the American president, the Mexican president may introduce legislation in the Congress on his own authority, thus retaining direct legislative power in addition to his executive powers (1917 Constitution of Mexico, as amended, Article 71; Spain 1956, 626; Mahler 1995, 333). Indeed, historically the legislative agenda has been overwhelmingly controlled by the president. The president also has a legislative veto power which, until the recent onset of divided government, was never exercised because of the submissive stance of the Congress relative to the presidency (Mahler 1995, 333).

In addition to these constitutional powers, until very recently the president has enjoyed substantial extra-constitutional powers by virtue of seventy years of one-party rule by the PRI. With both houses of Congress controlled by the PRI, the president as the party leader completely dominated both the legislative and judicial branches (Cornelius, in Almond and Powell 1996, 505; Rodriguez 1997, 17-18; Camp 1999, 165). Banned by the constitution from consecutive re-election, PRI-associated members of Congress have been dependent on the president to advance their careers. As a result, the checks and balances normally associated with a separation of powers arrangement has been missing as legislators have followed presidential directives, rubber-stamping his policy initiatives and failing to engage in legislative oversight of executive actions (Camp 1999, 167; Peschard-Sverdup 2000, x; Ugalde 2000).

Late in 1997, a coalition of the two largest opposition parties–the National Action Party (PAN) and the Democratic Revolutionary Party (PRD)–took control of the Chamber of Deputies, the lower house of the Mexican Congress. This development has brought dramatic changes, as observers have watched the Congress "slowly begin to evolve and conduct business as a true legislature." (Peschard-Sverdup 2000, x) The opposition coalition has significantly altered executive proposals and has taken on more responsibility for legislative initiatives (Camp 1999, 167). For example, the Chamber of Deputies has become more assertive in amending budget bills and in making corruption more visible (Ugalde 2000, 166).

In December 2000, Vicente Fox of the PAN was inaugurated as the first non-PRI president of Mexico in seventy years. His party does not control the Congress. It will be interesting to see how the relationship between the legislative and executive branches evolves in the wake of these developments.

Meanwhile, compared to the U.S. Congress, the Mexican Congress remains in a weak position relative to the executive branch, primarily because of the constitutional prohibition on consecutive re-election. Without a chance for continuous tenure, members of Congress lack the opportunity to develop the expertise and seniority which enhances the power of U.S. legislators (Camp 1999, 169). More significantly for intergovernmental relations, the ban on consecutive re-election essentially diminishes the accountability of legislators to the local constituencies that elected them. With this accountability lacking, state- and locally-based interests have no effective representation at the national level (Ugalde 2000).

Turning now to the final structural consideration of Mexican federalism, the Mexican Senate is composed of 128 senators. Two senators are directly elected from each of the thirty-one states and the Federal District, for sixty-four. Under reforms implemented in 1994, each state and the Federal District was allocated a third Senate seat, to be assigned to the party with the second highest vote count in that jurisdiction; an additional thirty-two seats are assigned nationally according to proportional representation (Camp 1999, 165). Senators are elected for six-year terms, and cannot be re-elected to consecutive terms (Mahler 1995, 335; Camp 1999, 165).

Article 72 of the constitution provides that legislation may originate in the Senate. However, in practice the primary duties of the Senate are to approve or disapprove of executive branch appointments, and to approve or disapprove bills originating in the Chamber of Deputies (Camp 1999, 168). The Senate may participate in the review and approval of revenues, but is excluded from the budget approval process, which is an "exclusive power" of the Chamber of Deputies (Ugalde 2000, 33). The Mexican Senate has apparently received very little attention from observers of Mexican politics, and within the small amount of literature that exists on this topic, there is virtually no discussion of its federal role as a representative body for the states. This may be due, again, to the historic lack of accountability to local constituencies resulting from the ban on re-election and decades of one-party rule. It is reasonable to conclude that the Mexican Senate does not perform the federalist function traditionally attributed to federal second chambers.

The role of political parties in Mexican federalism

Several decades ago, Friedrich (1968, 67-68) observed that "a federal regime without an operative political opposition on both the national and local level is apt to remain 'on paper.'" A few years earlier, Riker (1964, 130-131) had characterized Mexico in this way, placing it in the same category as the Soviet Union and Yugoslavia, supposedly federal systems with highly centralized regimes. Looking at the three of them, Riker theorized that "it is the feature of one-partyism that causes the rupture of the federal bargain." Later, Elazar (1987, 180-181) came to the same conclusion:

> The importance to federalism of a noncentralized party system is well illustrated by contrast with those formally federal nations dominated by one highly centralized party such as the USSR, Czechoslovakia, Yugoslavia, and Mexico. In all four cases, the dominant party has operated severely to limit the power of the constituent polities in direct proportion to the extent of its dominance.

Looking at the situation from the perspective of hindsight, Mizrahi (2000, 1) notes: "For seventy-one years one political party...exercised a virtual monopoly of political power in Mexico and rendered the country's formally federalist institutions essentially inoperable." Clearly, the party system has played a defining role in shaping Mexican federalism.

While a number of opposition parties have operated for some time in Mexican politics, for over seventy years the PRI was dominant. As such, its role included providing a channel of information to the presidency; organizing political support for presidential policies; and controlling thousands of elective and appointive jobs at all governmental levels across the nation (Fagen and Tuohy 1972; Ugalde 1970; Mahler 1995, 338). In a classic study of politics in a Mexican municipality, Graham (1968) found

that local issues were resolved, not by internal agreement within the community, but through the PRI in an "upward and outward" pattern of issue resolution. With the municipal president dependent upon the governor and the PRI for his position and for resources, the "only channel through which interests could be articulated was a political one, maintained and operated by the state PRI organization" (Graham 1968, 24). From 1928 until quite recently, state governors were handpicked by presidents; they, in turn, appointed municipal presidents (Ugalde 2000, 128; Rodriguez 1997, 26). State and local autonomy was, as Friedrich and the others had observed, virtually nonexistent under these conditions.

Approximately fifteen years ago, this situation started to change with victories by opposition parties at the state level. As Rodriguez (1997, 54) notes, "(s)ince the presidential election of 1988, in every subsequent election opposition victories have multiplied." Baja California broke the mold in 1989 with the election of an opposition governor; since then the PRI has been defeated for governorships in Chihuahua, Jalisco and Guanajuato (Rodriguez 1997, 26). These elections have resulted in weakening of presidential control, as non-PRI state and local officials "began to challenge the centralized structure of power and pressed for an effective decentralization of economic resources and decision-making power." (Mizrahi 2000, 1)

Even within the PRI, centralization has loosened its grip with the advent of primaries to select party candidates. The first such primary was held in 1998 in Chihuahua, when a local politician with no direct ties to the president won the PRI

nomination and subsequently the governorship (Ugalde 2000, 137). Other states began to adopt primaries after this (Ugalde 2000, 137).

As mentioned above, in 1997 the PRI lost control of the Chamber of Deputies. The party's control within the Chamber had already been weakened a few years previously when it lost the two-thirds majority required to amend the constitution (Cornelius, in Almond and Powell 1996, 505). Without even a simple majority of the legislature controlled by his party, President Fox is navigating political territory previously uncharted in Mexico. Ugalde (2000, 122) predicts that as "partisan powers get detached from the presidential office, the nature and logic of presidential politics will undoubtedly undergo a dramatic transformation." The decline of *presidencialismo* related to the end of one-party rule is certain to have significant--as yet unforeseen--consequences for Mexican federalism.

Federal processes in Mexico

Federal processes in Mexico have been shaped by the one-party domination described above. The long rule of the PRI has resulted in informal rules based on clientelism, in which intergovernmental relationships are determined largely by personal relationships between state and local officials and those in positions above them (Graham 1968, 13; Ugalde 2000, 124). Clientelism and centralism have gone hand in hand: "The most important mentor in the Mexican clientelist structure is the president, whose control over state government is based on a wide variety of formal and informal powers..." (Rodriguez 1997, 23)

This situation has significantly impacted the behavior of political actors in Mexico. Assetto, Hajba, and Mumme (2001, 16) observe that, traditionally, "PRI associated governors behaved more like prefects than independent executives of semi-autonomous sub-national governments, supporting the center and promoting central policies and power in their state domains." Rodriguez (1997, 23) notes that, because final decisions have generally been made in Mexico City, interest groups have adopted the habit of circumventing state governors and going directly to the president to achieve their goals.

As in the United States and Canada, federalism in Mexico is largely operationalized through fiscal arrangements. Here again, centralization is the norm, as Assetto, Hajba, and Mumme (2001, 12) explain:

> Fiscal authority in Mexico is historically highly centralized, with states and municipalities heavily dependent on the federal government for revenues. Neither states nor municipalities have any real fiscal autonomy with Mexico ranking lowest in this category among all OECD countries.

The federal government is the primary taxing entity, collecting the lion's share of public revenues through income taxes and value-added taxes (Zedillo 1999, 20-21). State and local governments raise revenues through a variety of sources, the most important of which are property taxes and public service fees such as water levies (Rodriguez 1997, 110). However, Mexico has a low level of property tax collection compared to other countries; collection of water charges is also low (Rodriguez 1997, 111). While amendments to Article 115 in 1983 provided states and municipalities with the constitutional authority to collect local revenues, most states still have a low capacity to

generate income through local taxation (Assetto, Hajba, and Mumme 2001, 12-13; Rodriguez 1997, 114).

Federal funds are provided to state and local governments through a system of revenue sharing and investments. Under the revenue sharing program, federal tax revenues collected in the states are sent to Mexico City and then redistributed to each state according to a formula based on population, the state's tax-collecting capacity, and an "equalization share" to address revenue shortfalls in the poorer states (Rodriguez 1997, 90-91). Under agreements signed by state governments, approximately twenty-five percent of revenue sharing funds received by a state are distributed to municipalities (Rodriguez, 1997, 90). Federal investments, which are a much larger source of state and local income than revenue sharing, are more discretionary and include funds for education and poverty alleviation (Rodriguez 1997, 96-106).

In the past, observers have noted that federal funds have been used as a tool of political control over state and local governments, with clientelism helping to determine how benefits would be distributed (Haces and Nicolas 1996, 239; Rodriguez 1997, 24). In the waning days of his administration, President Zedillo (1999, 19-20) pointed to reforms that "have ended with the margins for arbitrary and discretionary decisions...At the same time, clear and sound criteria have been laid down for the allocation of resources." Still, he warned, "With regard to fiscal federalism, I believe we have to make much more progress in Mexico." (Zedillo 1999, 21) Rodriguez (1997, 113) aptly summarizes the situation in concluding: "Mexico has evolved a complex system of fiscal

policy in which the lion's share remains firmly controlled by the federal government, notwithstanding the changes and attempts at decentralization that have been undertaken."

A look at federal processes in Mexico, then, reveals a system still in the throes of clientelism and centralized control. Again, it remains to be seen how this will change with the advent of true party competition within Mexican politics.

In summary, federalism in Mexico is heavily weighted in favor of the federal government. This stems directly from constitutional provisions establishing a highly centralized system, structural factors limiting accountability to state and local constituencies, and a history of one-party control. While the latter is no longer a factor, the first two still remain.

President Fox and the PAN are apparently committed to a more decentralized federalism as a means to strengthen democracy and spur economic development. Shortly after his election, Fox announced plans to create a new "office of federalism" to coordinate intergovernmental affairs and redefine the functions and capacities of the three levels of government (Mizrahi 2000, 2). However, many are skeptical that this initiative will be successful in revitalizing federalism in Mexico, considering that it will be required to work with all of the other federal agencies and state and municipal governments. In addition, because the constitution grants enormous powers to the federal executive, a comprehensive distribution of power between federal, state and local governments would likely require a series of constitutional amendments–which calls for a two-thirds majority in the Chamber of Deputies, where the PAN does not even control 50 percent. Another challenge is that the institutional capacities of state and local governments will require

substantial improvement if they are to undertake new functions and responsibilities. Finally, Fox faces a number of governors who come from the PRI and may not want to collaborate with him: "Many members of Fox's team fear that strengthening the power of State governors could be politically dangerous for Fox and the PAN." (Mizrahi 2000, 3)

Federalism in Mexico is obviously in a state of profound transition and uncertainty. Observers note that "Mexico is rapidly moving toward devolution of power to states and municipalities, although this process will take several decades to complete." (Herzog 2000) Following the development of Mexican federalism promises to be a rich and productive scholarly occupation for the foreseeable future.

Comparison: Centralization and Decentralization in the U.S., Canada and Mexico

The degree of centralization or decentralization is generally the underlying issue in studies of federal systems. Accordingly, for purposes of summary comparison we consider here the relative degrees of centralization and decentralization in the United States, Canada and Mexico.

As scholars of comparative federalism have noted, it is difficult to arrive at overall rankings of countries in terms of decentralization because there are different ways of measuring it (Watts 1996, 72-73). In addition, quantification is a problem no matter what measurement of decentralization one is using. To help in the process, I have chosen to borrow from Watts (1996), who has developed a set of measurements which, though they do not solve the quantification problem, prove useful in arriving at an overall comparative assessment of centralization and decentralization. Using Watts' measurements, I will first examine the three countries in terms of the legislative jurisdiction of the subnational units,

including the degree of autonomy they have in exercising this jurisdiction. Second, I will compare administrative jurisdiction. Third, I will look at decentralization in terms of the subnationals' roles in federal-level decision-making in each country. Fourth, I will examine the relative degrees of centralization in financial arrangements. Based on these measurements, I will offer a general assessment of the relative levels of centralization and decentralization among the U.S., Canada and Mexico.

In terms of legislative jurisdiction, the U.S. and Canada are roughly comparable in the number and type of policy areas for which subnational governments are authorized to pass laws. Canadian provinces have an edge in that they generally have exclusive jurisdiction in their areas of legislative responsibility, which enhances their autonomy (Watts 1996, 70). The autonomy of the Canadian provinces is further magnified by provincial voting patterns and the general disposition of the subnational governments to challenge the federal government (Lipset 1990, 194-195). In addition, Canada is much more decentralized than the U.S. in jurisdiction over the economy (Watts 1996, 72-73); as Fry (1990, 123) points out, "most provincial governments are much more active than their state counterparts in regulating businesses. Provincial governments also own hundreds of Crown corporations and are integrally involved in most facets of the economy." Lipset (1990, 198) similarly notes that "Canada is much more statist than the United States, but its statism...is more provincial than federal." This statist tendency at the provincial level has resulted in substantial subnational authority in an enormously important policy area which states in the U.S. do not enjoy. Mexico, on the other hand, features little legislative jurisdiction or autonomy at the state level, for reasons addressed at length above.

In both the United States and Canada, administrative jurisdiction generally coincides with legislative jurisdiction; in addition, as discussed above, in both of these federations the federal governments have delegated considerable responsibility for administration of federal programs to the constituent units (Watts 1996, 32-33). As for Mexico, efforts at decentralization in the past 15 years have generally been administrative in nature (Rodriguez 1997, 12). Under the administrations of Presidents de la Madrid, Salinas, and Zedillo, administrative decentralization has been focused on providing services and resources to outlying areas, easing the "hyperurbanization" of Mexico City, and alleviating some of the administrative problems that accompanied a high degree of centralization (Mahler 1995, 332; Rodriguez 1997, 1). For example, Zedillo (1999, 18-19) pointed with pride to the decentralization of basic services such as education and health during his tenure. On the other hand, Mizrahi (2000, 4), noting that education and health are indeed the two sectors that have undergone the most profound decentralization in Mexico, still points out that in these sectors "enormous decision-making power remains in control of the federal government." Thus, even in those areas where decentralization has been most extensive, it does not extend to actual decision-making authority for the state and local governments.

We turn now to examine decentralization in federal-level decision-making, a somewhat different axis on which to measure our three federations. In formal terms, the United States is the most decentralized according to this measurement. As discussed above, state interests have an influential voice in the federal Congress, as a result of separation of powers in combination with the decentralized party system. Canada, with its

parliamentary system and its virtually powerless Senate, does not provide its provinces with a formal voice in federal-level decision-making (Watts 1996, 72; Keating 1999, 10). However, the evolution of federal processes in the form of executive federalism has provided a provincial voice at an informal level that is extremely effective in articulating provincial and regional interests. In Mexico, the state and local governments generally lack influence in federal-level decision-making, due to centralization of power in the presidency as well as the lack of federal legislators' accountability to local constituencies described above.

In terms of financial decentralization, subnational governments in both the U.S. and Canada have substantial taxing and spending authority; in addition, both receive federal funds for a wide variety of activities, including federal programs in areas of traditionally subnational jurisdiction. Canada may be considered more decentralized in this area, however, because of the comparatively low percentage of federal funds that are conditional. In addition, the Canadian provinces have "substantial and unhindered access to both domestic and international borrowing" (Watts 1996, 68), while some U.S. states are constrained in borrowing by balanced budget requirements within their constitutions. As for Mexico, financial arrangements are highly centralized; the states, generally lacking in taxing capacity and borrowing authority, are heavily dependent upon federal funds to provide basic services.

A look at decentralization according to these different measurements yields a summary assessment that Canadian federalism is the most decentralized of the three. Watts (1996, 72-73) concludes:

> Canada in terms of the responsibilities and autonomy exercised by the provinces would appear on balance to be one of the more decentralized federations....(O)verall the Canadian provinces in terms of jurisdiction and fiscal autonomy across a wide range of policy areas of major importance to their residents have been more powerful than the constituent units in most other federations.

Several decades ago, Riker (1964, 112) observed that Canadian federalism is less centralized than federalism in the United States. Lipset (1990, 1994) argues that Canada is widely recognized as "more decentralized than any other industrialized country..." More recently the Commission for Environmental Cooperation (1997a, 23) confirmed this view: "Canada is by all accounts and in nearly all matters the most decentralized federal system in the world, resembling a confederation more than a federal system." Obviously, among the three North American federations, the United States ranks second in terms of decentralization; Mexico is by far the most centralized according to all measurements.

Having completed our examination and comparison of federalism in the U.S., Canada and Mexico in general terms, we turn now to a more specific focus on those aspects of federalism with most relevance to this dissertation. The next section examines environmental policy jurisdiction in these three countries. This will be followed by a brief look at subnational roles in international relations.

Environmental Policy Jurisdiction in the U.S., Canada and Mexico

Environmental policy in the United States

In the United States, environmental policy is an area of concurrent state and federal jurisdiction. Federal authority is based upon constitutional powers over interstate commerce, taxation and spending, federal lands and natural resources, navigation, and marine fisheries; state jurisdiction derives from constitutionally reserved powers, including

regulation of private property, contracts and business associations, liability for personal and property damage, and the general "police power" to protect public health, safety and welfare (CEC 1997a, 57).

Historically, the national government has been the most involved in comprehensive environmental policy, albeit with significant state participation. In particular, the 1960s and early 1970s witnessed a surge of national environmental regulation in the U.S. (Anton 1989, 183-184; Esty 1996, 602). National action was taken in response to growing demands for centralized environmental policy, as it became apparent that state and local nuisance and pollution laws were inadequate to deal with the problem. A federal response was considered necessary in light of the transboundary nature of environmental problems and the historically poor regulatory performance of states in this policy area (Esty 1996, 600-602; Mumme 1996, 33-34; Kraft and Scheberle 1998, 133).

Most of the federal environmental legislation passed during that period involved command-and-control regulation, designed to be implemented by the states (Kraft and Scheberle 1998, 133; Scheberle 1997, 4; Mumme 1996, 33; Rosenbaum 1995, 88, 142). Under the most common model, the federal government sets national environmental standards, which are then enforced by the states under federal supervision (CEC 1997a, 23, 58; Kraft and Scheberle 1998, 133). Generally states may exceed national standards in their own environmental policies, but may not enact standards lower than the national norm (CEC 1997, 58; CEC 2001a, 70). As Scheberle (1997, 13-14) explains, there are three general types of legal relationships between the federal and state governments in implementation of federal environmental laws. First, under partial preemption, states

apply for delegated authority from the federal oversight agency; if the application is successful, regulatory control is turned over to the state, subject to state fulfillment of national standards. The federal government can take regulatory authority back if the state fails to meet its enforcement obligations. Second, Congress can issue a direct statutory order obliging the states to perform certain tasks; failure to comply may result in sanctions or a court order. The third type of relationship is principally voluntary, relying on grant incentives to encourage state participation.

Nationally approved state programs are authorized to issue permits, conduct facility inspections, and initiate enforcement actions against violators of national environmental laws (CEC 2001a, 70). On average, states issue the majority of permits granted pursuant to national laws; conduct over eighty percent of all inspections; and are responsible for eighty-four percent of formal enforcement actions (CEC 2001a, 70, 83). As noted by the CEC (2001a, 70), this "cooperative regulatory arrangement ensures a key role for states in environmental enforcement, while reserving the national government's authority to determine whether the state programs meet the national requirements..." Indeed, this complex, overlapping division of responsibilities between the federal and state governments is considered the most notable feature of environmental regulation in the United States (CEC 1997a, 57).

In addition to implementation of federal policies, the states have, to varying degrees, undertaken environmental initiatives of their own. Many states have established comprehensive environmental agencies. States dominate several areas of environmental policy, including most aspects of waste management, groundwater protection, and coastal

zone management (Rabe 1997, 32-33; CEC 1997a, 25). The Council of State Governments has estimated that about seventy percent of all significant state-enacted environmental legislation reflects independent policy judgements, having little or nothing to do with federal policy (Rabe 1997, 32-33; CEC 1997a, 25-26). States often enact standards that exceed national standards (Orbuch and Singer 1995, 122-124; CEC 2001a, 70). In addition, innovative state environmental programs frequently serve as models for federal legislation (Rosenbaum 1995, 142; CEC 1997a, 26; CEC 2001a, 70). Besides participation in domestic initiatives, states are also directly involved in transboundary environmental projects with their counterparts in Canada and Mexico (Mumme 1996, 49-50; Orbuch and Singer 1995, 134; Herzog 2000).

Scholars have found significant variation among states in both environmental policy innovation and implementation of federal policies (Lester 1994, 58). State performance in environmental policy is extremely uneven, with the same states performing well year after year while other states consistently lag behind. Per capita spending by states on environmental programs consistently varies widely, even accounting for differences in state wealth (CEC 1997a, 26; Rabe 1997, 40-41). In addition, some states prohibit their environmental agencies from exceeding federal standards, while others see federal standards as a minimum (Rabe 1997, 40-41). The frequency and effectiveness of enforcement programs also vary significantly (Rabe 1997, 40-41).

Where state commitment to environmental policy is strong, it is attributed to broad public support; a sizable pool of environmental policy expertise; and state-level direct democracy tools such as initiatives and referenda that have called for such policies as

nuclear plant closure, recycling programs and public land acquisition (Rabe 1997, 33-34). In addition, Mumme (1996, 34) points out that state performance in environmental protection depends to a great extent on state governmental capacity. Some states have responded to expanded environmental program responsibilities by greatly expanding their fiscal and managerial capacity through additions of staff, increasing technical expertise, and finding state sources of funding (Mumme 1996, 34; Manzanilla 1996, 68-69; Scheberle 1997: 5; Kraft and Scheberle 1998, 133). Still, most states–however progressive–suffer from insufficient resources within their environmental institutions (Lester 1994, 58). Despite initiatives at the state level, states continue to be highly dependent on the federal government for funds, research and development, and other technical assistance (Rabe 1997, 42-43).

Not surprisingly in a policy area with so much federal-state overlap, there is ongoing discussion of the extent to which environmental policy should be centralized or decentralized. A report by the Commission for Environmental Cooperation (CEC 1997a, 24) neatly summarized the issue:

> Although the federal-state arrangement in the United States has been relatively satisfactory, states have long voiced reservations about the complex system of environmental federalism, and particularly the role of EPA headquarters staff in Washington. Among the chief complaints have been unclear and inflexible regulations and mandatory policy 'guidelines' that states argue waste their resources, stifle initiative, and add unnecessary costs – particularly so-called 'unfunded mandates.'

Indeed, states have become increasingly vocal in expressing their dissatisfaction with the old paradigm of federal command-and-control regulation, especially considering that the conditions and assumptions which led to the centralized approach thirty years ago

are no longer true in many instances (Kraft and Scheberle 1998, 131-132, 134). State complaints include inadequate federal financial assistance, federal micromanagement of state programs, and a lack of flexibility to set policy priorities according to local conditions (Kraft and Scheberle 1998, 133-134).

In response, since the mid-1990s the federal Environmental Protection Agency (EPA) has been working to improve federal-state relations through a variety of decentralizing initiatives (CEC 1997a, 65-66; Kraft and Scheberle 1998; Manzanilla 1996, 69). An example is the National Environmental Performance Partnership System (NEPPS) program. NEPPS allows a state to enter into a Performance Partnership Agreement which, while retaining federal standards and oversight, offers flexibility in meeting goals and addressing the state's highest environmental priorities (CEC 2001a, 71). Only states with strong environmental programs are eligible for such agreements, providing an incentive to states to perform well, and allowing EPA to concentrate its oversight efforts on weaker state programs (CEC 1997a, 65; Kraft and Scheberle 1998, 137).

Still, given the ever-changing nature of U.S. federalism in general, it is likely that discussions of the proper balance in environmental federalism will continue. While some perceive "an overheated federal government that squelches state creativity and capability to tailor environmental policies to local realities," others worry that many states are still too lethargic and susceptible to economic interests to take a serious role in environmental policy (Rabe 1997, 31). A commonly espoused middle approach calls for a balanced set of responsibilities across all government levels, determining the appropriate forum for

environmental regulation based on the particular issue in question (Esty 1996, 652-653; Rabe 1997, 49).

Environmental policy in Canada

The Constitution Act of 1867 did not mention environmental policy, and Canada's constitutional division of powers does not expressly assign jurisdiction over the environment to either the federal or the provincial level (MacLellan 1995, 325; CEC 1997a, 56). Both levels of government were given powers that authorize them to pass environmental laws. The federal level has jurisdiction over the seacoasts, federal lands, inland fisheries, navigation and shipping, international and interprovincial commerce, and export marketing of resources (Mumme 1996, 18; CEC 1997a, 56). The provinces have jurisdiction over provincial public lands, local works and projects, infrastructure, property rights, and natural resources (Mumme 1996, 18; CEC 1997a, 56). The Canadian constitution also provides for mostly provincial jurisdiction over energy production–an important sector in the Canadian economy–limiting the federal role to nuclear energy and international and interprovincial trade (Mumme 1996, 18; CEC 1997a, 56). The two levels share responsibility for agriculture (CEC 1997a, 56). Thus, while federal jurisdiction over natural resources and the environment is significant, most responsibility lies with the provinces, which have historically been dominant in this policy realm (MacLellan 1995, 323, 325; Lindquist 1999, 53).

The resulting system of environmental legislation "is complex, with considerable overlap between federal and provincial jurisdiction in specific areas..." (CEC 1997a, 56) For example, while the provinces regulate protection of wildlife and wildlife habitat, and

issue hunting licenses, trappers and hunters must also comply with federal laws if they want to transport their catch outside the province (CEC 2001a, 14). Implementation and enforcement are left primarily to the provinces (MacLellan 1995, 324-327). Overlap renders environmental policy coordination particularly difficult in Canada (DiMento and Doughman 1998, 717). The CEC (1997a, 61-62) notes that this challenge has been the subject of considerable controversy, with observers on both sides of the issue lamenting a lack of clarity and uniformity: "Industry is objecting to what it characterizes as overly burdensome and duplicative regulation, while environmentalists point to uneven provincial regulation and to gaps in the existing system that remain unaddressed at any level of government."

Within this context of jurisdictional overlap, much Canadian environmental policy is made and implemented through mechanisms of intergovernmental relations (MacLellan 1995, 323). Each province has an environment ministry that works closely with Environment Canada, the lead environmental agency at the federal level (Mumme 1996, 17). Bilateral formal and informal agreements between the federal and provincial governments are common as a fundamental part of environmental management in Canada (CEC 2001a, 11). For example, Environment Canada has bilateral agreements on inspections with Alberta and Saskatchewan, and an information exchange agreement with Quebec dealing with the pulp and paper sector (CEC 2001a, 21). As described by the CEC (2001a, 21), such agreements "generally set out which federal or provincial environmental law enforcement agencies carry out selected inspection activities and

facilitate the exchange of information and cooperation on investigations where both jurisdictions have a role to play."

True to the pattern of executive federalism, environmental objectives and regulatory standards are developed through federal-provincial consultation and bargaining, primarily through the Canadian Council of Ministers of the Environment (CCME). The CCME, composed of the environment ministers of the federal and all provincial and territorial governments, was formed in 1988 in response to growing environmental concern among the public (Lindquist 1999, 54). Predicated on a consensus approach, the organization is used by the ministers to coordinate policies, resolve interjurisdictional problems, exchange information, and coordinate action on national issues (DiMento and Doughman 1998, 717).

Most of the provinces have comprehensive laws and regulatory schemes relating to air, water, waste, and management of natural resources, and some provincial governments have displayed creativity and innovation in dealing with environmental problems (CEC 1997a, 56; MacLellan 1995, 326). However, as in the U.S., some provinces are more successful and effective in this area than others (CEC 1997a, 56; MacLellan 1995, 326). Again, this is largely a function of variations in provincial administrative capacity (Mumme 1996, 65).

As in the United States, there is an ongoing debate within Canada about the extent to which environmental policy should be centralized or decentralized, with recent moves toward decentralization. According to the CEC (1997a, 56), in Canada this discussion is

somewhat more intense than in the U.S. because it is part of a larger debate on the nature of federalism itself:

> In Canada the drive for decentralization in environmental matters is part and parcel of the on-going push from Quebec, some western provinces, and – most recently – Ontario to restructure the whole of federalism....In this political context it is possible that most, if not virtually all, authority in matters of environment and resources could pass to provincial authority.

Within this context, in January 1998 the ministers of the CCME–with the exception of Quebec–signed the Canada-wide Accord on Environmental Harmonization (Harmonization Accord) (CCME website 2002). Under the Accord, the level of government "best situated" to deal with an environmental issue will be responsible for it; furthermore, once a government has accepted such responsibility, the other level of government will not act for a period of time specified by a sub-agreement (CELA 1998). Quebec indicated that certain conditions would have to be met before it would sign the Accord, including adoption by Parliament of amendments to federal legislation that address the need to reduce overlap and duplication between jurisdictions (CCME website 2002).

Those promoting the Harmonization Accord argue that it will lead to better environmental protection across Canada and will achieve greater effectiveness, efficiency, accountability, predictability, and clarity in management of national environmental issues (CCME website 2002; Government of Alberta website 2002). However, the Harmonization Accord is widely regarded as a hand-off of environment-related powers and responsibilities from the federal government to the provinces (Blair 1999, 6; CELA 1998). Shortly after the Accord was signed, the Canadian Environmental Law

Association (CELA) expressed concern that the federal government was giving away its authority, declaring: "We suspect that the 'government' the Accord will define as 'best situated' are the provinces." (CELA 1998)

Of particular concern to observers is the fact that the Accord, which mandates consensus on substantive issues, was developed in the context of budget cuts and deregulation at the provincial level (Blair 1999, 6). As CELA (1998) lamented: "With the provinces increasingly unable (or unwilling) to protect their own environments, the terms of agreements on things like Canada-wide standards, will fall to the lowest common environmental denominator." Indeed, a competitive "race to the bottom" among provinces has been an ongoing concern, especially in the context of trade liberalization (CEC 1997a, 25). For example, in the wake of NAFTA both Ontario and Quebec loosened their provincial regulations on hazardous wastes in order to attract dumping businesses, resulting in a significant increase in U.S. exports of hazardous wastes to Canada (CEC website 2002).

The Harmonization Accord has survived a court challenge filed by CELA in 1998 (CELA 2000). However, the matter is by no means settled, as drafting and interpretation problems with the Accord could well bring it back before the courts (CELA 2000).

Meanwhile, some factions within Canada have been calling insistently for a stronger federal role in environmental policy. According to MacLellan (1995), these sentiments go back to the acid rain issue of the late 1980s, which created a sense of urgency to pass new federal environmental laws and enforce existing statutes. Awareness of globalization and commitments to international environmental agreements have added

to the centralization argument (MacLellan 1995, 329-336). As decentralization of environmental policy–as exemplified by the Harmonization Accord–progresses, criticism of the federal governments' failure to assert its environmental jurisdiction is ongoing (CEC 1997a, 62-63).

Environmental policy in Mexico

The Mexican constitution gives the federal government explicit jurisdiction over a broad range of specific matters which, taken together, have established a historically dominant federal role in natural resources and environmental protection (ELI 1996, ii, 8). Under the constitution of 1917, the states were left with relatively little environmental jurisdiction (ELI 1996, 8). The constitution gives municipalities authority over local land use planning and public services such as drinking water, sewer, sanitation, transit, and park maintenance (ELI 1996, ii, 8, 31). State governments are to establish the normative bases for municipal ordinances in these areas, and may assist in the provision of local services (ELI 1996, 8, 31).

The past fifteen years have witnessed significant changes to this centralized system of environmental authority. In 1987 the constitution was amended to introduce the concept of *concurrencia* in environmental policy (CEC 1997a, 59; ELI 1996, ii). The constitutional principle of *concurrencia* required the federal government to adopt legislation delegating some environmental authority to the state and municipal governments (CEC 1997a, 59; ELI 1996, ii). This constitutional mandate is the primary basis for Mexico's efforts toward decentralization of environmental policy in recent years (CEC 1997a, 59; ELI 1996, ii).

The concept of *concurrencia* is legislatively applied through the federal General Law of Ecological Equilibrium and Protection of the Environment (the "Federal Ecology Law") (CEC 1997a, 60; ELI 1996, ii-iii). The Federal Ecology Law, passed under the Salinas administration in January 1988, is the primary environmental statute at the federal level (ELI 1996, 5). It vested federal authority for environmental protection in the Secretariat for Urban and Ecological Development (which, after going through several incarnations and name changes, was replaced in 2000 by SEMARNAT, the Secretariat of Environment and Natural Resources) (Kublicki 1994, 83-84; Mumme 1996, 5). The Federal Ecology Law delegates jurisdiction over specific environmental matters to the states and municipalities (CEC 1997a, 60; ELI 1996, ii-iii, 9), providing that these governments may exercise authority and enact environmental policies for all areas within their jurisdiction that are not specifically reserved to the federal government (Mumme 2000, 19).

Pursuant to the Federal Ecology Law, subject matters falling under federal jurisdiction include environmental impact review; air, water and soil pollution; hazardous materials, activities and wastes; protected natural areas; wild and aquatic flora and fauna; and use of natural resources (ELI 1996, 290). The law delegates responsibility to the states in air and water pollution control; other forms of pollution, including noise and odors; non-hazardous solid waste management; and certain types of protected natural areas (ELI 1996, 290). State governments are not required to obtain federal approval of programs that fall within areas of state jurisdiction (ELI 1996, iv). However, states are not authorized to issue their own standards, even for matters that fall under state

jurisdiction; the Federal Ecology Law explicitly directs states and municipalities to apply federal standards (CEC 1997a, 60; ELI 1996, iv). Where federal standards are absent, it is unclear whether state and local governments may adopt their own (CEC 1997a, 60; ELI 1996, iv).

Acting under the authority delegated by the Federal Ecology Law, by 1994 all 31 Mexican states and the Federal District had enacted comprehensive environmental laws and established state environmental agencies (Mumme 1996, 12; CEC 1997a, 61; Mumme 2000, 19-20; Assetto, Hajba, and Mumme 2001, 7). For the most part, the State Ecology Laws closely parallel the federal law (ELI 1996, 293); however, the CEC (1997a, 61) has noted considerable variation in the level of detail in each state law to guide regulatory authority. The new state environmental laws provide for land use management, regulate pollution discharges from industrial and agricultural sources, and establish environmental impact assessment procedures (Mumme 1996, 12).

The state laws further specify the distribution of environmental jurisdiction between the states and municipalities (Mumme 2000, 19-20). According to the Environmental Law Institute, most states have not delegated significant control over environmental matters to the municipal governments (ELI 1996, vi-vii). Municipalities are generally responsible for issuing land use and construction permits for new facilities, and some state laws require them to consider environmental factors in granting such permits (ELI 1996, vii).

Under *concurrencia*, the federal government is responsible for all matters falling within state jurisdiction until states have enacted policies regulating the areas delegated;

similarly, state jurisdiction applies to matters delegated to municipalities until municipal regulations are implemented (Mumme 2000, 19; ELI 1996, v, 10, 304). Mumme (2000, 20) describes this aspect of *concurrencia* as "a *nested fail-safe system* where, if the lowest most responsible entity (the municipio) is incapable, then jurisdiction passes to the next highest level (the state), and if that proves inadequate, jurisdiction passes to the highest level (the federal government)."

Under 1996 amendments to the Federal Ecology Law, the federal and state governments have developed coordination agreements for delegation of specific federal functions in areas such as low-level hazardous waste, protection of natural resources, flora and fauna, and management and monitoring of protected natural areas (CEC 1997a, 60, 68). The coordination agreements include new mechanisms for federal oversight of state and local activities, facilitating federal intervention and assistance where a state lacks the requisite institutional capacity (CEC 1997a, 68; ELI 1996, v).

In addition to the Federal Ecology Law, other decentralizing efforts are under way in Mexico as well. Other federal laws affecting environmental protection have been amended to provide for state and municipal involvement in implementing federal policies (Mumme 2000, 20). For example, the federal government has largely turned administration of water resources over to the states and municipalities, while still retaining the decision-making authority in this area (Mumme 1996, 6-7, 62). According to the CEC (1997a, 69), the SEMARNAT Office of Decentralization has undertaken "a comprehensive evaluation of the needs and capacities of all state environmental programs, and is developing general criteria to guide the direction and nature of decentralization

efforts." Particular attention is targeted to the U.S.-Mexico border, where state and local agencies are increasingly involved in environmental management through coordination agreements and under the auspices of the Border 2012 (formerly Border XXI) program (CEC 1997a, 69; Mumme 1996, 63).

Despite this progress toward decentralization, environmental policy in Mexico remains highly centralized, with the federal government occupying the dominant role. As Mumme (1996, 12) points out, the "establishment of state environmental agencies has not, in the short run, significantly altered the pattern of federal predominance in Mexican environmental management..." Adoption of state environmental legislation is only a first step toward decentralization of policy, and most states are still in the early stages of implementing their laws (ELI 1996, x, 289, 309-310).

Observers point out several impediments to decentralization. These include ambiguity regarding where authority lies in some areas of environmental policy: the Federal Ecology Law left room for discretion by federal officials in determining whether to assert jurisdiction (CEC 1997a, 66), resulting in what Mumme (2000, 32-33) calls "a lack of clarity in the division of labor among the levels of government..." The Environmental Law Institute has also noted this state of affairs, calling for intergovernmental mechanisms to clarify jurisdictional questions (ELI 1996, x). Another impediment to decentralization is the slow pace at which state and municipal governments have adopted formal regulations to implement their new environmental laws (ELI 1996, x; Mumme 2000, 32-33; Assetto, Hajba, and Mumme 2001, 9).

Probably the most important and difficult challenge to decentralization is the limited fiscal and administrative capacities of the states and municipalities, which constrains implementation of the new environmental provisions (Mumme 2000, 20; ELI 1996, vi). State and municipal governments have limited abilities to raise their own revenues, and the federal government is usually better positioned to address a particular environmental problem (CEC 1997a, 67). State and local agencies are also lacking in technical expertise and personnel (CEC 1997a, 67; Mumme 1996, 12). Administrative decentralization has been a mixed blessing at best: as Mumme (1996, 62) observes, the "rapid transfer of both rule-making and implementation responsibilities has, by most accounts, substantially exceeded the capacity of these agencies to act on their new responsibilities." According to the CEC (1997a, 67), this situation has led observers to express "concern that increased decentralization of environmental functions cannot be realized without increased resources to ensure institutional capacity at the local level."

Thus, as Mumme (2000, 32) observes, in Mexico "the dominant form of decentralization is still disconcentration rather than devolution." This may not be surprising in light of the long history of centralization in Mexico and the relatively recent trend toward decentralization (CEC 1997a, 66).

Summary: Environmental policy jurisdiction in North America

The CEC (1997a, 23) points out that, in all three countries of North America, there has been a strong trend toward decentralization of environmental policy and governance. In the United States, this trend has been in response to the problems of heavy-handed command-and-control regulation by the federal government. In Canada, it

has been part of a larger, ongoing discussion of the nature of federalism. In Mexico, decentralization has accompanied constitutional reform. Each case of decentralization has been shaped by the federal arrangements peculiar to that particular country. However, they all share a tendency toward intergovernmental coordination to handle the complications of federalism.

Subnational Roles in International Relations

As discussed in Chapter One, subnational governments have become increasingly involved in foreign affairs in response to international interdependence. The states and provinces of the U.S., Canada and Mexico all display this tendency to varying degrees and in slightly different ways.

United States

As mentioned in Chapter One, the U.S. Constitution provides for federal-level control of foreign affairs. The states, however, have a significant role in international relations, through their influence on federal-level decision-making, direct state involvement in the international arena, and state actions that have indirect yet important impacts on foreign relations.

The states wield considerable influence on federal foreign policy decisions. Through a large and powerful lobby that includes the National Conference of State Legislatures, the National Association of State Development Agencies, and the National Governor's Association's Committee on International Trade and Foreign Relations, state interests have a loud voice in the halls of Congress (Duchacek 1984; Kline 1984, 91; Cooper 1986, 671; Kline 1986). State governments also have access to policy-making in

the executive branch, through such means as the state and local liaison office within the federal State Department, and the Intergovernmental Policy Advisory Committee on Trade within the office of the U.S. Trade Representative (Duchacek 1984, 27; Kline 1986, 524-525).

State influence at the federal level can have significant consequences for the shape of foreign policy. For example, in the 1980s the state governments joined forces to defeat a proposed tax treaty with the United Kingdom that would have restricted state taxing authority on multinational corporations (Kline 1984, 90). However, recently some state officials have expressed concern that these mechanisms for influence on federal policy are no longer adequate, as more subtle and complex issues have arisen with respect to free trade and its impacts on state regulatory authority (Orbuch and Singer 1995, 129).

In addition to working with officials in Washington, state governments have become more and more directly involved in international relations. As mentioned in Chapter One, the states have been increasingly assertive in the past few decades in promoting foreign trade and stimulating foreign investment. Their efforts include conducting foreign trade missions, establishing trade offices abroad, and promising grants, loans, or tax holidays to foreign companies setting up branches in the United States. State governments are currently allocating hundreds of billions of dollars per year to their international economic programs (Fry 2001, 7).

States are also becoming directly involved in foreign affairs through a growing network of relationships and agreements with their counterparts along the borders. Contiguous subnational jurisdictions have taken the initiative in solving regional problems,

establishing an impressive record of joint problem-solving (Kline, 1986: 518). The American border states have played a significant role in shaping U.S. policy on the Canadian border, particularly in connection with water issues in the Great Lakes and the Columbia River Basin (Elazar 1987, 260; Elwell 2001). On the Mexican border, the states are involved in issues including Mexican immigration to the U.S., as well as transportation, land use and environmental issues (Elazar 1987, 260; Manzanilla 1996, 69; Herzog 2000).

States also impact foreign relations indirectly, in the course of conducting policy in areas within their jurisdiction. This is particularly significant in the realm of international trade. States are not direct parties to trade agreements such as NAFTA and GATT; however, state policies in government procurement, taxation, regulation of agriculture, health and safety, and environmental protection commonly intersect with free trade rules (Cooper 1993). For example, in the summer of 1985 several midwestern governors passed health regulations banning the import of Canadian hogs, ostensibly because they might contain residues of a certain drug. Canadian hog exporters objected to these regulations as a thinly veiled obstruction to free trade, and the State Department appeared to encourage a threat by the Canadian government to mount a legal challenge on the grounds that the states' actions unconstitutionally interfered with federal jurisdiction over international trade (Cooper 1986).

There appears to be consensus among legal scholars that, under the Commerce Clause and the Supremacy Clause of the U.S. Constitution, the federal government has the constitutional authority to preempt state laws that are inconsistent with international trade

agreements (Kline 1986; Cooper 1993; Charnovitz 1993; Schaefer 2000). However, here again we find a disconnect between what is constitutionally permissible and what is politically possible. As Kline (1986, 526) observes, the "national government could legally pre-empt state control,...but such an approach would require a bruising political battle with state authorities that the national executive would be unlikely to win..." Cooper (1993, 143) agrees that federal officials are reluctant to use the power to preempt state laws. As trade liberalization progresses, balancing of federal-state relations in foreign policy remains a political, rather than constitutional, issue (Charnovitz 1993, 506; Schaefer 2000, 2).

Canada

Canada's constitution is much more vague than the U.S. constitution on the matter of foreign affairs, saying little about the division of powers in the conduct of international relations (Elazar 1987, 260; Michelmann 1986, 543). Because jurisdiction is not clearly defined, Canadian provinces have been rather successful in claiming that their fields of domestic jurisdiction extend to external affairs (Michelmann 1986, 570). Thus, "Canadian provinces operate from a stronger constitutional basis in their involvement in international affairs than do the United States states." (Kline 1986, 532-533).

Like the U.S. states, the provinces have a presence in federal-level foreign policy decisions, although this presence takes a very different form from the Congressional lobbying we see in the U.S. Not surprisingly, given what we now know about Canadian federalism, provincial influence on foreign policy is manifested primarily through federal-provincial conferences. These institutional mechanisms for executive federalism include

the Federal-Provincial Relations and Francophone Affairs Bureau within the Department of External Affairs; the Canadian Trade and Tariffs Committee, established during the Tokyo Round of GATT negotiations to get provincial input on non-tariff barriers to trade; and regular consultations between national and provincial representatives during the negotiations over NAFTA and the Canada-U.S. Free Trade Agreement (Cooper 1986, 671; Hocking 1986, 500-501; Fry 1990, 121; Fry 2001, 5).

Even more than the U.S. states, the Canadian provinces are directly active in international trade promotion (Kline 1986, 532-533; Fry 1990, 122). In a country economically dependent on exports and natural resource exploitation, the provinces have constitutional responsibility for economic development and management of natural resources, which inevitably translates to a high degree of subnational activity in this arena (Feldman and Feldman 1984, 58; Kline 1986, 535). The provinces "have historically had more offices opened overseas and spent appreciably more on international programs than their counterparts in the United States." (Fry 2001, 3) In particular, the western provinces–economically based in agriculture and well endowed in mineral resources–have been motivated to develop international connections, given that both of these sectors are dependent on export markets (Hocking 1986, 488; Cooper 1986, 663).

The Canadian provinces are also involved in a wide variety of transborder activities, participating extensively in organizations that bring together politicians and civil servants from subnational units on both sides of the border with the United States (Elwell 2001). While they are parties to a large and growing number of formal international agreements, most provincial relations with their American counterparts are informal in

nature (Feldman and Feldman 1984, 48; Michelmann 1986, 568).

Like the U.S. states, the Canadian provinces impact foreign relations in the natural course of conducting policy within their areas of jurisdiction; however, this impact is much more direct than it is in the U.S. While the federal government has the power to negotiate international treaties, the Canadian constitution is silent about the power to implement them (McIlroy 1997, 433). Thus, international treaties are not self-executing in Canada; under the principle of parliamentary supremacy, implementation of a treaty generally requires legislation (McIlroy 1997, 433). Under Section 132 of the constitution, the power to implement treaties through legislation is divided between the federal and provincial governments, with the implementing authority falling to the level of government that has jurisdiction over the subject matter covered in the treaty (Luz 2000/2001, 10-11; McIlroy 1997, 433-434; Fawcett 1996, 10).

Thus, where treaties affect policy areas that normally come under provincial jurisdiction, they require provincial legislation or consent to take effect (Watts 1996). With the global trade agenda evolving away from tariffs and encompassing subjects such as investment, procurement, services, and labor and environmental standards, international treaties negotiated by the federal government of Canada are encroaching more and more on areas of provincial jurisdiction (Luz 2000/2001, 3; McIlroy 1997). Within this context–in contrast to the situation in the U.S.–the constitutional power of the federal government to compel subnational compliance with international obligations is questionable at best (McIlroy 1997, 435, 438). As Fawcett (1996, 11) observes:

> Nothing in the NAFTA, or any other international agreement for that matter, prevents a subnational unit...from disregarding a commitment undertaken by a federal government under an international agreement where such commitment relates to a matter otherwise within provincial jurisdiction.

Thus far, the Canadian system has muddled through this dilemma, in some instances barely avoiding payment of compensation for provincial violation of trade agreements (McIlroy 1997, 438; Luz 2000/2001, 11-12). However, as the international trade agenda continues to encroach on provincial powers, significant changes may soon be necessary (McIlroy 1997, 438-439; Luz 2000/2001, 3). Thus, as McIlroy (1997, 439) observes, Canada faces a difficult choice: either expand the federal power to implement treaties at the price of provincial sovereignty, or lose credibility and leverage in international negotiations.

Mexico

In contrast to the United States and Canada, the subnational role in international relations in Mexico is essentially limited to transborder activities, as a result of the significant limitations in state and local capacity discussed above. Regular summit meetings between Mexican governors and their U.S. counterparts constitute an important mechanism for transborder relations (Duchacek 1984, 10). In addition, the six Mexican border states have participated in establishing state-level joint commissions with their four neighboring U.S. states to handle regional problems (Hansen 1984, 141; Mumme 1996, 63). Other such activities include numerous international conferences involving all ten border states, as well as transborder state alliances and regional plans to address such issues as water management, air quality, transportation, land use planning, and economic

development (Hansen 1984, 141; Bennett and Herzog 2000, 984; Mumme 1996; Herzog 2000). Moreover, in response to recent rapid urbanization along the border, some twin cities straddling the U.S.-Mexico international boundary are developing effective cross-border liaisons (Hansen 1984, 140; Bennett and Herzog 2000, 985; Herzog 2000). The extensive international activities of the northern Mexican states and municipalities have served as an exception to the general rule that subnational governments in developing countries do not become internationally involved, due to limited capacity (Fry 1988).

Far removed from Mexico City, many border state and local officials feel that they have a better understanding than national officials of local needs and appropriate solutions (Hansen 1984, 141). Transboundary contacts have developed out of necessity, as cross-boundary movements of products, persons, and pollutants have grown in speed and volume (Duchacek 1984, 9). Environmental and social problems along the border have worsened rapidly with increasing economic interdependence between the U.S. and Mexico, manifested especially in tourism and the *maquiladora* industry (Haces and Nicolas 1996, 240). The impacts of free trade have created a particularly desperate need for infrastructure such as highways, bridges, waste disposal, and water treatment in the northern states (Haces and Nicolas 1996, 241; U.S. GAO 1996). Lacking in fiscal, technical and administrative capacity to meet these needs, state and local governments along the border have pursued binational relationships as a partial–though insufficient–response (U.S. GAO 1996).

As for subnational impacts on foreign policy, the Mexican states do not compare to the states of the U.S. or the Canadian provinces. In a highly centralized federal system,

the states lack both the political clout of their U.S. counterparts and the constitutional advantages of the provincial governments.

Conclusion

The general observations yielded by this examination of federalism in the United States, Canada and Mexico can be translated into expectations of how the NAFTA environmental regime will impact the states and provinces of these three countries. While the U.S. states and the Canadian provinces both enjoy a significant amount of power and autonomy, the provinces operate from a somewhat stronger position within their federal system, both generally and within the environmental and international policy spheres. The Mexican states lag far behind across the board for a number of important reasons, including constitutional restrictions, a long history of centralization, and a severe lack of institutional capacity.

In the chapters that follow, I will provide details of the NAFTA environmental regime and its impacts, both potential and real, on the states and provinces of the three North American countries. Such impacts may present either constraints or opportunities to the subnational governments. As will be discussed in Chapter Four, the investment rules in Chapter 11 of NAFTA carry potentially severe constraining effects, by limiting the ability of states and provinces to regulate the environment. Further, constraints may be found in the environmental side agreement's citizen submission process, which can call a government's enforcement practices into question; cases of this will be presented in Chapter Five. Finally, Chapter Six will address the potentially enabling impacts of the

regime, in which opportunities may be offered to the states and provinces through capacity-building and provision of a forum.

Based on the observations I have just presented in this chapter, I expect to find substantial variation among the states and provinces in terms of how they are impacted by the NAFTA environmental regime. In particular, I anticipate finding the Canadian provinces and the U.S. states to be significantly less constrained by the regime than the states of Mexico. According to my expectations, the U.S. states will use intergovernmental processes and their considerable political clout to overcome the constraints presented by the regime. The Canadian provinces will be in a similar, perhaps even stronger position, relying on the mechanisms of executive federalism as well as their constitutional authority in environmental policy and international relations to overcome constraints. The Mexican states, in a much weaker position than their northern counterparts, will have no choice but to accept the limitations imposed by the regime.

On the other hand, I anticipate that the Mexican states will benefit most from the opportunities provided by the regime's enabling aspects. Clearly the states of Mexico have the most to gain in this respect. They are the most in need of capacity-building, and in a centralized system where the states have historically lacked a voice in governance, they stand to benefit most from any forum the regime may provide to them. Indeed, it may prove to be serendipitous that such opportunities are presenting themselves at a time of such profound transition in Mexican federalism, particularly in the environmental policy arena.

With these expectations in hand, we move on now to a closer look at the NAFTA/NAAEC environmental regime and its impacts. The following chapter describes the details of the regime. As mentioned, Chapters Four, Five and Six will then present cases, focusing on constraints and opportunities. In Chapter Seven, I will offer conclusions, detailing whether, and to what extent, my expectations are borne out.

CHAPTER THREE

Introduction

The North American Free Trade Agreement (NAFTA) took effect, along with its side agreements, on January 1, 1994. It created the world's largest free trade zone to date, with approximately $300 billion in trade among 360 to 370 million consumers (Johnson and Beaulieu 1996, 12; DiMento and Doughman 1998, 659; IISD 2001a, 7). As discussed in Chapter One, the NAFTA negotiations came at a time of rising concern among environmentalists over the consequences of liberalized trade for environmental protection; the fact that the trade agreement included Mexico, a developing country with a history of poor environmental enforcement, deepened these misgivings. As a result, the agreement received sharp attention from environmental nongovernmental organizations (ENGOs), focusing primarily on the U.S. Congress, where approval was required for NAFTA's implementation. The intense scrutiny and well-publicized demands of environmentalists made it necessary to write environmental provisions into the NAFTA text, as well as an environmental side agreement, to secure approval of the trade pact in Congress (Johnson and Beaulieu 1996, 24-34; Kirton 1997, 480; Raustiala 1996, 724-725; Moreno et al. 1999, 422).

Given the mandate to incorporate environmental sensitivity within a liberalized trade regime, the treaty negotiators found themselves in new territory, lacking any substantive precedents from which to draw. The results of their efforts are thus novel and,

as Johnson and Beaulieu (1996, xiii-xiv) point out, "will therefore be subject to ongoing interpretation in the context of evolving environmental concerns of North Americans." As trade liberalization continues to progress beyond the elimination of tariffs to nontariff trade barriers, the model established by the NAFTA environmental regime is expected to have a lasting impact on future considerations of the trade/environment nexus (Johnson and Beaulieu 1996).

This chapter provides an overview of the NAFTA environmental regime. The first section presents the various components of the main treaty text that bear more or less directly on environmental issues. This is followed by a look at the North American Agreement on Environmental Cooperation (NAAEC), the environmental side agreement where the core of the regime is found. The third section provides a brief examination of the main bilateral environmental agreements and institutions in North America that provide some complement to the NAFTA regime. The fourth section discusses the provisions of NAFTA and NAAEC that address subnational governments. The concluding section speculates briefly on some of the constraints and opportunities presented by the regime to the subnational governments, and anticipates the cases that will be examined in the following three chapters to help illuminate the roles and responsibilities, limitations and opportunities of the subnational governments under the NAFTA environmental regime.

Environmental Provisions in the NAFTA Text

Preamble

The NAFTA Preamble presents fifteen statements of ideals toward which the governments of the U.S., Canada and Mexico are "resolved" to strive; three of these

statements refer to the environment. After stating various resolutions relating to expanded trade, the Preamble proclaims that the parties are resolved to "(u)ndertake each of the preceding in a manner consistent with environmental protection and conservation..." The parties also promise to "(p)romote sustainable development;" and to "(s)trengthen the development and enforcement of environmental laws and regulations..." As Johnson and Beaulieu (1996, 66-67) point out, these three provisions in the Preamble set a general tone for mitigating the environmental effects of trade; however, because they are not enforceable, their significance is limited.

Article 104

Article 104 lists three international environmental treaties that will take precedence over NAFTA in the event of any inconsistency: the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES); the *Montreal Protocol on Substances that Deplete the Ozone Layer* (Montreal Protocol); and the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal* (Basel Convention). This article is supplemented by Annex 104.1, which lists the La Paz Agreement between the U.S. and Mexico on the protection and improvement of the border environment, as well as an agreement between the U.S. and Canada on the transboundary movement of hazardous waste, as international pacts that will take precedence over NAFTA. Article 104 further provides that the parties may agree to include additional environmental agreements in Annex 104.1 in the future.

Specifically, Article 104 states that the named environmental agreements "shall prevail to the extent of the inconsistency, provided that where a Party has a choice among

equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent" with the free trade provisions of NAFTA. Johnson and Beaulieu (1996, 109), while noting that this "rule of paramountcy, or supremacy, of named environmental treaties is without precedent," also point out that domestic measures implementing such treaties could be challenged on the grounds that they are not the "least inconsistent" means of doing so. The term "least inconsistent" has been used under the General Agreement on Tariffs and Trade (GATT) to set an extremely high standard for such a domestic environmental measure to be acceptable, and Condon (2002) argues that the terms of Article 104 are not much different from those of the GATT. On the other hand, Johnson and Beaulieu (1996, 109) note that the wording of NAFTA's Article 104 may mitigate its effects somewhat: "For a challenge to succeed, a panel must be satisfied not only that there is at least one measure that is more NAFTA-consistent than the challenged measure but also that this more NAFTA-consistent measure is both 'equally effective' and 'reasonably available.'" These qualifiers within Article 104, then, may provide a reasonable expectation that domestic measures implementing the listed international environmental agreements would be safe from challenge as obstacles to free trade.

Chapter Seven

Chapter Seven, Section B of NAFTA establishes the discipline governing sanitary and phytosanitary (S&P) measures, which are defined under Article 724 as those measures that

a Party adopts, maintains or applies to:

(a) protect animal or plant life or health in its territory from risks arising from the introduction, establishment or spread of a pest or disease,
(b) protect human or animal life or health in its territory from risks arising from the presence of an additive, contaminant, toxin or disease-causing organism in a food, beverage or feedstuff,
(c) protect human life or health in its territory from risks arising from a disease-causing organism or pest carried by an animal or plant, or a product thereof, or
(d) prevent or limit other damage in its territory arising from the introduction, establishment or spread of a pest... (NAFTA, Article 724)

Johnson and Beaulieu (1996, 74) point out that rules on S&P measures are particularly important in the North American context "because of the significant gap between U.S. and Mexican standards for pesticide use and levels of pesticide application and residue on crops." The discipline established under Chapter Seven applies to those S&P measures "that may, directly or indirectly, affect trade between the Parties." (NAFTA, Article 709) It has been argued that, with the expected expansion of trade between the U.S., Canada and Mexico under NAFTA, it would be difficult to enact an S&P measure that does *not* affect trade between the parties; thus, virtually all such measures are expected to fall under the rules of Chapter Seven (Johnson and Beaulieu 1996, 101, 106).

The NAFTA parties retain their autonomy in deciding their own levels of sanitary and phytosanitary protection, so long as those levels do not result in arbitrary or unjustifiable discrimination against another party's goods or constitute a disguised restriction on trade [NAFTA, Articles 712(2), 715(3)(b)]. However, the measures that a party adopts to achieve its chosen levels of protection must meet several criteria to be considered legitimate. First, such measures must be based on scientific principles, and on

a risk assessment as appropriate [NAFTA, Article 712(3)]. Second, they must not arbitrarily or unjustifiably discriminate against like goods of another party, where identical or similar conditions of production prevail [NAFTA, Article 712(4)]. Third, such measures must be applied "only to the extent necessary" to achieve appropriate levels of protection, "taking into account technical and economic feasibility" [NAFTA, Article 712(5)]. Finally, they must not be adopted or implemented as disguised restrictions on trade [NAFTA, Article 712(6)]. Scholars have speculated as to the respective meanings of these criteria, their relationship to similar wording in GATT, and the stringency of any tests that future NAFTA panels may use to determine the legitimacy of S&P measures (Hodges 2001; Hufbauer et al. 2000; Johnson and Beaulieu 1996, 76-86). This speculation will likely continue until actual NAFTA challenges to S&P measures arise and reach resolution.

The NAFTA parties are encouraged to use international standards in adopting S&P measures, "(w)ithout reducing the level of protection of human, animal or plant life or health," and to participate in international standardizing organizations such as the *Codex Alimentarius Commission*, the *International Office of Epizootics*, the *International Plant Protection Convention*, and the *North American Plant Protection Organization* (NAFTA, Article 713). While S&P measures are not required to conform to international standards, those that do are presumed to be consistent with the criteria for legitimacy described above (NAFTA, Article 713). A party's S&P measure that is not based on a relevant international standard is subject to question by another party if the measure appears to be having an adverse impact on trade; in such a case, the party adopting the

measure may be required to provide a written explanation of the reasoning behind it (NAFTA, Article 713). However, any party asserting that an S&P measure of another party is not legitimate under NAFTA maintains the burden of proving this allegation (NAFTA, Article 723).

The parties are encouraged to pursue upward harmonization of S&P measures and protection levels "to the greatest extent practicable." (NAFTA, Article 714) Toward that end, the agreement mandates technical cooperation between the parties (NAFTA, Article 720) and establishes a trilateral Committee on Sanitary and Phytosanitary Measures (NAFTA, Article 722). However, Johnson and Beaulieu (1996, 115-116) point out that upward harmonization is not an enforceable objective. They argue that the actual achievement of upward harmonization is largely a matter of political will among the three parties, with the "greatest extent practicable" qualifier possibly excusing some parties from accomplishing it on the basis of wealth, institutional capacity, and/or ecological carrying capacity (Johnson and Beaulieu 1996, 115-116).

The general implications of NAFTA's Chapter Seven for domestic S&P laws and regulations are still unclear. While it could provide the basis for challenges to such measures, Chapter Seven has been declared to be "on balance, no more menacing to domestic environmental measures than existing international law." (Johnson and Beaulieu 1996, 85)

Chapter Nine

Chapter Nine of NAFTA governs all non-S&P standards-related measures enacted by the parties. Article 915 defines a standards-related measure as one of three things: 1) a

standard–a document that establishes guidelines or characteristics for goods, processes and production methods, services, or operating methods, with which compliance is *not* mandatory; 2) a *technical regulation*–a document that establishes such guidelines or characteristics, with which compliance *is* mandatory; or 3) a *conformity assessment procedure*–a procedure used to determine that a standard or technical regulation is fulfilled, such as inspection, monitoring, and registration (NAFTA, Article 915). Given this expansive definition of a standards-related measure, Johnson and Beaulieu (1996, 87) argue that most environmental measures enacted by the NAFTA parties would be covered by Chapter Nine rather than Chapter Seven. Chapter Nine, like Chapter Seven, applies only to such measures that "may, directly or indirectly, affect trade" between the parties (NAFTA, Article 901); again, most standards-related measures are expected to fall within this broad category (Johnson and Beaulieu 1996, 101).

In enacting standards-related measures, each NAFTA party retains the right to establish the levels of environmental protection it considers appropriate [NAFTA, Article 904(2)], as long as it avoids "arbitrary or unjustifiable distinctions between similar goods and services" in arriving at those levels [NAFTA, Article 907(2)]. With regard to the measures themselves, Article 904(1) affirms each party's right to

> adopt, maintain or apply any standards-related measure, including any such measure relating to safety, the protection of human, animal or plant life or health, the environment or consumers, and any measure to ensure its enforcement or implementation. Such measures include those to prohibit the importation of a good of another Party or the provision of a service by a service provider of another Party that fails to comply with the applicable requirements of those measures or to complete the Party's approval procedures [NAFTA, Article 904(1)].

Chapter Nine has been pegged as more lenient than Chapter Seven in terms of the domestic environmental measures it will allow. As Johnson and Beaulieu (1996, 89) point out, this chapter lacks the "only to the extent necessary" wording found in Chapter Seven, instead requiring merely that standards-related measures "relate to" environmental and health objectives. Also missing in Chapter Nine is the requirement that such standards be based on scientific principles or risk assessment (DiMento and Doughman 1998, 662; Johnson and Beaulieu 1996, 94).

Chapter Nine does require that, in enacting standards-related measures, a party must accord to the goods and service providers of the other NAFTA parties both national treatment and most-favored-nation treatment–that is, treatment no less favorable than that accorded to like goods and service providers of any other country [NAFTA, Article 904(3)]. It also stipulates that standards-related measures not be adopted "with a view to or with the effect of creating an unnecessary obstacle to trade..." [NAFTA, Article 904(4)] However, it goes on to say:

> An unnecessary obstacle to trade shall not be deemed to be created where:
> (a) the demonstrable purpose of the measure is to achieve a legitimate objective; and
> (b) the measure does not operate to exclude goods of another Party that meet that legitimate objective [NAFTA, Article 904(4)].

As Dreckmann (1997) points out, "legitimate objective" is not defined. Johnson and Beaulieu (1996, 93-94) argue that, because environmental protection and sustainable development are both recognized in the NAFTA Preamble as legitimate objectives, "(o)ne would have difficulty imagining any thoughtfully drafted and duly enforced environmental standards-related measure that this exonerating clause could not save."

Chapter Nine contains some provisions similar to those found in Chapter Seven. In adopting standards-related measures, the parties are again encouraged to consult relevant international standards; any standards-related measure that conforms to an international standard is presumed to satisfy the requirements concerning non-discriminatory treatment and unnecessary obstacles to trade (NAFTA, Article 905). As with S&P measures, any party challenging a standards-related measure as a violation of free trade under NAFTA bears the burden of proof [NAFTA, Article 914(4)]. Chapter Nine also, like Chapter Seven, encourages the parties to pursue upward harmonization of their standards-related measures (NAFTA, Article 906), calling for technical cooperation (NAFTA, Article 911) and establishing a Committee on Standards-Related Measures (NAFTA, Article 913) to help achieve this end. However, again, such harmonization is called for only "to the greatest extent practicable." (NAFTA, Article 906) The same limitations on upward harmonization of S&P measures noted above are expected to apply to upward harmonization of standards-related measures under Chapter Nine (Johnson and Beaulieu 1996, 114-116).

As with Chapter Seven, it is still too early in NAFTA's history to tell how Chapter Nine will be interpreted in the event that a party's standards-related measure is challenged. Thus far, the NAFTA parties have avoided such disputes; Hufbauer et al. (2000, 8) speculate that this is due in part to skillful management of controversies by the NAFTA institutions and other bilateral arrangements. Some observers argue that environmental measures are more likely to prevail under Chapter Nine than under Chapter Seven; thus,

"the party complained against would do well to ensure that a challenged law or regulation is not classified as an S&P measure." (Johnson and Beaulieu 1996, 95)

Chapter Eleven

NAFTA's Chapter Eleven establishes the discipline governing investment. It requires that each NAFTA party accord to investors of the other parties national treatment, most-favored-nation treatment, or the better of the two (NAFTA, Articles 1102, 1103, 1104). A rather vague provision also mandates "fair and equitable treatment," a minimum standard as recognized by international law (NAFTA, Article 1105). Pre-existing non-conforming laws and regulations may be exempted from the most-favored-nation and national treatment requirements by reservation in an Annex (NAFTA, Article 1108).

Article 1110, which deals with expropriation, has received a great deal of attention from observers. It states that no party "may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment...," except for a public purpose, on a non-discriminatory basis, in accordance with due process of law, *and* on payment of compensation [NAFTA, Article 1110(1)]. Thus, as Kass (2000, 3-4) points out, a government that takes a measure amounting to indirect expropriation of an investment must pay compensation to the investor, "even when the governmental action is taken on a non-discriminatory basis for a public purpose in accordance with all applicable legal requirements."

The intended purpose of Article 1110 was primarily to protect U.S. and Canadian investors from arbitrary governmental expropriation of their investments in Mexico, where the foreign investment climate has historically been unpredictable (Kass 2000, 3, 4; McKinney 2000, 224; Dhooge 2001, 28; IISD 2001a, 7). For its part, Mexico embraced the provision, which held the prospect of attracting foreign investment (IISD 2001a, 7). However, North American investors and their attorneys have expanded the ban on indirect expropriation beyond its original intent, "creatively using this concept to ask for damages allegedly resulting from pollution control regulations..." (McKinney 2000, 242)

At the time that NAFTA was implemented, most of Chapter Eleven was seen as having little to no relevance to environmental issues. Even Johnson and Beaulieu (1996)–arguably the most comprehensive and widely cited early analysis of the NAFTA environmental regime–limited discussion of Chapter 11 to Article 1114. This article, titled "Environmental Measures," reads as follows:

1. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

2. The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from...such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment....If a Party considers that another Party has offered such encouragement, it may request consultations with the other Party...(NAFTA, Article 1114).

Most of the attention to Article 1114 has been focused on the second part, commonly referred to as the "pollution havens" clause. This language was included in

NAFTA in response to environmentalists' concerns that free trade would motivate governments to relax environmental regulation in order to attract foreign investment, thus triggering a "race to the bottom." (IISD 2001a, 12) However, as several observers have noted, this section is purely hortatory and lacks an enforcement mechanism; where relaxation of environmental measures to attract investment is suspected, the only recourse is consultations between the parties (IISD 2001a, 12; Johnson and Beaulieu 1996, 112-113; DiMento and Doughman 1998, 661).

Because most observers of the NAFTA environmental regime were focused on Article 1114, it came as a broad surprise when investors began using other sections of Chapter Eleven to challenge environmental laws. The first Chapter Eleven challenge of an environmental measure came in late 1996, when the U.S.-based Ethyl Corporation sued the government of Canada over its ban on MMT, a gasoline additive manufactured by Ethyl (Kass 2000, 4; Mumme 1999, 2). Although the ban was supported by environmental science, the case was settled in July 1998 with Canada's withdrawal of the measure and payment of $13 million in compensation (Mumme 1999, 2; IISD 2001a, 15).

The implications of this case and its subsequent resolution caused grave concern among environmentalists–concern which proved to be well founded over time (IISD 2001a, 15). As Kass (2000, 4) notes, the Ethyl case let the Chapter Eleven "cat out of the bag." Since 1996, a total of twenty-nine Chapter Eleven lawsuits are known to have been filed (www.naftalaw.org 2002). Of these, eleven have been challenges of environmental or land-use regulations (IISD 2001a, 70; www.naftalaw.org 2002).

Chapter Eleven is a landmark in trade liberalization, representing the first instance of a trade agreement allowing foreign investors to directly challenge the policies of host governments through binding arbitration (McKinney 2000, 224). The investor-state dispute process, which involves an arbitration panel consisting of three people appointed by the disputing parties, does not allow for public participation (NAFTA, Article 1120, 1123-1136). Indeed, as Kass (2000, 4) laments, "absent the parties' consent, it is extremely difficult for the public to know the outcome of pending claims, the bases for arbitrators' decisions or even the number of active claims." Governments may not deny a request for arbitration (Stevis and Mumme 2000, 30), and the decision of the arbitral panel is automatically enforceable in the domestic courts of the country involved (McKinney 2000, 225). The belated recognition of Chapter Eleven's potentially far-reaching ramifications–particularly for the environment-trade relationship–is causing considerable concern among observers (Stevis and Mumme 2000; Mumme 1999; Kass 2000; McKinney 2000; IISD 2001a).

Chapter Twenty

Chapter Twenty, which deals with dispute settlement under NAFTA, relates only indirectly to environmental issues. The chapter creates the Free Trade Commission (FTC) for the purposes of implementing NAFTA and resolving disputes that may arise under the agreement (NAFTA, Article 2001).

Some trade disputes may fall under either NAFTA or GATT. Article 2005 recognizes this possibility and stipulates that, in disputes relating to Article 104, Chapter Seven or Chapter Nine of NAFTA, the party complained against may require that the

dispute be settled under NAFTA rather than GATT [NAFTA, Article 2005(3) and (4)]. Thus, as Gantz (1999) points out, the three NAFTA parties are presented with unique choice-of-forum opportunities that do not exist for any other group of nations. This is significant because the dispute settlement provisions of NAFTA are somewhat more friendly to environmental concerns than those under GATT. As mentioned above, under Chapters Seven and Nine the burden of proof in dispute settlement lies with the complaining party, in direct contrast to the rules for dispute settlement under GATT. Another innovation within NAFTA is that the dispute panel may seek the advice of a technical expert or scientific review board, thus allowing consideration of matters other than economic or trade concerns [NAFTA, Article 2007(5)]. However, as with GATT and virtually all other trade agreements, dispute proceedings under NAFTA still lack transparency, making it difficult to assure that environmental concerns will be given due consideration (Johnson and Beaulieu 1996, 72-73).

It should be noted that the dispute settlement process established under Chapter Twenty is a state-to-state procedure, similar to those found elsewhere in international law. Any state-to-state disputes arising under the investment rules of Chapter Eleven are thus covered by Chapter Twenty (IISD 2001a, 11). However, this chapter does not relate to investor-state disputes arising under Chapter Eleven, which are instead pursued through arbitration before either the International Centre for Settlement of Investment Disputes (ICSID) or the United Nations Commission on International Trade Law (UNCITRAL) (NAFTA, Article 1120; Kass 2000, 4; McKinney 2000, 225).

Summary: Environmental provisions in the NAFTA text

While the NAFTA text broke new ground in including unprecedented environmental provisions, it remains essentially a trade agreement (Johnson and Beaulieu 1996, 66, 118). As such, as Mumme (1999, 2) points out, NAFTA "predictably privileges trade over the environment, notwithstanding its preambular rhetoric in favor of sustainable development." Limited in its promise of environmental protection, NAFTA failed to win the support of the environmental interests crucial to winning Congressional approval. Thus, the three parties were obliged to return to the negotiating table to craft the environmental side agreement known as the North American Agreement on Environmental Cooperation (NAAEC).

North American Agreement on Environmental Cooperation

Unlike NAFTA, the NAAEC, as an executive agreement, did not require approval by the U.S. Congress. Any NAFTA party may withdraw from the NAAEC with six months notice, normally without involving its legislature (NAAEC, Article 50; Richardson 1998, 10; Johnson and Beaulieu 1996, 126-127). While such a withdrawal would not legally impact a party's membership in NAFTA, Johnson and Beaulieu (1996, 127) point out that the NAAEC was so important in getting support for NAFTA that "withdrawal from NAAEC by any party would probably create a serious political crisis, both domestic and international, and put NAFTA itself in jeopardy."

The NAAEC negotiations were particularly difficult, for two primary reasons. First, Mexico and Canada were reluctant participants at best; as McKinney (2000, 91) observes,

> both Canada and Mexico have historically gone to some lengths to protect their national sovereignty against encroachment by the superpower next door....Negotiations that would address the concerns of environmentalists in the United States and at the same time not offend the sensibilities of the other two partners, particularly Mexico, were indeed a challenge.

The second difficulty was that the parties had agreed not to re-open the text of NAFTA itself. The negotiators were thus faced with the challenge of making the trade regime under NAFTA more environmentally sensitive without changing the trade rules themselves. Some have argued that this constituted an impossible restriction, and that the NAAEC negotiations ultimately fell far short of their goal by failing to integrate trade and environmental concerns, rules and institutions (Johnson and Beaulieu 1996, 123-128; Hufbauer et al. 2000, 2).

The NAAEC has a minimal relationship with NAFTA. While Article 1(d) of the NAAEC states that one of the side agreement's goals is to "support the environmental goals and objectives of the NAFTA," and Article 10(6) calls for cooperation with the NAFTA Free Trade Commission to accomplish these goals and objectives, closer examination reveals an extremely limited institutional connection between the two agreements. The Commission for Environmental Cooperation (CEC) created by the NAAEC is to provide assistance to the Free Trade Commission when consultations arise under the "pollution havens" clause of NAFTA's Article 1114; identify experts to provide technical advice to NAFTA committees and working groups; and engage in an ongoing consideration of the environmental effects of NAFTA [NAAEC, Article 10(6)]. Several scholars have bemoaned the passive role of the CEC in these matters, limited to mere monitoring and advice that may or may not be accepted by the NAFTA bodies involved

(Johnson and Beaulieu 1996, 129, 264-265; Stevis and Mumme 2000, 28). The CEC is given no role in expanding the list of environmental treaties recognized by NAFTA's Article 104 (Johnson and Beaulieu 1996, 265). Neither is there any CEC involvement in the NAFTA committees on S&P and Standards-Related Measures (DiMento and Doughman 1998, 736-737). Furthermore, the CEC has virtually no jurisdiction over trade matters or the operation of NAFTA (Johnson and Beaulieu 1996, 265; Stevis and Mumme 2000, 26). Finally, although the CEC's mandate includes monitoring of NAFTA's environmental effects, "it has no resources to directly fund structural adjustment or otherwise mitigate NAFTA's environmental impact..." (Stevis and Mumme 2000, 28-29)

Indeed, the institutional relationship between the CEC and the Free Trade Commission has been extremely slow to develop. As of December 2002–almost nine years after the NAAEC and NAFTA took effect–the two bodies had only met once, and had yet to define their respective roles in matters involving trade and the environment (Hufbauer et al. 2000, 37; Knox 2002; Block 2002a).

NAAEC objectives

Article 1 of the NAAEC lists the agreement's objectives:

> The objectives of this agreement are to:
> (a) foster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations;
> (b) promote sustainable development based on cooperation and mutually supportive environmental and economic policies;
> (c) increase cooperation between the Parties to better conserve, protect, and enhance the environment;
> (d) support the environmental goals and objectives of the NAFTA;
> (e) avoid creating trade distortions or new trade barriers;
> (f) strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices;

(g) enhance compliance with, and enforcement of, environmental laws and regulations;
(h) promote transparency and public participation in the development of environmental laws, regulations and policies;
(i) promote economically efficient and effective environmental measures; and
(j) promote pollution prevention policies and practices.

Observers have noted the great breadth of the NAAEC's mission as specified in this list of objectives. As Mumme and Duncan (1997, 45) point out, "no environmental issues are explicitly excluded from its scope." Johnson and Beaulieu (1996, 140-141) note that the objectives extend well beyond trade to establish a comprehensive regime of trilateral cooperation for the improvement of the North American environment.

The expansive scope of the NAAEC may be viewed as an asset, justifying virtually any environmental project the CEC may undertake and providing it with the flexibility to respond to environmental concerns as they arise (Block 1997, 2-3). On the other hand, it may be seen as something of a liability in that the NAAEC provides

> little specific guidance as to which elements ought to be accorded a priority....This has left the CEC fishing for a functional role in the real world of North American environmental management. (Mumme and Duncan 1997, 49)

Indeed, a four-year review of the NAAEC recommended a sharper focus, calling on the CEC to forego the shotgun approach and concentrate on a small number of meaningful projects (Independent Review Committee 1998).

Obligations of the Parties

The governments of the U.S., Canada and Mexico commit themselves to certain environmental obligations in Articles 2 through 7 of the NAAEC. These obligations include preparation and publication of periodic reports on the state of the environment; development of environmental emergency preparedness measures; promotion of

environmental education; environmental research and technology development; promotion of economic instruments to achieve environmental goals; consideration of CEC recommendations regarding specific pollutants; and consideration of export bans on pesticides and toxic substances whose use is already banned domestically (NAAEC, Article 2). In addition, each party is called upon to "ensure that its laws and regulations provide for high levels of environmental protection...," and to continually strive to improve its environmental policies (NAAEC, Article 3). Other obligations include providing private access to domestic remedies–such as lawsuits, sanctions, emergency closures and injunctions–when violations of environmental policies occur (NAAEC, Article 6); and procedural guarantees of fairness, openness and due process in each party's domestic administrative and judicial proceedings (NAAEC, Article 7).

Unlike the obligations under NAFTA, most of the obligations listed within the NAAEC are not enforceable. For example, observers have noted that Article 3, which calls upon the parties to ensure that their laws and regulations provide for "high levels" of environmental protection, fails to define what such "high levels" might be (Raustiala 1996, 730; Richardson 1998, 6). Furthermore, the provision "is essentially hortatory, as no mechanism exists to police or investigate the level of environmental law." (Raustiala 1996, 730) Johnson and Beaulieu (1996, 149) suggest that, because these obligations are not binding on the NAAEC parties themselves, it will be up to environmental nongovernmental organizations (NGOs) and, perhaps, the CEC to monitor their implementation and publicize any lapses by member governments.

The only enforceable obligation found in the NAAEC is expressed in Article 5: "With the aim of achieving high levels of environmental protection and compliance with its environmental laws and regulations, each Party shall effectively enforce its environmental laws and regulations through appropriate governmental action...." This commitment to "effectively enforce" domestic environmental policy is the sole obligation that is subject to dispute resolution as detailed in Part Five of the NAAEC (Richardson 1998, 9; Johnson and Beaulieu 1996, 147, 172). It highlights the primary concern of the side agreement's negotiators: as Raustiala (1996, 729) observes, the "NAAEC, though covering a number of important trade and environmental issues, is centrally concerned with strengthening the enforcement of domestic environmental law." Johnson and Beaulieu (1996, 257) agree that the "NAAEC displays a constant, unambiguous preoccupation with the obligation for signatory countries to effectively enforce their environmental laws."

This focus on enforcement was largely due to environmentalists' observations that environmental statutes and regulations in Mexico were generally acceptable, but often inadequately enforced (Kirton 1997, 464; Johnson and Beaulieu 1996, 257, 260). In addition, concerns over national sovereignty limited the NAAEC negotiators to an emphasis on enforcement of domestic environmental norms rather than the substantive content of the norms themselves (Richardson 1998; Johnson and Beaulieu 1996, 260). The fact that the NAAEC allows dispute settlement for inadequate enforcement, but not for inadequate laws, has been lamented as an illogical and half-hearted solution to environmental degradation (Coatney 1997; Johnson and Beaulieu 1996, 250-251). Indeed, Johnson and Beaulieu (1996, 259) argue that this limited focus may actually invite

a weakening of environmental regulation, since weak laws "are easier to enforce and may become more attractive..."

For purposes of the enforcement obligation, "environmental law" is defined by NAAEC Article 45 as follows:

> **"environmental law"** means any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through:
> (i) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants,
> (ii) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto, or
> (iii) the protection of wild flora or fauna, including endangered species, their habitat and specially protected natural areas in the Party's territory, but does not include any statute or regulation, or provision thereof, directly related to worker safety or health. [NAAEC, Article 45(2)(a)]

Declaring this definition "uncomfortably broad," Johnson and Beaulieu (1996, 184-185) argue that most environmental statutes in the three NAFTA countries, whether enacted at the federal or the state/provincial level, will be subject to the enforcement obligation. However, Article 45 goes on to provide an important exception to what constitutes an environmental law:

> ...the term **"environmental law"** does not include any statute or regulation, or provision thereof, the primary purpose of which is managing the commercial harvest or exploitation, or subsistence or aboriginal harvesting, of natural resources. [NAAEC, Article 45(2)(b)]

The natural resources exception to the obligation to enforce environmental law presumably was included as an acknowledgment of the sovereign right of nations to use and manage their own natural resources. However, because environmental protection and natural resources management are often inextricably linked, it may be difficult to

determine, for purposes of the NAAEC, whether a statute or regulation falls under this exception (Johnson and Beaulieu 1996, 189-191).

The NAAEC provides guidance as to what constitutes "effective enforcement" of environmental policy, listing a number of examples of "appropriate governmental action" in Article 5(1). Such actions include appointing and training inspectors; monitoring, investigation and inspections; seeking voluntary compliance; public releases of non-compliance information; issuing bulletins on enforcement procedures; environmental auditing; record keeping and reporting; mediation and arbitration; licensing and permitting; initiating proceedings to seek sanctions or remedies for environmental violations; providing for search, seizure or detention; and issuing administrative orders, including those of a preventative, curative or emergency nature [NAAEC, Article 5(1)(a)-(l)].

Exceptions to a party's obligation to effectively enforce its environmental laws are provided in Article 45, which stipulates that a party has *not* failed to meet this obligation if its action or inaction

(a) reflects a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory or compliance matters; or
(b) results from *bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities [NAAEC, Article 45(1)]

While it might be argued that these exceptions effectively remove the teeth from the enforcement obligation, it will ultimately fall to NAAEC dispute resolution panels to determine exactly what constitutes "reasonable discretion" and "*bona fide*" resource allocation decisions by governments (Johnson and Beaulieu 1996, 202-207).

The CEC Secretariat has determined that the enforcement obligation applies only to the executive branches of the NAFTA parties. The first two citizen submissions alleging a government's failure to effectively enforce its environmental laws concerned actions by the U.S. Congress curtailing environmental enforcement. To the disappointment of many environmental NGOs, the CEC dismissed the submissions, arguing that Congressional action constitutes new environmental law and not a failure to enforce. Under this interpretation, the enforcement obligation is limited to administrative agencies or officials charged with implementation (DiMento and Doughman 1998, 684-686; Raustiala 1996, 721-763; Moreno et al. 1999, 446-447).

Some legal scholars point out that the enforcement obligation under NAAEC may be unrealistic in the real world of environmental management (Raustiala 1996, 759-760). Johnson and Beaulieu (1996, 194) observe that

> environmental enforcement is spotty and standards compliance voluntary....Not every environmental degradation is defined as a violation. Not every violation is detected or reported. Few of the documented violations lead to regulatory agency action and follow-up. Numerous such follow-ups never include court action. Court proceedings do not always lead to convictions. The low dollar (or peso) value of the fines imposed on convicted firms will often constitute a poor deterrent for the future. While there are national, regional, and sectoral differences, this is the sobering reality of environmental enforcement everywhere in North America.

In sum, the impact of the enforcement obligation for the North American environment is unpredictable. While it focuses an international spotlight on domestic efforts (or the lack thereof) to implement environmental laws and regulations, it is not guaranteed to bring about actual improvements in environmental enforcement. While governments are subject to dispute resolution and possible economic sanctions if they fail

to enforce their environmental laws, the complex and protracted dispute settlement process (discussed below) makes it unlikely that this possibility causes much concern to the governments involved. On the other hand, some observers warn that the enforcement obligation may have a "chilling" effect, providing a disincentive for governments to adopt strong environmental laws for fear of not being able to enforce them (Johnson and Beaulieu 1996, 209). It is small wonder, then, that DiMento and Doughman (1998) characterized the NAAEC's enforcement provisions as "soft teeth in the back of the mouth."

The Commission for Environmental Cooperation

The heart of the NAAEC is its creation of the Commission for Environmental Cooperation (CEC), and the success or failure of the agreement's implementation rests largely on the CEC's shoulders (Kirton 1997, 467; Moreno et al. 1999, 423). As a trilateral ministerial commission with a broad environmental mandate, the CEC is considered by some to be a major institutional advance in environmental management on the North American continent (Johnson and Beaulieu 1996, 126, 131; Kirton 1997, 467). The CEC consists, at minimum, of a governing Council, a Secretariat and a Joint Public Advisory Committee (NAAEC, Article 8).

The CEC Council is a three-member body composed of "cabinet-level or equivalent representatives of the Parties, or their designees." (NAAEC, Article 9) It is mandated to meet at least once annually; it must hold meetings that are open to the public [NAAEC, Article 9(3)(a), 9(4)]. Most Council decisions are to be made by consensus [NAAEC, Article 9(6)]. The three Council members are the administrator of the U.S.

Environmental Protection Agency (EPA) and the environment ministers of Mexico and Canada. Article 9 allows the parties to designate alternative representatives to the Council; to date, however, with only two exceptions, the annual meetings have been attended by the cabinet-level members (CEC website, 2002). Article 9(5) also empowers the Council to establish standing committees, working groups or expert groups. The Council has used this authority to create a General Standing Committee, composed of lower-level government officials, that meets approximately twice a month and functions as the Council's day-to-day liaison to the Secretariat (McKinney 2000, 92; Kirton 1997, 474).

The Council functions as the CEC's governing body, with full decision-making power and a broad mandate. The set of Council responsibilities listed under Article 10 is extensive, and includes a collection of tasks which the Council "shall" do as well as those which it "may" do. The duties which the Council "shall" do include: serve as a forum for discussion of environmental matters; approve the CEC's annual program and budget; promote and facilitate cooperation between the parties with respect to environmental issues; facilitate the improvement of environmental laws and regulations; encourage effective enforcement by each party of its environmental laws and regulations; promote public access to environmental information; and develop recommendations on a number of procedural and substantive matters relating to the environment [NAAEC, Article 10(1), 10(3)-(5)]. Under Article 10(6), the Council is required to cooperate with the NAFTA Free Trade Commission in environmental matters; this includes an ongoing consideration by the CEC of the environmental effects of NAFTA. In addition, within its first three

years of operation, the Council is mandated to develop recommendations for an agreement between the parties on transboundary environmental impact assessment (TEIA) [NAAEC, Article 10(7)]. The Council also has specific duties, described below, in relation to reporting, submissions on enforcement matters, preparation and publication of factual records, and dispute settlement.

In addition to the Council's required duties, Article 10(2) lists a number of assignments which the Council "may" undertake. The Council may consider and develop recommendations on a wide variety of subjects, ranging from data gathering techniques to pollution prevention strategies to promotion of environmental public awareness to environmental emergency preparedness and response activities. Clearly, the NAAEC presents the Council with an ambitious mandate; as Johnson and Beaulieu (1996, 144) observe, "One thing is clear: There is hardly an environmental issue that is not included in the mandate of the Council." They add that most of these issues have only a faint connection with trade (Johnson and Beaulieu 1996, 144).

Four years into the NAAEC's implementation, DiMento and Doughman (1998) conducted a survey of various CEC stakeholders in all three North American countries for purposes of evaluation. Among the results, they found that respondents considered the advancement of trilateral cooperation to be the Council's most important function. Encouraging the effective enforcement of environmental law was deemed the second most important function, and promoting public access to information ranked third (DiMento and Doughman 1998, 692).

The Secretariat, established by Article 11 of the NAAEC as the administrative organ of the CEC, is a permanent, centralized institution located in Montreal. It currently consists of about two dozen staff members (CEC 2002a) and operates on a budget of approximately $9 million (CEC 2002b). The Secretariat is headed by an Executive Director chosen by the Council for a once-renewable three-year term; the position of Executive Director rotates consecutively between nationals of each party [NAAEC, Article 11(1)]. Additional staff members, who are hired and supervised by the Executive Director, are to be appointed strictly on the basis of competence and integrity, with due regard paid to recruiting a roughly equal proportion among the nationals of each party [NAAEC, Article 11(2)]. Any staff appointment may be rejected by the Council on a two-thirds vote [NAAEC, Article 11(3)].

The Secretariat's responsibilities are to be international in character: neither the Executive Director nor any staff member may seek or receive instructions from any government or other authority external to the Council [NAAEC, Article 11(4)]. However, some argue that the General Standing Committee's involvement with the day-to-day activities of the Secretariat subverts the purpose of this provision through "micromanagement" of the organization (Kirton 1997, 474; Mumme and Duncan 1997, 50; Knox 2002). Another perspective is that such intense involvement by government officials in the Secretariat's activities may lead to greater understanding and support for the Secretariat within those governments (Kirton 1997, 474).

The Secretariat functions in an administrative and technical support capacity for the Council. It is required to prepare and publish, in accordance with the Council's

instructions and subject to the Council's review, an annual report covering the CEC's activities and expenses for the previous year as well as its approved program and budget for the coming year (NAAEC, Article 12). The annual report also describes the actions taken by each party in connection with its obligations under the NAAEC, including data on environmental enforcement activities (NAAEC, Article 12). The annual report is to include relevant views and information submitted by NGOs and individuals, as well as recommendations on any subject within the scope of the NAAEC, and "any other matter that the Council instructs the Secretariat to include." (NAAEC, Article 12) As discussed below, the Secretariat may prepare other documents in addition to the annual report (NAAEC, Article 13). The Secretariat also has a primary role to play in submissions alleging failure to enforce environmental laws, as well as preparation of factual records on such allegations (NAAEC, Articles 14, 15). These responsibilities will be discussed below.

The Joint Public Advisory Committee (JPAC) is composed of fifteen individuals: five appointed by each of the parties [NAAEC, Article 16(1)]. The JPAC may choose its own chair, but its rules of procedure are established by the Council [NAAEC, Article 16(2)]. It convenes at least once a year, to coincide with the annual meeting of the Council; it may hold additional meetings at the Council's instruction, or at the Chair's initiative with the consent of a majority of JPAC members [NAAEC, Article 16(3)]. As its name implies, the JPAC plays an advisory role: it provides advice to the Council on any matter within the scope of the NAAEC, and it provides technical, scientific and other information to the Secretariat as needed [NAAEC, Article 16(4)-(5)].

The Council, Secretariat and JPAC are all trilateral in nature. In addition, the NAAEC encourages each party to form two supplemental advisory committees. Each party may establish a national advisory committee (NAC), "comprising members of its public, including representatives of non-governmental organizations and persons, to advise it on the implementation and further elaboration" of the agreement (NAAEC, Article 17). The United States established a NAC in 1994 (U.S. EPA 1994); Canada followed suit in 1996 (Governmental Committee 1998). There has been some disagreement among scholars as to whether Mexico has established a NAC (Wilder 2000, 893; McKinney 2000, 106). Apparently Mexico chose not to convene a new national advisory committee for the purposes of the NAAEC, instead assigning its responsibilities to existing public committees on sustainable development (DiMento and Doughman 1998, 701; Kirton 1997, 476).

Each party may also convene a governmental advisory committee (GAC), "which may comprise or include representatives of federal and state or provincial governments, to advise it on the implementation and further elaboration" of the agreement (NAAEC, Article 18). The purpose of the GACs is presumably to address intragovernmental and intergovernmental concerns that arise under the NAAEC with respect to each party's federal system of government (DiMento and Doughman 1998, 701). The U.S. was, again, quick to form a GAC (U.S. EPA 1994), and Canada has established a version peculiar to its own brand of federalism (Canadian Intergovernmental Agreement 1994; Governmental Committee 1998). Thus far, Mexico has opted not to form a GAC (Wilder 2000, 893; McKinney 2000, 106). As DiMento and Doughman (1998, 701) point out, there has been

little coverage of any of these groups in the mainstream media or in scholarly reviews and journals.

As mentioned above, the CEC's mission is painted with broad strokes. However, more specific responsibilities are found in Articles 13 through 15 of the NAAEC, as well as the chapter on dispute settlement. These sections spell out the core of the CEC's mandate, which can be divided into two general categories: information and reporting functions, and regulatory functions.

Information and reporting functions of the CEC

The information and reporting functions of the CEC are considered by some to be its greatest source of power and legitimacy. DiMento et al. (2001, 293) point out that "(k)nowledge is power, and the CEC is charged in a variety of ways to create information useful for mobilizing and defending environmental interests." Johnson and Beaulieu (1996, 149) agree:

> In a sense, the CEC and its Secretariat may have no greater power than that of gathering and providing information....Given the appropriate technical resources and proper access to national sources of information, the CEC could use sound science and objective findings to inform and influence public opinion. Thus, the CEC could prove to be a major contributor to North American environmental efforts.

As mentioned above, Article 12 of the NAAEC charges the Secretariat with preparing and publishing an annual report that describes the CEC's activities as well as the actions of the parties in enforcing their environmental laws. Article 13 provides further information and reporting power to the CEC by authorizing the preparation of Secretariat reports. Under Article 13, the Secretariat may prepare a report on any matter within the scope of the CEC's annual program; it may also prepare a report on any other

environmental issue, unless the Council objects by a two-thirds vote [NAAEC, Article 13(1)]. The only issue on which the Secretariat may not prepare a report under Article 13 is the question of whether a party has failed to enforce its environmental laws and regulations [NAAEC, Article 13(1)]. The Secretariat submits reports to the Council and, unless the Council decides otherwise within sixty days, makes them publicly available [NAAEC, Article 13(3)].

Acting under its information and reporting mandate, the CEC is making great strides in producing significant and useful information on the North American environment, much of which has previously been either unavailable or difficult to obtain (Stevis and Mumme 2000, 28-29). For example, the CEC recently developed a tool that helps downwind communities to identify, for the first time, the upwind pollution sources that most affect them, thus enabling them to take corrective action (Miller 2000, 3). The Commission is also in the process of identifying land-based threats to marine and coastal ecosystems in the Gulf of Maine and off the Californias (Moreno et al. 1999, 430). *Taking Stock*, an annual assessment of North American pollutant releases and transfers, is beginning to be useful for measuring trends in toxic emissions and is expected to encourage industry to generate less pollution (McKinney 2000, 94; TCPS 1999, 4; Moreno et al. 1999, 429). In addition, the Secretariat has developed a statistical database for measuring the environmental performance of the three parties (Kirton 1997, 473). The list of informational documents generated by the CEC is extensive and runs the gamut of environmental issues (see Appendix, *List of CEC Publications*).

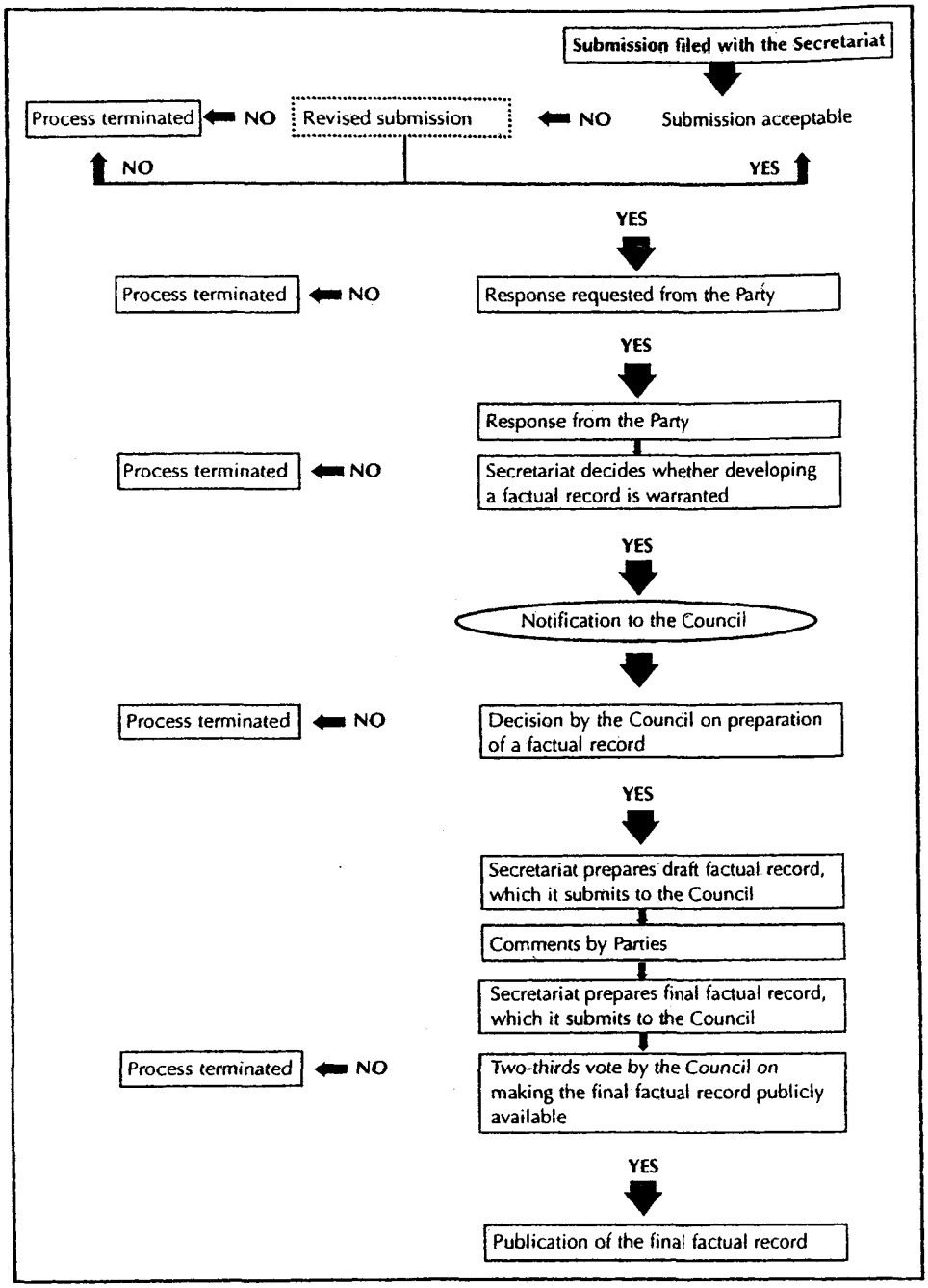
Articles 14 and 15 provide some further basis for the CEC's information and reporting authority, although these two sections of the NAAEC are primarily of a regulatory nature, as discussed below. Article 14 empowers the Secretariat to consider submissions from any NGO or individual asserting that a party is failing to effectively enforce its environmental law. Such submissions must meet certain criteria. Specifically, they must be in writing in a language accepted by the party complained against (currently English, French or Spanish); clearly identify the person or organization making the submission; provide sufficient information to allow effective review by the Secretariat; appear to be "aimed at promoting enforcement rather than at harassing industry;" indicate that the issue has been communicated in writing to the relevant authorities of the party complained against; and be filed by a person or organization residing or established in the territory of any one of the three parties [NAAEC, Article 14(1)(a)-(f)].

If the Secretariat determines that a submission meets these criteria, it then determines whether to request a response from the party complained against. In making this determination, the Secretariat considers whether the submission alleges harm to the person or organization making the submission; whether it raises matters whose further study would advance the goals of the NAAEC; whether private remedies available under the party's law have been pursued; and whether the submission is drawn exclusively from mass media reports [NAAEC, Article 14(2)]. If the Secretariat decides to request a response, it forwards a copy of the submission and any supporting documents to the party complained against. The party then has thirty days, or in exceptional circumstances sixty

days, to respond to the Secretariat with its perspective on the matter [NAAEC, Article 14(3)].

Article 15 authorizes the next step in the submissions process. If the Secretariat, in light of the party's response, considers that the submission warrants developing a factual record, it makes this recommendation to the Council [NAAEC, Article 15(1)]. The Council then decides, by a two-thirds vote, whether to instruct the Secretariat to prepare a factual record on the matter [NAAEC, Article 15(2)]. After receiving such instructions, the Secretariat prepares a factual record which includes any information furnished by the party, as well as any relevant technical, scientific, or other information that is publicly available, submitted by NGOs or individuals, submitted by the JPAC, or developed by the Secretariat or independent experts [NAAEC, Article 15(4)]. The factual record is to summarize, as objectively as possible, the history of the issue, the party's obligations under the environmental law in question, the party's actions in fulfilling those obligations, and other relevant facts (CEC 2000a, 1). The Secretariat submits the draft factual record to the Council and allows forty-five days for any NAFTA party to comment on its accuracy [NAAEC, Article 15(5)]. After incorporating such comments into the factual record as appropriate, the Secretariat submits the final factual record to the Council [NAAEC, Article 15(6)]. Finally, the Council decides, by a two-thirds vote, whether to release the final factual record to the public [NAAEC, Article 15(7)]. The submissions process is diagramed in Figure 3-1 (CEC 2000a, 4). The Secretariat has established an online submissions Registry which makes publicly available information on each submission, the party's response, the status of the submission, and the reasoning behind any decisions

FIGURE 3-1
The Citizen Submission Process



Source: Commission for Environmental Cooperation (CEC). 2000. *Bringing the Facts to Light: A Guide to Articles 14 and 15 of the North American Agreement on Environmental Cooperation*. Montreal: CEC. Page 4.

made by the Council or the Secretariat with respect to the submission (CEC 2000a, 19-20; CEC website).

In the first comprehensive assessment of the NAAEC and the CEC, Johnson and Beaulieu (1996, 152) predicted that the Article 14/15 submissions process "could very well become the most dynamic and innovative element of the fact-finding and information management mandate of the Secretariat." A little later, DeMestral (1998, 176-177) referred to Article 14 as "the core provision of the NAAEC...," arguing that it was "designed to gather information on environmental problems of common concern to the Parties, with a view to understanding and resolving them." In its own publication on the Article 14/15 process, the CEC (2000a, 1) noted that a factual record "provides information regarding enforcement practices that may prove useful to governments, and to the submitters and other members of the interested public." Clearly, the information and reporting function of the CEC is partially based in Articles 14 and 15. However, these two articles, along with Chapter Five on dispute settlement, also authorize a regulatory function that is significant as well.

Regulatory functions of the CEC

The regulatory aspect of the Article 14/15 submissions process lies in its capacity, as Johnson and Beaulieu (1996, 149) observe, "to publicize environmental mismanagement, broken promises, and government failure to act on behalf of the environment..." The enforcing mechanism in the process lies in the threatened publication of a factual record: as Stevis and Mumme (2000, 29) point out, "if a factual record is produced it is not binding but aims at 'shaming' the accused government into correcting

the implementation of its own domestic laws." Knox (2001, 36-37) similarly notes that, even though factual records are not binding, if done properly they will provide enough information for citizens to reach their own conclusions and pressure their governments to enforce more effectively. The use of public scrutiny and shame as a regulatory technique apparently had great appeal for the environmental community as the NAAEC was being negotiated; the submissions process was considered a crucial legitimating feature of the agreement, and continues to be the primary focus of environmental NGOs (Stevis and Mumme 2000, 29; DiMento and Doughman 1998, 681).

Much of the work of the CEC revolves around Article 14/15 submissions. In some ways, the process presents difficulties for the Commission: Mumme and Duncan (1997, 49-50) note that the allowance of any citizen or group to forward a submission may effectively diminish the CEC's control over its own regulatory docket. In addition, DiMento and Doughman (1998, 731) point out that such submissions may put the CEC between the proverbial rock and a hard place: "Outcomes that foster support from the NGOs that initiated submissions may well dampen enthusiasm by governments targeted by the submissions." This quandary is not insignificant in light of the fact that the environmental community is intended to form much of the CEC's constituency, but it is the governments of the three NAFTA parties that provide the Commission's funding.

Scholars have noted that the governments generally hold the upper hand in the submissions process. They have access to legal, financial, technical, and human resources that may not be available to citizens and private organizations; furthermore, they have an advantage before the CEC Council, which is made up of cabinet-level ministers

representing the federal governments of the three countries (Bennett and Herzog 2000, 983). The submissions process is also highly complex and legalistic, limiting the chances of success for average citizens and the majority of NGOs, which lack legal expertise (Wilder 2000, 889).

Several revisions to the submission guidelines were proposed in 1998 which would have added to the procedural burden for submitters (Knox 2001, 29). However, in response to negative reaction from NGOs and the JPAC, the Council rejected most of the revisions at its meeting in Banff, Alberta, in June 1999 (Knox 2001, 30; TCPS 1999, 1). The Council did approve changes relating to Secretariat communications with the Council at various stages of the process (TCPS 1999, 1), prompting several commenters at the Banff meeting to object that these revisions could undermine the Secretariat's neutrality and independence in processing submissions (TCPS 1999, 8).

Some observers, noting ongoing efforts by the Mexican and Canadian governments to further revise the guidelines, have expressed concern that such efforts may make the submissions procedure more complex and less accessible (Stevis and Mumme 2000, 29). However, at its annual meeting in Guadalajara, Mexico in June 2001, the Council adopted suggestions by the JPAC to increase the transparency of the process. Under CEC Council Resolution 01-06, a Secretariat recommendation to develop a factual record on a citizen submission–including the Secretariat's rationale for the recommendation–may be made known to the public five days after the recommendation is made to the Council (CEC 2001b). Under previous rules, the Secretariat was required to

wait thirty days before notifying the public of such a recommendation, and could only publish its reasoning by a vote of the Council (CEC 2001c).

As of December 2002, thirty-six submissions alleging nonenforcement of environmental laws have been made under Articles 14 and 15[1]. Mexico has been the target of sixteen submissions; Canada has been the subject of twelve; and eight have targeted the United States. To date, three submissions–one against Canada, and two against Mexico–have resulted in completion and publication of a factual record. An additional ten factual records are in progress, and three active cases are in the early stages of the procedure. The remaining twenty submissions have been dismissed at various stages (see List of Submissions, Chapter Five).

It may be too early to determine the regulatory impact of the Article 14/15 submissions process. The "shaming" value of a factual record may be insufficient to actually change government enforcement behavior; moreover, the fact that the majority of submissions have failed to reach this stage may be cause to doubt the effectiveness of Articles 14 and 15 for regulatory purposes (Blair 1999, 2; McKinney 2000, 105). On the other hand, some point to the *potential* of the submissions process for changing patterns of government behavior, particularly in Mexico. Wilder (2000, 891) expresses optimism that public access to the process may make Mexican federal officials more accountable for environmental enforcement activity; indeed, she argues that the "CEC Citizens Submittal

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1 The information in this paragraph is based on extensive review by the author of the CEC Registry of Submissions on Enforcement Matters, online at www.cec.org, last visited December 15, 2002.

process has changed the geography of discourse between the Mexican state and society." While it remains to be seen whether this is an exaggeration, recent news out of Mexico is encouraging: Environmental Minister Victor Lichtinger has apparently proposed a domestic procedure to hear environmental grievances as a way to avoid complaints against Mexico at the tri-national level (Nauman 2001, 3). If this does indeed come about, it is reasonable to conclude that the regulatory threat implicit in the CEC submissions process was a causal factor.

The other regulatory function of the CEC is based in Part Five of the NAAEC, which establishes procedures for dispute settlement. The only NAAEC obligation enforceable through dispute settlement is the obligation of the parties to effectively enforce their environmental laws and regulations. The process begins with consultations: any party may request consultations with any other party regarding whether the latter has exhibited a "persistent pattern of failure...to effectively enforce its environmental law." (NAAEC, Article 22) The request for consultations is delivered to the Secretariat and the other NAAEC parties, whereupon the disputing parties "shall make every attempt to arrive at a mutually satisfactory resolution of the matter through consultations..." (NAAEC, Article 22)

If the matter is not resolved within sixty days of the delivery of request for consultations, any consulting party may request a special session of the Council, which convenes within twenty days and attempts to resolve the dispute (NAAEC, Article 23). The Council may seek the advice of experts, initiate mediation or other dispute resolution techniques, and/or make recommendations on how to achieve resolution (NAAEC, Article

23). In the latter case, such recommendations will be made public if the Council so decides by a two-thirds vote (NAAEC, Article 23).

If the matter is still not resolved within sixty days after the Council has met, and the alleged failure to enforce environmental law relates to a situation involving trade between the parties, a consulting party may request convening an arbitral panel (NAAEC, Article 24). Such a panel is convened by the Council by a two-thirds vote (NAAEC, Article 24). An arbitral panel consists of five members, drawn from a roster of up to forty-five environmental law experts maintained by the Council (NAAEC, Articles 25, 27). The panel considers the submissions and arguments of the disputing parties, as well as any advice it may seek from outside sources (NAAEC, Articles 30, 31). Within 180 days after the last panelist is selected, the panel presents to the disputing parties an initial report which contains its determination as to whether there has been a persistent pattern of failure to effectively enforce environmental law, as well as its recommendations for resolving the dispute (NAAEC, Article 31). Where a failure to enforce has been found, the panel's recommendations "normally shall be that the Party complained against adopt and implement an action plan sufficient to remedy the pattern of nonenforcement." (NAAEC, Article 31) The parties are given an opportunity to submit written comments on the initial report, after which the panel develops and presents a final report to the disputing parties, which send it on to the CEC Council (NAAEC, Articles 31, 32). The final report is published five days after it is transmitted to the Council (NAAEC, Article 32).

If the final report concludes that there has been a persistent pattern of failure by the party complained against to effectively enforce its environmental law, the disputing

parties may agree on a mutually satisfactory action plan, which normally conforms with the panel's recommendations. Upon agreement on an action plan, the disputing parties are to promptly notify the Secretariat and the Council of the resolution of the dispute (NAAEC, Article 33). If, on the other hand, the disputing parties cannot agree on an action plan within sixty days of the final report, or if an action plan has been established but the disputing parties cannot agree on whether it is being fully implemented, a disputing party may request reconvening the arbitral panel (NAAEC, Article 34). The panel is to decide on an appropriate action plan, or where an action plan already exists, whether it is being fully implemented (NAAEC, Article 34). If the arbitral panel finds that the party complained against is failing to live up to its obligations in either case, it may impose a fine against that party (NAAEC, Article 34).

Fines are to be paid into a fund established by the Council, to be spent at the Council's direction "to improve or enhance the environment or environmental law enforcement in the party complained against, consistent with its law." (NAAEC, Annex 34) If the fine is not paid within 180 days, the complaining party may suspend NAFTA trade benefits to the offending party "in an amount no greater than that sufficient to collect the monetary enforcement assessment." (NAAEC, Article 36) The party complained against may then ask the Council at any time to reconvene the arbitral panel to determine whether the fine has been collected or whether the action plan is being fully implemented (NAAEC, Article 36). If the panel makes a positive determination in either case, the suspension of benefits is terminated and NAFTA trade benefits are restored (NAAEC, Article 36).

Not surprisingly, the possibility of trade sanctions as an ultimate consequence of environmental nonenforcement was vigorously opposed by Canada and Mexico during the NAAEC negotiations. The disproportionate trade dependency of both countries on the United States caused concerns that their economic independence would be threatened by U.S. environmental interests (DiMento and Doughman 1998, 671). Canada ultimately refused to be subject to trade sanctions; under a special arrangement, if Canada fails to pay a fine imposed by an arbitral panel, the CEC may file the panel's determination through domestic judicial proceedings in Canada (NAAEC, Annex 36A). The Canadian court is bound by the panel's findings and must issue a court order to pay the fine (NAAEC, Annex 36A).

Unlike the Article 14/15 submissions process, there is no private access to the dispute settlement mechanism, which is exclusively a government-to-government procedure (Richardson 1998, 9; Johnson and Beaulieu 1996, 158, 175). Dispute resolution is also significantly more limited in its application than the submissions process, relating only to a "persistent pattern" to effectively enforce environmental laws, and only in situations involving trade. Requiring a trade connection for dispute settlement is presumably an acknowledgment of the competitive aspect of environmental enforcement, recognizing that competitiveness may vary with levels of environmental cost internalization (Johnson and Beaulieu 1996, 177-179, 239). Interestingly, however, a complaining party need not show economic injury resulting from another party's failure to enforce its environmental laws (Johnson and Beaulieu 1996, 179).

The dispute settlement process has been subject to considerable criticism. Observers complain that the procedure is lengthy, cumbersome, and unpredictable (Johnson and Beaulieu 1996, 238; McKinney 2000, 107-108). In addition, Johnson and Beaulieu (1996, 180-181) express concern that requiring a trade connection to initiate dispute settlement will result in a double standard, with the environmental laws affecting traded goods and services more vigorously enforced than those that do not. The need to prove a "persistent pattern" of failure to enforce is also problematic: the NAAEC defines a "persistent pattern" as a "sustained or recurring course of action or inaction beginning after the date of entry into force of this Agreement." (NAAEC, Article 45) Thus, as Johnson and Beaulieu (1996, 208) point out, lax enforcement practices that existed before January 1994 will not be subject to scrutiny; indeed, past enforcement practices

> may well be available for comparison. Hence, if a panel decides that a 'persistent pattern' is akin to a marked divergence from past practice in a given jurisdiction,...then enforcement practices prior to 1 January 1994 may be offered as evidence in the demonstration of a current, persistent pattern of ineffective enforcement. Paradoxically, under such an interpretation, parties with spotty enforcement records prior to 1994 could end up with a relative advantage under the Agreement because a current pattern of ineffective enforcement would not constitute a decline in enforcement.

Furthermore, the system of fines and trade sanctions established by the NAAEC has been criticized as illogical. Although environmental enforcement is associated with competitiveness concerns by requiring a trade connection to initiate dispute settlement, neither the fines nor the trade sanctions would be directed to remedy environmental externalities or correct the actual competitive advantage resulting from inadequate enforcement (McKinney 2000, 109; Johnson and Beaulieu 1996, 251-252). Johnson and Beaulieu (1996, 223) conclude from this that the sanctioning measures are "intended to

punish, not to correct." Unlike most other international environmental dispute settlement procedures, the NAAEC scheme, then, "resembles an international quasi-regulation rather than a compensation system..." (Johnson and Beaulieu 1996, 239)

Dispute settlement under Part Five of the NAAEC is clearly intended as a last resort, with cooperation and consultation as the preferred means to resolve government-to-government conflicts over environmental enforcement (McKinney 2000, 106-108; Johnson and Beaulieu 1996, 169). Indeed, no dispute settlement cases have been initiated to date. Several observers predict that the likelihood of this mechanism ever being activated is remote, since the governments of the U.S., Canada and Mexico seem unwilling to use it for fear of retaliation (Blair 1999, 5; Kirton 1997, 469; McKinney 2000, 107-108). As Knox (2001, 24) observes, Part Five

> is - and almost certainly will remain - a dead letter. It is a dead letter not because it is limited in scope or impossibly difficult to use, but rather because the parties will be extremely averse to invoking it against one another, for all of the reasons that states are generally reluctant to invoke adjudication to resolve international environmental disputes. Doing so would undermine the many areas in which the parties cooperate with one another, as well as provoke possible backlash complaints.

To remedy this situation, some call for allowing private access to the process by NGOs and individuals (Blair, 1999: 6).

Public access to the CEC

Concern over public access and transparency is a preoccupation of the environmental community when it comes to trade institutions, where these characteristics have generally been absent (Johnson and Beaulieu 1996, 58, 162-163). The issue of

public access and transparency was therefore a priority concern among environmentalists in the design of the CEC and its processes.

In some ways, the NAAEC represents progress in promoting public access to environmental management in North America. Its Preamble notes "the importance of public participation in conserving, protecting, and enhancing the environment;" and included among its Objectives is a commitment to "promote transparency and public participation in the development of environmental laws, regulations, and policies..." (NAAEC, Article 1) As mentioned above, the CEC Council is required to open its annual meetings to the public; Johnson and Beaulieu (1996, 254) argue that this requirement may "import an element of accountability." In addition, the Council may seek advice from NGOs, and its decisions are to be made public unless it decides otherwise [NAAEC, Article 9(7)].

The Article 14/15 submissions process is considered by some to be a major advance for transparency, inviting unprecedented NGO involvement in addressing environmental concerns and creating new opportunities for public scrutiny of government activities related to environmental law enforcement (Johnson and Beaulieu 1996, 165-166; DiMento et al. 2001, 294; Moreno et al. 1999, 444). The transparency of the submissions process is enhanced by the Secretariat's maintenance of a public Registry of submissions, including all documents, decisions, and the status of each case. The Registry is available, along with an impressive volume of other CEC-generated information, on a sophisticated website maintained by the Secretariat (McKinney, 2000, 240; CEC website). Indeed, DiMento and Doughman (1998, 731) note that "despite expressed opposition from the

governments of the Parties, the Secretariat has made aggressive use of its website to publicize CEC actions and related information."

Transparency and public access are also promoted by the inclusion of information from NGOs and the JPAC in Secretariat publications and factual records (McKinney 2000, 94, 99). The JPAC itself is considered an effective tool for public access, providing a channel through which the CEC can receive input from civil society (McKinney 2000, 240). In addition, in 1995 the CEC created the North American Fund for Environmental Cooperation (NAFEC) to encourage public participation in environmental protection. The NAFEC provides funding for community-based environmental projects which further the objectives of the NAAEC (Moreno et al. 1999, 443; CEC website). To date, the NAFEC has awarded 172 grants, distributing millions of dollars to projects throughout North America (CEC 2002c). The 2002 grant cycle, which focused on energy projects, distributed approximately $400,000 to sixteen projects (CEC 2002c).

On the other hand, the extent of public access and transparency within the CEC has been a disappointment to some. The Article 14/15 submissions process is widely considered unduly burdensome and restrictive (Stevis and Mumme 2000, 30; Mumme 1999, 2; Johnson and Beaulieu 1996, 165). As mentioned above, the North American governments have the advantage over submitters in this process, by virtue of their greater financial, legal, and human resources as well as their representation on the CEC Council. The CEC Secretariat also retains considerable discretion in processing submissions, exercising its authority to terminate them for a variety of reasons (Mumme 1999, 2). The

dispute resolution process is even less transparent, restricted to interaction between governments with no avenues for public scrutiny or input.

In fact, there have been a number of calls for increased public access to the CEC and its activities. In the evaluation conducted by DiMento and Doughman in 1998, a large majority of survey respondents indicated that greater public participation in the CEC would be beneficial (DiMento and Doughman 1998, 726). Increased public access to information on CEC activities and greater outreach to the Commission's various constituencies was in fact the most frequent recommendation made by survey respondents (DiMento and Doughman 1998, 738-739). Experts have proposed a stronger role for NGOs, such as giving them official observer status at the CEC (DiMento and Doughman 1998, 739). Victor Lichtinger, former Executive Director of the Secretariat and–as Mexico's new Environment Minister–the newest member of the CEC Council, has issued a recent call for greater citizen involvement in the CEC, including a stronger, more influential JPAC (Nauman 2001, 2-3). It remains to be seen how aggressively these proposals will be pursued, and what impact they may have on North American environmental cooperation.

Summary assessment: NAAEC and the CEC

The CEC and the NAAEC are likely to be important models for future discussions of the trade/environment nexus, as negotiations proceed for trade liberalization initiatives such as the Free Trade Area of the Americas (FTAA) and expansion of the GATT (McKinney 2000, 114, 241). Assessments of the agreement and the organization are marked by a wide divergence of opinions on their potential and performance, ranging from

deep disappointment to cautious optimism to enthusiastic approval (Kirton 1997, 459-461). In their 1998 survey of stakeholders, DiMento and Doughman (1998, 694) found ambivalence about the success of the NAAEC's implementation, with most respondents indicating that some of the objectives of the Agreement were being met and others were not. The authors suggest that the NAAEC itself is not sufficiently clear in its criteria for successful implementation to make a conclusive finding of success likely (DiMento and Doughman 1998, 706-707).

One of the most significant issues on which observers disagree is the extent to which the NAAEC created a supranational institution. DeMestral (1998, 174) argues that environmentalists advocating the NAAEC were in fact calling for supranational rules and institutions; he concludes that the agreement and the CEC fall far short of the kind of supranationality for which the environmental community had hoped. Other observers unequivocally categorize the CEC as supranational: for example, Raustiala (1996, 723) declares that the "NAAEC is a landmark attempt to reconcile trade and environmental concerns through the creation of a new set of supranational institutions." The CEC's supranational aspect derives from the Council's authority to decide a number of important matters by a two-thirds vote (Kirton 1997, 468; McKinney 2000, 115). Decisions on which the national veto is removed by a two-thirds voting scheme include instructing the Secretariat to prepare a factual record; making the factual record public; making it available to the JPAC; and convening an arbitral panel for dispute settlement (Kirton 1997, 468).

The Council has fulfilled its mandate to meet every year, and the ministerial level of this body is considered a significant potential source of political support (CEC website; Johnson and Beaulieu 1996, 129). However, of all the branches of the CEC, the Council has received the most criticism. Contrary to the hopes of political support from the ministers on the Council, some observers have noted Council resistance to a strong CEC agenda, including a tendency to avoid difficult and specific issues in favor of less controversial long-range studies (DiMento and Doughman 1998, 698, 739; Block 2002a).

The Secretariat is viewed more favorably, although it has yet to develop the autonomy foreseen by early observers. Johnson and Beaulieu (1996, 161) predicted that the institutional and physical distance between the Council members and the Secretariat would result in considerable independence for the latter; Kirton (1997, 472) also expressed optimism for the Secretariat's autonomy as a single permanent organization. However, experts responding to the survey by DiMento and Doughman noted a lack of independence for the Secretariat; a frequent recommendation by survey participants in general was to increase the organization's autonomy, with suggestions including authorizing it to prepare factual records without Council approval and allowing it to develop and publicize reports without government interference (DiMento and Doughman 1998, 726-727, 739). Despite the lack of autonomy, the Secretariat is generally considered to be doing an outstanding job under often difficult circumstances, carrying out its tasks and working with the Council in an effective and competent manner (DiMento and Doughman 1998, 740-741).

The JPAC is seen as a useful channel for communication between the public and the CEC, although it experienced some early difficulty in clarifying its mission (DiMento and Doughman 1998, 741). Observers have been impressed by the fact that the JPAC has been quite active, meeting frequently and consulting with hundreds of stakeholders representing NGOs, industry and government (DiMento and Doughman 1998, 700-701; Kirton 1997, 476).

The CEC's budget, which is funded equally by the three member governments, has totaled $9 million annually since the organization's inception. The four-year evaluation of the CEC mandated by the NAAEC found this amount of funding to be adequate (Independent Review Committee 1998), and DiMento and Doughman (1998, 729) argue that the government contributions are significant for international commitments. Nevertheless, the budget is an ongoing target of criticism. Kirton (1997, 472-473) notes that the budget is substantially smaller than the amount originally envisioned, and the need for more funding has become more pressing with the expansion of CEC activities since 1994. Similarly, Mumme (1999, 4) protests that the

> CEC has limped along at a level of $9 million annually, down from the $15 million originally promised. The CEC's U.S. staffing component is the least provided for by any of the three governments. Lack of funding is implicated in both the slow pace of processing citizen submissions and the tardiness in implementing the CEC's important NAFTA Effects study.

Even the Independent Review Committee suggested that the budget be diversified, with funding links to donors and major development banks cultivated to make more resources available for the implementation of agreed-upon projects (McKinney 2000, 115).

Much of the criticism of the NAAEC and the CEC appears to be rooted in high expectations that have been disappointed. McKinney (2000, 115) laments: "For those who expected the NAAEC to greatly improve environmental conditions in North America or to cause much more stringent enforcement of environmental laws, the functioning of the CEC must be a disappointment." DiMento and Doughman (1998, 742) suggest that the JPAC has raised expectations among NGOs which the CEC cannot actually meet, due to constraints related to sovereignty and other political limitations. Recalling that the original goal of the environmental community in demanding the NAAEC was primarily to mitigate the environmental impacts of liberalized trade, the CEC's tardiness in addressing this issue has been a particular disappointment (Blair 1999, 3, 5; Johnson and Beaulieu 1996, 262).

Some critics have, as mentioned above, expressed disappointment in the weakness of the CEC's regulatory mechanisms. The Article 14/15 submissions process is not well known to many of the NGOs that might take advantage of it, especially in Mexico and in remote areas (DiMento and Doughman 1998). Wilder (2000, 891) muses that some NGOs may actually view the submissions process as an unacceptable risk, with governments possibly interpreting a submission dismissal as a license to continue violating environmental laws, thus leaving the situation worse than it would have been without a submission. She also points out that, even if a submission gets to the stage of publication of a factual record, this is not guaranteed to have any practical effect in terms of compelling a government to improve its environmental performance (Wilder 2000, 892). As for the dispute settlement process, as noted above, it is lengthy and convoluted, with a

low probability that it will ever be pursued to the point of sanctioning a party for nonenforcement of environmental laws.

The NAAEC itself has been criticized as too ambitious in its mandate, with a sharper focus needed to guide the CEC in its activities (DiMento and Doughman 1998; McKinney 2000, 114, 121). The Agreement has also been disparaged as unacceptably unclear, with conflicting principles evident in its Preamble, and inadequate definitions of important terms such as "environmental law," "persistent pattern," and "effectively enforce" (DiMento and Doughman 1998).

However, assessments of the NAAEC and the CEC are not all negative. Kirton (1997) enthusiastically points to the CEC as an effective organization that has successfully institutionalized a previously ad hoc transboundary relationship. The CEC is universally considered an important advance for trinational cooperation in addressing environmental issues (DiMento and Doughman 1998, 694, 727; Raustiala 1996, 761; McKinney 2000, 116-117; Stevis and Mumme 2000, 29). The organization's information and reporting function is also cited as a positive aspect, with potential for expansion into an agenda-setting role (Stevis and Mumme 2000, 29; DeMestral 1998, 178).

The earliest years of the CEC and the NAAEC were marked by difficulties including initial reluctance on the part of Mexico and, to some extent, Canada to participate, as well as an assault on environmentalism within the U.S. and Canadian governments and a massive economic crisis in Mexico (Kirton 1997, 461, 483; DiMento and Doughman 1998, 713). The CEC is generally considered to have overcome this initial period of growing pains (McKinney 2000, 117). However, less than a decade into the

NAAEC's implementation, it may still be too early to fully assess what actual impact the agreement and the CEC will have on the physical environment or the political landscape of North America.

Bilateral North American Environmental Institutions

The trilateral NAFTA environmental regime is supplemented by several bilateral institutions and relationships between the U.S. and each of its neighbors. These include the Border Environment Cooperation Commission (BECC) and the North American Development Bank (NADB)–both created in conjunction with NAFTA–as well as institutions along the Mexican and Canadian borders that pre-date the continental free trade agreement.

BECC/NADB

The BECC and the NADB were both established under an agreement signed by the governments of the United States and Mexico in connection with NAFTA in November 1993. They were created in response to concerns about severe environmental problems along the U.S.-Mexico border. Largely as a result of the *maquiladora* program, the border population had more than doubled in the last few decades, with grave consequences (McKinney 2000, 162; Herzog 2000). Environmental quality had sharply degraded, especially with regard to water, wastewater treatment, and solid waste disposal; environmentalists were concerned that this situation would be exacerbated by the increased population and economic activity projected as a result of NAFTA (McKinney 2000, 162-163). The BECC and the NADB, established specifically to deal with these problems, were formally established along with the other NAFTA institutions on January

1, 1994; however, they were delayed in becoming operational because appropriations for these two organizations did not begin until fiscal year 1995 (U.S. GAO 1996, 2).

The BECC's mandate is to assist border states and communities in the development, implementation, and maintenance of environmental infrastructure projects. Priority is given to infrastructure projects that deal with drinking water supply, wastewater treatment, and municipal solid waste disposal in economically disadvantaged communities (Moreno et al. 1999, 48; Bennett and Herzog 2000, 982; U.S. EPA 2000). The BECC helps to analyze the financial feasibility and/or environmental aspects of such projects, evaluates their social and economic benefits, and assists in the development of financing [BECC/NADB Agreement, Article 1, Section 2(i)]. One of the BECC's most significant responsibilities is certification of projects for financing by its sister organization, the NADB [BECC/NADB Agreement, Chapter I: Article 1, Section 2(ii)].

The NADB's role is to facilitate project financing by providing loans and helping to secure supplemental funds from other sources (BECC/NADB Agreement, Chapter II: Article I). The NADB has available to it an initial capital stock of $3 billion, contributed equally by the U.S. and Mexico; of this, $450 million is paid-in capital and the remaining $2.55 billion is callable capital (BECC/NADB Agreement, Chapter II: Article II). Although the NADB requires BECC certification to finance a project, such certification is not a guarantee and not all BECC-certified projects receive NADB financing (McKinney 2000, 168).

States and municipalities on the Mexican side of the border have historically experienced difficulty in accessing NADB financing, partially because the Mexican

constitution prohibits subnational governments from incurring debts in foreign currencies and with foreign creditors (U.S. GAO 1996, 11; McKinney 2000, 172). Thus, states and municipalities were initially obliged to go through federal agencies to access this source of capital (U.S. GAO 1996, 13-14). The NADB addressed the constitutional problem by creating a Mexican corporation that allows it to lend directly to governments south of the border (Mumme 1999, 3). However, this has not solved the entire dilemma for Mexican states and municipalities, which are also constrained by their limited taxing authority and lack of experience in planning, constructing, and administering public works projects (U.S. GAO 1996, 2-3, 11). Because of their fiscal limitations, most Mexican communities lack the financial standing in capital markets to meet the NADB's standards for creditworthiness; the colonias on the U.S. side of the border have a similar problem (U.S. GAO 1996, 15-16). Thus, many of the border communities most in need of environmental infrastructure lack the financial and administrative capacity to secure BECC certification and NADB financing (McKinney 2000, 168).

In response to this situation, the International Boundary and Water Commission and the U.S. Environmental Protection Agency have agreed to help communities on both sides of the border to meet the BECC's certification requirements and enhance their eligibility for NADB financing (U.S. GAO 1996, 21). In addition, the BECC and the NADB themselves have both established technical assistance programs (Moreno et al. 1999, 449; McKinney 2000, 164). These programs include grants to assist communities in the development of environmental infrastructure projects, as well as training courses to

help state and municipal public utility operators to upgrade their basic technical skills (McKinney, 2000: 165; Mumme 2000, 12).

Mumme (1999, 1-2) notes that these two institutions "have infused much-needed resources for environmental infrastructure into resource-strapped border communities, promoting sustainable development and public participation in environmental decision-making." The numbers as of December 2002 bear out this observation:

> The BECC has certified a total of 57 projects, of which 39 are operational or under construction. The NADB has administered or is in the process of administering $330 million in EPA-provided grant funds to 36 of these projects and coordinates other financing for BECC certified projects. These projects will represent a total investment of approximately $1 billion and many more projects are in the pipline. (U.S. EPA 2002)

However, these two institutions have been subject to some criticism. The institutional structure of the BECC and the NADB, wherein one helps to develop and certify projects for funding while the other finances them and oversees their implementation, has been characterized as awkward and difficult (McKinney 2000, 241; Korous 2001). The BECC has been criticized as too slow to certify projects and too narrow in its focus; and the NADB has been faulted as too slow to provide financing (Moreno et al. 1999, 449; Korous 2001; Mumme 2000, 13). A significant problem is that the NADB bases its lending on market rates, making its loan packages unaffordable for the poor border communities most in need of assistance (Mumme 1999, 4; Korous 2001). The most frequent complaint about both institutions is that they are inadequately funded and therefore insufficient to meet the extensive needs along the border (Mumme 1999, 4; *borderlines* 1999, 5; McKinney 2000, 175-176; Bennett and Herzog 2000, 982).

These difficulties have recently resulted in calls for institutional reform. Largely due to its prohibitive lending rates, NADB loans thus far have amounted to just three percent of the bank's paid-in capital (Korous 2001; Ellingwood 2001). The government of Mexico, faced with funding priorities that largely fall outside the environmental infrastructure category, is advocating reform of the NADB to use the idle funds for economic development projects such as highways, housing, and energy (Ellingwood 2001; Korous 2001). Under Mexico's proposal, NADB funds would be directed beyond the northern border region to support economic development in parts of Mexico where scarce economic opportunities lead to emigration (Korous 2001; TCPS 2001).

Environmentalists have responded to these proposals with understandable concern that such reforms will shift the focus of the BECC and the NADB away from the environmental problems that they were established to address (Korous 2001; Ellingwood 2001). Presidents Bush and Fox recently agreed to take specific measures to reform the two institutions, including a three-fold expansion of their geographic scope, increasing opportunities for low-interest loans for the poorest border communities, and replacing the two boards of directors with a single board to oversee both institutions (U.S. EPA 2002).

Pre-NAFTA binational environmental institutions

The need for transboundary environmental cooperation has been recognized for decades, with binational agreements and organizations established in response. This section will examine only the most prominent institutions that oversee environmental cooperation along the U.S. borders with Mexico and Canada.

The International Boundary and Water Commission[2] (IBWC) is the oldest and most institutionally developed organization on the U.S.-Mexico border. Established by treaty in 1944, the IBWC is comprised of two national sections charged with boundary maintenance, allocation of transboundary water resources, construction and operation of reclamation and joint sewage and sanitation works along the border, and resolution of differences related to the quality of transboundary water. Until the mid-1980s, the IBWC was considered the lead agency dealing with water quality issues on the U.S.-Mexico border. However, its own narrow interpretation of its formal jurisdiction resulted in a conservative approach to transboundary water management, especially with respect to environmental issues. This criticism in turn led to the creation of new institutions with which the IBWC now shares this responsibility.

The U.S.-Mexico Border Environmental Cooperation Agreement[3]–commonly known as the La Paz Agreement–was signed in 1983. This agreement "establishes a process for binational consultation on border area environmental problems, the assignment of priorities, and the development of binational solutions to identified problems." (Mumme 1996, 59) National coordinators of the agreement are the Director of the U.S. Environmental Protection Agency and the Environmental Minister of Mexico. The La Paz Agreement is implemented primarily through binational working groups that are

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2 This section draws heavily from Stephen P. Mumme, "The Institutional Framework for Transboundary Inland Water Management in North America," Report submitted to the Commission for Environmental Cooperation, December 1996.

3 Ibid.

comprised of federal agency officials from both countries in specific substantive areas (U.S. EPA 2002).

Under the La Paz Agreement, the Border XXI Program was initiated in 1996, emphasizing public participation and cooperation with government agencies at all levels to promote sustainable development along the border (Mumme 1996, 60; EPA website, 9/12/01; Mumme 2000, 14-15). Between 1996 and 2000, it achieved some notable successes, including development of strong interagency ties, sharing of information, and increases in infrastructure development (Mumme 2000, 14; U.S. EPA 2002). However, its structure did not facilitate local-level planning and participation, and it was heavily dominated by the federal governments of both countries (U.S. EPA 2002; Mumme 2000, 14). In response, Border XXI was recently replaced by the Border 2012 program, which will attempt to build on the earlier program's successes while addressing its shortcomings (U.S. EPA 2002).

Along the U.S.-Canada border, the most prominent binational environmental organization is the International Joint Commission (IJC)[4]. Established by the 1909 Canada-U.S. Boundary Waters Treaty, the IJC functions as two national sections, each responsible to its national government. The IJC enjoys broad jurisdiction over transboundary environmental issues, including approval of construction and maintenance of any works that would alter the natural level of waters on the other side of the boundary; monitoring and surveillance of water levels, air quality, and water quality along the border; and investigating and making recommendations to the two governments on specific

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[4] This section draws heavily from Mumme, *supra* note 2.

boundary problems. While it has been criticized in some quarters for failure to deal comprehensively with environmental issues and an institutional dependency on the two governments for policy guidance, the IJC is generally regarded as an effective institution for cooperation on a wide range of environmental border issues.

The focus of this dissertation is on the trinational environmental regime established by NAFTA and the NAAEC, and further elaboration of the binational agreements and organizations discussed above lies outside its scope. However, it is prudent to keep in mind that the NAFTA/NAAEC environmental regime does not exist within a vacuum, and is supplemented by these institutional arrangements.

Subnational Governments and the NAFTA Environmental Regime

The NAFTA environmental regime is superimposed onto three federal systems, and–as discussed in previous chapters–is likely to have significant consequences for the subnational governments within those systems. This section examines the provisions within NAFTA and the NAAEC that bear directly upon the states and provinces.

Article 105 of NAFTA is titled "Extent of Obligations" and states simply: "The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments." Thus, the federal governments of the U.S., Canada and Mexico are obligated to take any steps necessary to ensure that their state and provincial governments comply with the disciplines established under NAFTA.

As mentioned in Chapter One, the "all necessary measures" language of Article 105 is more stringent than the corresponding provision in GATT, which requires only that

each party take "such reasonable measures as may be available to it" to ensure subnational compliance. Given the strict way in which the GATT provision has been interpreted–effectively requiring federal governments to secure subnational compliance–the NAFTA language "leaves no room for dispute over the extent to which (U.S.) states are obligated to comply." (Cooper 1993, 158). Thus, where a party's national government is constitutionally empowered to override subnational legislation that is found to be inconsistent with NAFTA, that government may be obliged to resort to such heavy-handed tactics (Johnson and Beaulieu, 1996: 102-103). Furthermore, as Dhooge (2001, 6) notes, "Article 105 codifies an established principle of international law that holds national governments responsible for acts of their component states, even where existing law does not provide them with the means of compelling such states to fulfill existing international obligations." This means that parties that are unable to secure such compliance from their subnational units will be held accountable for any violations of trade rules by those units (Dhooge 2001, 6).

Article 105 does not apply to NAFTA's Chapter Nine, which establishes the discipline for standards-related measures. As discussed above, most environmental laws and regulations enacted by the three parties should fall under Chapter Nine. With respect to standards-related measures, the national governments are obligated to "seek, through appropriate measures, to ensure observance...by state or provincial governments...." (NAFTA, Article 902). On its face, this requirement seems less stringent than the "all necessary measures" obligation that applies to the other NAFTA disciplines. However, Johnson and Beaulieu (1996, 104-105) argue that lowering the threshold from "necessary

measures" to "appropriate measures" may not have any practical significance. Since, as mentioned above, a country generally may not invoke its constitutional law in defense of its noncompliance with international obligations, a NAFTA party may be held responsible for an inconsistent state or provincial measure even if the measure falls outside the federal government's jurisdiction (Johnson and Beaulieu 1996, 104). As a result,

> the change in language from 'necessary measures' to 'appropriate measures' should not translate into a lesser obligation for federations (and their federated states and provinces) to enact standards-related environmental measures that comply with NAFTA's Chapter Nine discipline. (Johnson and Beaulieu 1996, 105)

In any event, any exemption of subnational laws from Chapter Nine trade disciplines has thus far turned out to be a moot point, since NAFTA challenges to environmental laws have come under Chapter Eleven rather than Chapter Nine.

Chapter Eleven includes some references to subnational obligations with respect to foreign investment. Article 1102 explicitly extends the national treatment obligation to the states and provinces, clarifying that they are to treat the investments and investors of the other parties no less favorably than they treat investments and investors headquartered in their own country [NAFTA, Article 1102(3)]. It can be assumed that the NAFTA negotiators considered it necessary to include this provision as a clarification of what "national" treatment means.

Article 1108 contains further references to subnational obligations under Chapter Eleven. It stipulated that the national treatment and most-favored nation treatment obligations under Articles 1102 and 1103 would not apply to any pre-existing non-conforming state or provincial measures for the first two years after NAFTA's entry into

force [NAFTA, Article 1108(1)(a)(ii)]. Furthermore, it provides for continuing exemption of such measures by reservation in an annex [NAFTA, Article 1108(2)]. Finally, local governments are exempted from the Articles 1102 and 1103 obligations [NAFTA, Article 1108(1)(a)(iii)]. With these exceptions, the subnational governments are presumed to be bound by the obligations of Chapter Eleven (Dhooge 2001, 5). The implications of Chapter Eleven for the states and provinces will be discussed in detail in Chapter Four of this dissertation.

Turning now to the NAAEC, Article 18 provides for an optional subnational role by allowing each party to "convene a governmental committee, which may comprise or include representatives of federal and state or provincial governments, to advise it on the implementation and further elaboration of this Agreement." As mentioned above, Canada and the United States have each formed committees under this provision; to date, Mexico has opted not to do so. Representation on Canada's Article 18 committee is limited to those provinces that have chosen to participate in the NAAEC under Annex 41, as discussed below (McKinney 2000, 106). Details about the U.S. and Canadian committees formed under Article 18 will be provided in Chapter Six of this dissertation.

Finally, Annex 41 of the NAAEC addresses the question of the Canadian provinces' role in dispute settlement. Recall that Canada is a relatively decentralized federation, with jurisdiction over environmental regulation shared between the provinces and the federal government (Dimento and Doughman 1998, 717; Johnson and Beaulieu 1996, 224-229); it has been estimated that approximately seventy-five percent of the responsibility for environmental protection in Canada rests with the provincial

governments (Kirton 1997, 480). Thus, the obligation to effectively enforce environmental law requires action by provincial as well as federal officials. However, as discussed in Chapter Two, the federal Canadian government cannot unilaterally bind the provincial governments to an international accord.

Annex 41 addresses the problem of provincial participation in the NAAEC by establishing a formal accession procedure for the provinces (DiMento and Doughman 1998, 717). It requires Canada to set out a list of the provinces that agree to be formally bound to the environmental enforcement obligations of the NAAEC [NAAEC, Annex 41(1)]. The government of Canada may not initiate consultations or dispute settlement on behalf of any province that is not included in the list of participating provinces [NAAEC, Annex 41 (3)]; it also may not initiate dispute settlement on its own behalf, unless it involves an issue that would fall under federal jurisdiction if it were to arise within the territory of Canada [NAAEC, Annex 41(4)]. For an environmental issue falling under provincial jurisdiction to be considered for dispute settlement–either at Canada's initiation or that of the U.S. or Mexico–the "55 percent" thresholds must be reached: the provinces included in the list of participating provinces must account for at least fifty-five percent of Canada's Gross Domestic Product; and where the matter concerns a specific industry or sector, at least fifty-five percent of total Canadian production in that sector must be located within the participating provinces [NAAEC, Annex 41(4)-(5)].

As the mechanism for provincial accession to the NAAEC under Annex 41, the federal and provincial governments developed the Canadian Intergovernmental Agreement Regarding the NAAEC (CIA) in the spring and summer of 1994 (Johnson and Beaulieu

1996, 229). The CIA establishes a committee to manage Canada's involvement in the NAAEC (CIA, Article 3). It provides that, if another party challenges a province's environmental enforcement, that province will take the lead in dispute settlement procedures (CIA, Article 7). Most importantly, it binds all ratifying provinces to all NAAEC rights and obligations (CIA, Article 2). Alberta was the first province to ratify the CIA, signing on in 1995 (Province of Alberta 1995); Quebec, where the CEC is located, followed suit in 1996 (Province of Quebec 1996). Since that time, only the province of Manitoba has elected to participate, ratifying the CIA in 1997 (Province of Manitoba 1997; McKinney 2000, 115).

This less-than-enthusiastic response by the provinces is considered by some to be a significant restriction on Canada's participation in the NAAEC (McKinney 2000, 115). As Johnson and Beaulieu (1996, 234) point out,

> until 55 percent of Canadian GDP is represented on the (CIA), no dispute settlement can take on the issue of provincial failure to effectively enforce environmental laws, whatever the status of individual provinces targeted by the complaint vis-a-vis the Agreement. This means that if a group of provinces (or a couple of large provinces) refuse to become bound, *all* the Canadian provinces are shielded from the effects of Part Five of the Agreement on dispute settlement.

In fact, the provinces–which enjoy the benefits of trade under NAFTA regardless of whether they sign on to the NAAEC–have very little incentive to ratify the CIA and subject themselves to dispute settlement over their environmental enforcement practices (DiMento and Doughman 1998, 718). However, given the apparently remote possibility that dispute settlement will ever be activated in any case, the fact that the provinces are currently immune from this process may not be of any practical consequence.

Conclusion

The NAFTA/NAAEC environmental regime, then, presents us with a number of interesting possibilities. It has the potential to be either constraining on the subnational governments or to be of benefit to them, or to be both at the same time. Furthermore, these impacts will vary according to the ways in which federalism is manifested in the three NAFTA countries.

Constraints on the states and provinces fall into two categories: NAFTA constraints, and NAAEC constraints. The NAFTA constraints refer to the national treatment, most-favored-nation, fair and equitable treatment, and other obligations found in the disciplines of Chapters Seven, Nine and Eleven of the trade agreement. Under these disciplines, state and provincial environmental laws are clearly susceptible, to varying degrees, to challenge as barriers to free trade (Orbuch and Singer 1995, 122-124; Morel 1996, 19).

In the event of such a challenge, a state or province would have limited avenues to defend its policies. Trade disputes are heard in secret, by panels usually consisting of trade lawyers and economists who do not necessarily sympathize with the demands of federalism (Orbuch and Singer 1995, 127). Even if the policy in question is enacted at the subnational level, it is usually the national government that is represented before such a panel (IISD 2001a, 37). Faced with economic consequences as a result of subnational policies, national governments may resort to various means of coercion to bring states and provinces into compliance. As discussed in Chapter Two, the subnational governments of all three NAFTA Parties depend to varying degrees on federal funds; there is some

concern that threats of withholding federal funds will be the primary means by which national governments will secure state and provincial cooperation with NAFTA trade disciplines (Orbuch and Singer 1995, 127; Stumberg 1994, 13).

As mentioned previously, of all the trade disciplines within the NAFTA text, Chapter Eleven has generated the most activity in terms of challenges to subnational environmental laws. The following chapter of this dissertation will discuss three such cases–the Metalclad case involving Mexico, the Methanex case involving the U.S., and the case of Sun Belt Water involving Canada–to illuminate the constraining effects of NAFTA's Chapter Eleven on the states and provinces.

The NAAEC constraints on the states and provinces lie in the obligation to effectively enforce environmental laws and regulations under the NAAEC. Except for those dealing with the use and management of natural resources, all environmental policies at all levels are subject to this obligation to some extent (Johnson and Beaulieu 1996, 191). In Canada, as discussed above, the provinces are exempt from the dispute settlement proceedings which are meant to put teeth into the enforcement obligation, at least until certain specific conditions are met under Annex 41. Recall, however, that dispute settlement is not the only regulatory mechanism available under the NAAEC. Individuals and NGOs may bring Article 14/15 submissions against the provincial governments of Canada, just as they can against the states of the U.S. and Mexico (Acheson and Hanak 2002). The "shaming" aspect of such submissions may be an effective means to compel the subnational governments of all three countries to enforce their environmental laws more vigorously than they would otherwise. Chapter Five of the

dissertation will address this constraint under the NAAEC, examining ten submissions under Articles 14 and 15 that allege subnational nonenforcement of environmental laws.

On the other hand, the NAFTA environmental regime may also present the states and provinces with specific opportunities. First, as predicted by regime theory (see dissertation Chapter One), the institutions established by the NAFTA/NAAEC regime may provide a forum for subnational governments to participate in continental environmental management. The Governmental Advisory Committees (GACs) authorized by the NAAEC's Article 18 could be quite effectively used as channels for subnational participation. More informal venues may also be provided through the work of the CEC.

Second, regime theory anticipates that this regime may perform a capacity-building function for the subnational governments. In particular, the information and reporting function of the CEC may prove to be a great help to these governments. It takes significant financial, technical and human resources to collect the often complex scientific data needed to develop and implement rational environmental policies. As mentioned in Chapter Two, to varying degrees the states and provinces lack such resources; the CEC may be taking on much of the burden by providing information these governments can use to accomplish their environmental goals. Other capacity-building benefits may be found through the provision of technical assistance such as training, and through the CEC's involvement in transboundary initiatives in which the states and provinces are involved. The regime may also work as a catalyst to help the subnational governments address difficult environmental problems. Chapter Six of the dissertation will discuss these

potential opportunities, and address the extent to which they have been utilized by the states and provinces.

Thus, we turn now to a closer look to determine just how these possibilities have developed so far. The following three chapters will present case studies that shed some light on how the NAFTA/NAAEC environmental regime has impacted the subnational governments of the U.S., Canada and Mexico to date. Chapter Seven will present conclusions drawn from the cases.

CHAPTER FOUR

Introduction

How does the NAFTA/NAAEC environmental regime impact federalism in the United States, Canada and Mexico? Specifically, what constraints and opportunities are presented by that regime to the subnational governments of these countries, and how do they vary? This chapter commences a look at cases to help illuminate the answers to these questions. We will begin with an examination of constraints. This chapter deals with the investment rules found in NAFTA's Chapter Eleven, which have given rise to several disputes involving subnational environmental policies. It begins with a brief overview of Chapter Eleven's provisions and some of the general issues involved. The remainder of the chapter examines three cases of Chapter Eleven disputes pertaining to subnational policies: the Metalclad case, in which a U.S.-based corporation challenged the actions of a state and municipality in Mexico; the Methanex case, in which a Canadian corporation is disputing a California policy; and the case of Sun Belt Water, which involves a U.S. corporation's challenge to a ban on bulk water exports by the province of British Columbia. The chapter will conclude with a comparison of the cases and some analysis of what they reveal.

NAFTA Chapter Eleven

Chapter Eleven of NAFTA begins with Article 1101, which provides that the chapter "applies to measures adopted or maintained by a Party relating to" investors and investments of the other NAFTA parties [NAFTA, Article 1101(1)]. Its trade disciplines commence with Article 1102, which requires that each NAFTA party accord to the investors and investments of the other parties "treatment no less favorable than that it accords, in like circumstances," to its own investors and investments "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." [NAFTA, Article 1102(1), (2)] This "national treatment" obligation is explicitly extended to the governments of the states and provinces [NAFTA, Article 1102(3)]. Similarly, Article 1103 calls for "most-favored-nation" treatment among the parties, requiring that each accord to the others' investments and investors "treatment no less favorable than that it accords, in like circumstances," to those "of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." [NAFTA, Article 1103(1), (2)] Where there is a difference between national treatment and most-favored-nation treatment, the parties are to accord one another's investors and investments the better of the two (NAFTA, Article 1104).

Under Article 1105, "(e)ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." [NAFTA, Article 1105(1)] This requirement is commonly referred to as the "minimum standard of treatment" or "minimum

international standards." As the Supreme Court of British Columbia (BCSC 2001a, 14) pointed out in its decision on the Metalclad case, while Articles 1102 and 1103 are both framed in relative terms,

> ...Article 1105 is framed in absolute terms. In considering Article 1105, the way in which the Party treats other investors is not a relevant factor. Article 1105 is intended to establish a minimum standard so that a Party may not treat investments of an investor of another Party worse than this standard irrespective of the manner in which the Party treats other investors and their investments.

The minimum standard of treatment established in Article 1105 is that considered "fair and equitable" under international law. Thus, a breach of Article 1105 would be "treatment which is not in accordance with international law." (BCSC 2001a, 15) This is a broad general standard which, as we will see, has been the subject of some interpretive debate.

Article 1108 provides for certain exceptions to Articles 1102 and 1103. The national treatment and most-favored-nation requirements do not apply to any existing non-conforming measure maintained by a party at the federal level, as long as such measure is set out in an Annex [NAFTA, Article 1108(1)(a)(i)]. They also did not apply to any existing non-conforming measure maintained by a state or province for the first two years after NAFTA's entry into force; after that, the states and provinces could continue to have such measures exempted by listing them in an Annex [NAFTA, Article 1108(1)(a)(ii), Article 1108(2)]. Finally under Article 1108, the requirements of Articles 1102 and 1103 do not apply to existing non-conforming measures maintained by local governments [NAFTA, Article 1108(1)(a)(iii)].

In response to the exemption provisions of Article 1108, the three parties' trade ministers reached an agreement in April 1996 to exempt, in a general reservation, all non-conforming state and provincial policies that were in effect as of January 1, 1994 (Melle 2002; *Inside NAFTA* 1996). This action by the three federal governments was reportedly taken in response to pressure from the Canadian provinces–particularly British Columbia–which expressed concern about U.S. penetration of the Canadian health care system if the provinces did not exempt their entire health and social services sector regulatory schemes (*Inside NAFTA* 1996). The U.S. government supported the general reservation because the process of identifying non-conforming measures from fifty state governments, and listing them in an Annex, proved to be unwieldy and impractical (*Inside NAFTA* 1996).

Much of the attention devoted to Chapter Eleven has focused on Article 1110, which deals with expropriation:

> No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment..., except:
> (a) for a public purpose;
> (b) on a non-discriminatory basis;
> (c) in accordance with due process of law and Article 1105(1); and
> (d) on payment of compensation... [NAFTA, Article 1110(1)]

Compensation for expropriation under Article 1110 must be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place [NAFTA, Article 1110(2)], and include interest from the date of the expropriation until the date of actual payment [NAFTA, Article 1110(4)]. Article 1110 does not define what government acts would be considered a compensable expropriation (IISD 2001a, 30;

Dhooge 2001, 5). It has been noted that "there is no exception to Article 1110 granted to national, state, provincial or local governments, and all levels of government are bound by Article 1110's commitment." (Dhooge 2001, 5). While the requirements of Articles 1102, 1103 and 1105 have figured prominently in cases arising under Chapter Eleven, the expropriation provision of Article 1110 has "been the most debated issue concerning the relation of investor protections to environmental and human welfare protection." (IISD 2001a, 30) The reasons for this will become clear.

Legal scholars have noted the extraordinary breadth of Chapter Eleven. "Investment" is broadly defined under Article 1139, and

> embraces virtually all forms of participation in a business enterprise including majority and minority ownership interests, income and profit-sharing arrangements, tangible and intangible property (including goodwill and intellectual property rights) and real estate. (Dhooge 2001, 4)

Thus, as the International Institute for Sustainable Development (IISD 2001a, 23) has observed: "In short, almost any kind of business *activity* can constitute an investment that is subject to protection." Chapter Eleven does not, however, cover government procurement and financial services; there are also general exceptions for national security, taxation, balance of payments and Canada's "cultural industries." (Dhooge 2001, 4)

Investments made prior to NAFTA's entry into force are protected by Chapter Eleven (IISD 2001a, 23). Ironically, the chapter's provisions only apply to foreign investors and their investments (IISD 2001a, 24)–a situation which has been observed to create

> an unfair advantage for foreign investors at the expense of domestic companies. Although foreign investors are permitted to mount full-scale assaults upon a potentially

> limitless number of measures adopted by their host states, domestic companies are prohibited from engaging in such attacks through their exclusion from Chapter Eleven's protections. (Dhooge 2001, 29)

On the other hand, Gaines (2003, 281-282) points out that domestic companies generally have other legal and political tools at their disposal in their home countries, unlike foreign corporations: "One reason for international protections for foreign investors is that they are not effectively represented in the political processes of the host country..."

Articles 1115 through 1138 establish the novel "investor-state" process for handling conflicts that arise under Chapter Eleven. The investor-state process involves international arbitration between a foreign investor and its host government. It begins when an investor files a Notice of Intent to Submit a Claim to Arbitration (see Box 4-1, Flowchart of Investor-State Dispute Settlement Process, page 197). This is followed by a consultation period of at least ninety days. Actual arbitration is initiated when the claimant sends a "Notice of Arbitration" or "Notice of Claim" to the NAFTA party involved. The International Institute for Sustainable Development (IISD), a Canadian NGO that has tracked Chapter Eleven disputes, notes that the Notice of Intent and Notice of Arbitration are always sent to the national government of the NAFTA party, regardless of whether the disputed measure is from a state, provincial or local government (IISD 2001a, 37).

When filing the Notice of Arbitration, the investor chooses among the arbitration processes operating under the United Nations Commission on International Trade Law (UNCITRAL) or the International Center for the Settlement of Investment Disputes (ICSID). Whichever arbitration process is chosen, the rules of procedure "are fairly

BOX 4-1
Flowchart of Investor-State Dispute Settlement Process

- Notice of Intent
- Minimum 90-day consultation period
- Notice of Arbitration
- Appointment of arbitral tribunal
- Statement of Claim (often accompanies Notice of Arbitration)
- Statement of Defense
- Opportunity for friends of the court "*amicus*" petition
- Reply to Statement of Defense
- Rejoinder to Reply
- Opportunity for friends of the court "*amicus*" petition
- Filing of evidence, witness statements
- Cross-examinations
- Filing of full written arguments
- Oral hearings
- Possible subsequent written briefs
- Decision
- Possible claim for judicial review/appeal
- Payment of award

Source: International Institute for Sustainable Development (IISD). 2001. Private Rights, Public Problems: A guide to NAFTA's controversial chapter on investor rights. Monograph. Winnipeg, Manitoba: IISD. Page 38.

similar, allowing for the filing of legal arguments, presentation of evidence, cross-examination of witnesses, oral arguments, and finally the decision of the Tribunal." (IISD 2001a, 39)

The Tribunal is a three-person body, with one arbitrator each selected by the investor and the government involved; the third is either chosen by agreement between the parties to the dispute or is appointed by the ICSID Secretary General. According to the IISD (2001a, 40), the arbitrators appointed to date have been drawn primarily from the field of commercial law. The Tribunal's job is to interpret and apply investors' rights as set out in Chapter Eleven and–under Article 1105–as established in international law (IISD 2001a, 40; Kass 2000, 4; Dhooge 2001, 7). If a Tribunal finds in the investor's favor, it is empowered to issue a ruling and determine the amount of compensation the host government is obliged to pay. Final monetary awards are binding and must be fully enforced; any NAFTA party that fails to comply with an award is subject to state-to-state dispute settlement under Chapter Twenty (Dhooge 2001, 7; Luz 2000/2001, 8). However, losing parties do have the opportunity to appeal an arbitral award in the courts of the country where the Tribunal was legally located (IISD 2001a, 45).

Most observers of the Chapter Eleven investor-state process have taken issue with its highly secretive and non-transparent nature. Gaines (2003, 265-266) points out that the ICSID and UNCITRAL systems designated by NAFTA for Chapter Eleven arbitration, "which were designed for commercial arbitrations where confidentiality can promote resolution of disputes, are inherently secretive in nature and thus not well suited

to quasi-public disputes where a government measure is at issue." As IISD (2001a, 11) notes,

> The arbitration takes place with limited public access to the written documents produced for the case, and no public access to the actual proceedings unless all participants agree to open them up (something that has not happened to date). The secrecy surrounding the investor-state process has been a major source of civil society criticism.

An illustration of such criticism is found in the literature of NGOs such as Global Trade Watch, which recently complained that the investor-state process offers "none of the basic due process or openness guarantees afforded in national courts." (Bottari 2001, 1)

The secrecy of the investor-state process goes beyond denying public access to proceedings and documents; indeed, there is no requirement to divulge whether an arbitration is occurring at all, making it difficult to ascertain the exact number of Chapter Eleven cases that have been launched to date (Greider 2001; Kass 2000, 4). The IISD (2001a, 42) points out that such secrecy is especially problematic, from a public policy perspective, at the Notice of Intent stage of arbitration:

> The consequence of secrecy at this stage is important: it provides foreign investors and their companies operating in the host state with privileged but private access to government decision-makers on actual or proposed measures. In effect, the virtually cost-free notice of intent to arbitrate is an exclusive opportunity to lobby, influence, maybe even to threaten, the government on any measure a foreign investor does not like, far from the prying eyes of the public.

Dhooge (2001, 28-29) similarly bemoans the consequences of secrecy for the public policy process once a case reaches actual arbitration:

> Increasingly complex issues are determined behind closed doors by arbitrators possessing little or no competence to examine the dispute from a scientific, environmental or public health standpoint. Furthermore, Chapter Eleven's procedures ignore the necessity of multi-stakeholder consultations on issues of public interest such

> as the environment. Instead, Chapter Eleven encourages governments to litigate public interest issues in a secretive manner in which the interests of only one party are presented and considered.

The lack of public access to arbitration procedures extends to subnational governments, which do not participate in the proceedings even when it is their laws and regulations that are at issue (Dhooge 2001, 3).

In July 2001, the NAFTA Free Trade Commission (FTC) issued an interpretation of Chapter Eleven designed to clarify several provisions, including those regarding secrecy in arbitration proceedings. The interpretation states:

> Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and...nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal. (FTC 2001)

It further specifies that

> nothing in the relevant arbitral rules imposes a general duty of confidentiality or precludes the Parties from providing public access to documents submitted to, or issued by, Chapter Eleven tribunals, apart from the limited specific exceptions set forth expressly in those rules. (FTC 2001)

Significantly, the FTC interpretation also states an agreement by each NAFTA party to "make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal," subject to three exceptions: confidential business information; information which is privileged or otherwise protected from disclosure under the party's domestic law; and information which the party must withhold pursuant to the relevant arbitral rules, as applied (FTC 2001). As the IISD (2001b, 2) observes, the third exception is critical:

> In effect, it makes the statement that Parties will release all documents submitted to and issued by the Tribunal, unless the arbitral rules established by the Tribunal prohibit such an action. Given that all tribunals to date have established strong rules of secrecy, does this mean that the statement is completely empty?

Gaines (2003, 266) similarly notes that the FTC interpretation left "the door open for a tribunal to decide that the customary confidentiality of arbitral proceedings must be observed." However, because the FTC interpretation clearly states that the intent of the parties is to encourage openness in the proceedings, the IISD anticipates that government lawyers acting in future cases will at least be obliged to argue for open access to documents, "something that has not always been the case to date." (IISD 2001b, 2)

Under the FTC interpretation, the NAFTA parties

> further reaffirm that the Governments of Canada, the United Mexican States and the United States of America may share with officials of their respective federal, state or provincial governments all relevant documents in the course of dispute settlement under Chapter Eleven of NAFTA, including confidential information. (FTC 2001)

While it falls short of allowing actual participation by subnational governments in arbitral proceedings, this statement represents a significant departure from past practices, in which federal officials were obliged to seek special permission to share confidential information with their subnational governments (IISD 2001b, 3). Especially in Chapter Eleven cases involving challenges to state or provincial policies, this new access to arbitration documents could be a critical improvement from the subnational point of view. It is worth noting, however, that the use of the word "may" rather than "shall" leaves the sharing of information with subnational governments entirely up to the discretion of federal trade officials.

Besides the secrecy surrounding arbitration, observers have found plenty to criticize in Chapter Eleven. While some observers point out that it builds on precedents in the Canada-U.S. Free Trade Agreement (CUFTA) and bilateral investment treaties (Gaines 2003, 262), others consider Chapter Eleven unprecedented in its establishment of the investor-state dispute process and other expansions of investor protection over those found in previous agreements (Campbell and Nizami 2001, 5; Bottari 2001, 1; IISD 2001a, 8, 16; Luz 2000/2001, 4). As international trade legal expert Steven Shrybman, quoted in an online publication by the Council of Canadians, explains:

> The investor-state suit provisions of NAFTA represent nothing short of a radical departure from both the domestic and international legal norms in at least three fundamental ways. First, by providing corporations with the right to directly enforce an international treaty to which they are neither parties, nor under which they have any obligations. Second, by extending international commercial arbitration to claims that have nothing to do with commercial contracts and everything to do with public policy and law. Third, by creating substantive legal rights concerning expropriation and national treatment that go far beyond those available to (domestic) citizens or businesses. (Shrybman, quoted in Barlow 2001)

The IISD (2001a, 16) laments that the provisions of Chapter Eleven are "being turned into a means to fend off proposed new regulations, lobby for or against specific government actions, and generally to preserve or gain a competitive position." The national and subnational governments of North America now have cause to hesitate before passing environmental regulations, for fear of having to pay compensation to private corporations (IISD 2001a, 33). As Dhooge (2001, 29) points out,

> it is inappropriate to require the payment of compensation for regulatory adjustments in environmental regulation. Such a result would amount to utilization of public funds to pay for the government's right to regulate the environment.

Concerns over the possibility of compensating a foreign investor for losses due to environmental regulation are considered likely to lead, in turn, to regulatory chill (IISD 2001a, 34; Dhooge 2001, 30).

As mentioned above, much of the criticism has focused on the expropriation provision of Article 1110. Of particular concern is the impact of Article 1110 on the exercise of a government's "police powers." According to the IISD (2001a, 31-32),

> Under the traditional international law concept of the exercise of police powers, when a state acted in a non-discriminatory manner to protect public goods such as its environment, the health of its people or other public welfare interests, such actions were understood to fall outside the scope of what was meant by expropriation....
>
> One of the most disturbing aspects of NAFTA...is the current tendency of Chapter 11 tribunals to ignore traditional approaches to expropriation law in a manner that ultimately threatens to severely narrow or even extinguish the doctrine of legitimate police powers.

In light of these concerns, the Commission for Environmental Cooperation (CEC) established by the side agreement to NAFTA has been urged to become involved in Chapter Eleven issues (CEC 1999a; Elwell 2002; MacKenzie 2002). However, to date the governments of the NAFTA parties have been reluctant to allow the CEC to enter the fray (Gaines 2003, 277-278; IISD 2001a, 13). At its annual meeting in June 2002, the CEC Council was urged by the JPAC as well as environmental groups to address the issue of Chapter Eleven (Elwell 2002; MacKenzie 2002). The Council agreed to help arrange a forum in which stakeholders can express their views to the Chapter Eleven Experts' Group of the NAFTA Free Trade Commission (CEC 2002b). However, the Council members themselves expressed reluctance to enter the debate, leading some to complain that the Council is again failing to adequately address the issue (MacKenzie 2002). Some

CEC stakeholders have expressed concern that "the lack of action by the CEC on Chapter 11 issues continues to have a major negative impact on the credibility of the institution to address trade-environment issues." (CEC 1999a)

Most of the twenty-nine known Chapter Eleven investor-state disputes that have arisen to date have been in response to measures taken by national levels of government. However, several cases have involved challenges to subnational environmental policies. We turn now to an examination of those cases, to shed some light on how Chapter Eleven may constrain the subnational governments of the U.S., Canada and Mexico. Most of the attention will focus on the Metalclad case, since it involved a complex situation concerning three levels of government, and it is the only one of the three that has been pursued to its legal conclusion. The other two cases, however, should also be revealing for our purposes.

Metalclad* v. *Mexico

Background

The Metalclad case concerned a hazardous waste facility within the municipality of Guadalcazar, in the central Mexican state of San Luis Potosi. The site is located in the valley of La Pedrera, about seventy kilometers from the city of Guadalcazar; approximately 800 people live in the immediate vicinity (BCSC 2001a, 3). A Mexican corporation known as COTERIN operated a hazardous waste transfer station at the site from October 1990 until September 1991, when the federal government ordered the transfer station closed for unauthorized activities in excess of COTERIN's federal permit (BCSC 2001a, 3; Dhooge 2001, 9). In 1991, COTERIN applied to the municipality of

Guadalcazar for a permit to construct a hazardous waste landfill at the same site. The application was rejected, and a new municipal government reaffirmed that decision in 1992 (BCSC 2001a, 3).

However, in January 1993 COTERIN received a federal construction permit to build the landfill from the National Institute of Ecology (INE), an agency of the Secretariat of the Environment, Natural Resources and Fisheries (SEMARNAP) (Kass 2000, 5; Dhooge 2001, 2, 9). Metalclad, a U.S.-based corporation, entered into an option agreement to purchase COTERIN in April 1993. According to the appeals decision rendered in the case by the Supreme Court of British Columbia, the option agreement

> provided that the payment of the purchase price was subject to, among other things, the condition that either (a) a municipal permit was issued to COTERIN or (b) COTERIN had received a definitive judgment from the Mexican courts that a municipal permit was not required for the construction of the landfill. Metalclad completed its purchase of COTERIN without either of these conditions being satisfied...(BCSC 2001a, 3-4)

In May 1993, the state government of San Luis Potosi granted COTERIN a land use permit to construct the landfill, subject to certain technical specifications (Kass 2000, 5; Dhooge 2001, 2, 9-10). A federal permit to operate the landfill was approved by INE in August 1993 (Kass 2000, 5; Dhooge 2001, 2, 10). The following month, Metalclad exercised its option to purchase COTERIN, including the landfill site and all permits that had been acquired to date. Metalclad alleged in later arbitration–and the Tribunal agreed–that Mexican federal officials had provided assurances at the time of purchase that Metalclad possessed all permits required to undertake the landfill project (Kass 2000, 5; Dhooge 2001, 2, 10; BCSC 2001a, 4). Construction of the landfill began in May 1994 (Kass 2000, 5; Dhooge 2001, 10).

In the meantime, several environmental impact assessments had been performed on the site, with mixed results. Around the time that COTERIN first applied for a permit to construct a hazardous waste landfill in 1991, a study by Sergio Aleman Gonzalez–a professor at Autonomous University of San Luis Potosi (AUSLP)–concluded that the site was unsuitable for such a project due to numerous aquifers, underground streams and caverns, the porous nature of the underlying rock, and evidence of recent seismic activity in the area (Dhooge 2001, 9). However, a few months later a consultant retained by COTERIN published contradictory findings, concluding that the location was suitable for a hazardous waste landfill (Dhooge 2001, 9). Another study was done in 1993 by a group of AUSLP geology professors at the request of the San Luis Potosi state legislature, which was considering COTERIN's request for a land use permit at the time (Dhooge 2001, 10). This study also found the site suitable for the project (Dhooge 2001, 10).

The state government of San Luis Potosi indicated early support for the landfill, including a declaration of support by Governor Horacio Sanchez Unzueta in the summer of 1993 (Dhooge 2001, 10). However, shortly thereafter a newly appointed State Director of the Environment expressed strong opposition to the project, and persuaded Governor Unzueta to change his position (Dhooge 2001, 10).

Construction continued from May 1994 until October of that year, when the municipality of Guadalcazar issued a stop work order due to the absence of a municipal construction permit (BCSC 2001a, 4; Kass 2000, 5; Dhooge 2001, 2, 10). According to the Chapter Eleven complaint filed later by Metalclad, the company was told by an official of the Federal Attorney's Office for the Protection of the Environment (PROFEPA) that

no municipal permit was needed due to the primacy of federal authority over hazardous waste (Dhooge 2001, 2, 11). However, the federal official reportedly recommended that Metalclad apply for the municipal permit as a show of respect and to facilitate amicable relations with the local government (Dhooge 2001, 11; Kass 2000, 5). Metalclad applied for the municipal permit and resumed construction in November 1994 (Kass 2000, 5; BCSC 2001a, 4; Dhooge 2001, 2, 11). At about this time, additional environmental impact studies were conducted by the University of San Luis Potosi and PROFEPA. Both studies concluded that the site was suitable for a hazardous waste landfill, subject to engineering requirements (Kass 2000, 5; IISD 2001a, 75).

The facility was completed and a "grand opening" was scheduled on March 10, 1995. However, demonstrators blocked the site for several hours (BCSC 2001a, 4). Metalclad alleged that about 100 armed demonstrators, as well as state troopers, were transported to the site by the San Luis Potosi state government (Dhooge 2001, 11). The demonstrations prevented the landfill from opening, and the facility remained closed (BCSC 2001a, 4; Kass 2000, 5-6).

At this point, Metalclad entered into further negotiations with federal authorities; the state government of San Luis Potosi apparently agreed at first to participate in the negotiations, but subsequently withdrew (Dhooge 2001, 11). In November 1995 these negotiations resulted in a *convenio*, an agreement between the company, the INE, and PROFEPA (Kass 2000, 5-6; BCSC 2001a, 4). Under the *convenio*, Metalclad would be permitted to operate the landfill for an initial period of five years; in return, during the first three years of this period the company would remediate previous contamination from the

operation of the transfer station (BCSC 2001a, 4; Kass 2000, 5-6; Dhooge 2001, 11). Other provisions of the *convenio* called for Metalclad to designate a portion of the landfill site for preservation of native species; provide hazardous waste management training to local officials; and make significant contributions to the local community, including free medical services (Dhooge 2001, 11; Kass 2000, 5-6).

In December 1995, the municipality of Guadalcazar rejected Metalclad's application for a municipal construction permit on the grounds that 1) COTERIN had been denied a construction permit in 1991 and 1992; 2) the company had begun construction before applying for the permit and finished while the application was still pending; 3) there were environmental concerns; and 4) many of the local residents were opposed to the landfill facility (BCSC 2001a, 4). Metalclad was apparently not notified of the meeting where the decision to deny the permit application was made, and thus had no opportunity to comment or otherwise participate in the decision process (Kass 2000, 6; Dhooge 2001, 11).

In addition to denying the permit, the municipality challenged the *convenio*. It filed an administrative complaint against the agreement with SEMARNAP–an action which was subsequently dismissed by the Secretary of the Environment (BCSC 2001a, 4; Dhooge 2001, 12). In early 1996, the municipality also filed a writ of amparo against the *convenio* in federal court, which resulted in a temporary injunction suspending operation of the landfill (BCSC 2001a, 4; Dhooge 2001, 12). The injunction was ultimately lifted when the amparo was dismissed in May 1999 (BCSC 2001a, 4; Dhooge 2001, 12);

however, by that time the landfill had been permanently barred from opening by subsequent state actions.

The controversy continued through 1996. In February of that year, the federal INE granted another permit to Metalclad, authorizing the company to expand the landfill's capacity ten-fold from 36,000 tons to 360,000 tons annually (IISD 2001a, 75; BCSC 2001a, 4; Dhooge 2001, 12). Meanwhile, state and local opposition to the facility continued. In April 1996, the municipality of Guadalcazar rejected Metalclad's request to reconsider the application for a construction permit (BCSC 2001a, 4).

Finally, in September 1997 Governor Unzueta–three days prior to the end of his term– issued an Ecological Decree designating a large area, including the landfill site, as a preserve for the protection of twenty species of native cacti (BCSC 2001a, 5; Dhooge 2001, 12). The decree, which was subsequently affirmed by Unzueta's successor, ordered immediate cessation of all industrial activity in the designated area, effectively terminating any possibility of opening the landfill (Dhooge 2001, 12; IISD 2001a, 75).

Chapter Eleven arbitration

In October 1996–well before the governor had issued the Ecological Degree–a frustrated Metalclad filed a Notice of Intent to Submit a Claim to Arbitration under NAFTA (BCSC 2001a, 5; IISD 2001a, 74; Dhooge 2001, 3). This was followed in January 1997 by the filing of a Notice of Claim with the ICSID Secretariat (BCSC 2001a, 5; IISD 2001a, 74; Dhooge 2001, 3, 13, 15). A three-member Tribunal, convened shortly thereafter, determined that the legal location of the case would be Vancouver, British Columbia (BCSC 2001a, 5; Dhooge 2001, 15). Written submissions and witness

statements–including submissions by Canada and the U.S. in support of Mexico–were exchanged during the following months, and oral arguments were held before the Tribunal in August and September 1999 (BCSC 2001a, 5; Dhooge 2001, 15).

Metalclad argued in its claim that Mexico had violated several provisions of NAFTA's Chapter Eleven. It alleged that the municipal requirement of a construction permit violated the national treatment obligation under Article 1102, noting that the municipality had never required such a permit before (a claim which the Supreme Court of British Columbia later contradicted) and that Guadalcazar did not even have an agency responsible for processing applications and issuing permits (Dhooge 2001, 14). Metalclad also argued that the imposition of permit, testing and study requirements constituted a violation of the most-favored-nation treatment established by Article 1103 (Dhooge 2001, 14).

Much of Metalclad's complaint was based on Article 1105, which requires fair and equitable treatment in accordance with international law. The corporation cited repeated assurances by the Mexican federal government that it exercised full authority over hazardous waste and that all permit requirements had been met (Kass 2000, 5; DePalma 2001a, W-1; IISD 2001a, 74-75; Dhooge 2001, 13). Metalclad argued that, given federal authority in this policy area, the federal government should be held accountable for its failure to override local opposition to the landfill (Dhooge 2001, 13). The corporation also claimed that the actions of the San Luis Potosi state government, including withdrawal of previously expressed support for the project and the alleged deployment of

state troopers to keep the landfill from opening, violated the fair and equitable treatment obligation of Article 1105 (Dhooge 2001, 13-14).

Finally, Metalclad argued that the combined actions of the federal, state and local governments constituted an expropriation in violation of Article 1110 (IISD 2001a, 75; Kass 2000, 6; Dhooge 2001, 15). The corporation complained that it had been deprived of its investment by government actions including federal assurances which were not upheld, active state opposition, and denial of a construction permit at the municipal level. Metalclad asked the Tribunal for compensation of $90 million–an amount representing projected profits from the landfill facility–or $20.4 million, which was the estimated value of its actual investment (Dhooge 2001, 15).

The Tribunal issued its decision on August 30, 2000 (BCSC 2001a, 2). The first issue it addressed was the question of whether the federal government of Mexico should be held responsible for the actions of the state and the municipality. As Luz (2000/2001, 7) summarizes the ruling on this question, it

> restated a well-settled rule of international law: a state cannot plead a violation of, or deficiencies in, its internal law to absolve itself of responsibility for the breach of an obligation pursuant to a treaty. Mexico did not dispute this, as NAFTA Article 105 clearly makes Mexico and the United States responsible for their respective state governments, and Canada responsible for the actions of its provinces.

In addition, the reference to state and provincial governments within Article 105 was held to include federal responsibility for the local governments within the states and provinces (Dhooge 2001, 16).

Virtually ignoring the questions of national and most-favored-nation treatment under Articles 1102 and 1103, the Tribunal's ruling addressed the issues of fair and

equitable treatment under Article 1105 and expropriation under Article 1110 (Dhooge 2001, 16). With regard to Article 1105, the Tribunal ruled that Mexico had in fact failed to provide fair and equitable treatment to Metalclad in accordance with international law. This finding was based on two arguments: first, that international law now included a "transparency" guarantee according to NAFTA's objectives; and second, that the municipality had exceeded its legal authority in denying a permit.

In finding a breach of Article 1105, the Tribunal relied heavily on Article 102, which states the objectives of NAFTA. Article 102 reads in part:

> The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to:
>
> ...
>
> (c) increase substantially investment opportunities in the territories of the Parties...

Observers have pointed out that, among NAFTA's various objectives and underlying principles, the notion of transparency was given prominence by the Tribunal (IISD 2001a, 17-18, 75-76; BCSC 2001a, 7). Furthermore, the transparency objective was read by the Tribunal as a rather broad guarantee; as noted in the appeals decision by the Supreme Court of British Columbia,

> The Tribunal understood "transparency" to include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments should be capable of being readily known to all affected investors of a Party and that there should be no room for doubt or uncertainty. The Tribunal held that, if the authorities of the central government of a Party become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated. (BCSC 2001a, 7)

The Tribunal reasoned that since, in their view, a transparency guarantee is now included

within international law under NAFTA, Mexico's failure to provide transparency constituted a failure to treat Metalclad in accordance with international law.

A further breach of Article 1105 was found in Guadalcazar's refusal to issue a municipal construction permit. Citing the Mexican constitution and the Federal Ecology Law, the Tribunal concluded that the federal government has controlling authority over hazardous waste (Dhooge 2001, 16; BCSC 2001a, 7). Municipal authority, the Tribunal found, is limited to specific physical construction aspects, and denial of the permit was therefore improper because it did not reference construction considerations or flaws of the physical facility (BCSC 2001a, 7). The municipality's refusal to grant a permit, in excess of its authority, was deemed by the Tribunal to be a denial of substantive due process (Dhooge 2001, 17). Furthermore, the fact that the municipality's decision was made at a town meeting of which Metalclad was not notified, and where it was not represented, was found to be a denial of procedural due process (Dhooge 2001, 17; Kass 2000/2001, 6). Noting that the situation was further muddied by federal assurances to Metalclad that no municipal approval was required, the Tribunal held in summary

> that Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment. It said that the totality of the circumstances demonstrated a lack of orderly process and timely disposition in relation to an investor acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA. The Tribunal stated that, moreover, the acts of the State of SLP and the Municipality (which were attributable to Mexico) failed to comply with or adhere to the requirements of Article 1105. (BCSC 2001a, 7-8)

The Tribunal then turned to the issue of expropriation under Article 1110. It

> defined expropriation under Article 1110 of the NAFTA as the open, deliberate and acknowledged taking of property, as well as covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant

> part, of the use or reasonably-to-be-expected economic benefit of property... (BCSC 2001a, 8)

Referring to its earlier findings that Guadalcazar had acted outside its authority and thus breached Article 1105 in denying the construction permit, the Tribunal ruled that Mexico's tolerance of the municipality's behavior constituted a measure tantamount to expropriation under Article 1110 (BCSC 2001a, 8, 17). It further stated that the Ecological Decree issued by Governor Unzueta constituted grounds for a finding of expropriation, since the Decree had the effect of barring forever the operation of the landfill (BCSC 2001a, 8). The Tribunal was careful to state that the Ecological Decree was not a strictly necessary basis for its finding that expropriation had taken place; this was due to apparent concern that an appeals ruling would reject consideration of the Ecological Decree, since it was a government action taken after arbitration had been initiated (BCSC 2001a, 8).

Based on its findings that Mexico had breached Articles 1105 and 1110, the Tribunal awarded Metalclad damages in the amount of U.S. $16,685,000 including interest up to the time of the award (BCSC 2001a, 9). The amount of assessed damages reflected the Tribunal's estimation of Metalclad's actual investment in the landfill project (BCSC 2001a, 9).

Neither Metalclad nor Mexico was satisfied with this outcome. Metalclad criticized the amount of the award, complaining that it did not reflect the true value of the landfill project; Mexico was disappointed for the obvious reason that the Tribunal had found it in breach of Chapter Eleven (Dhooge 2001, 20). In October 2000, Mexico initiated a petition to the Supreme Court of British Columbia seeking review of, or appeal

from, the Tribunal's ruling (IISD 2001a, 77). The petition made a number of claims, including that: 1) the Tribunal had exceeded its authority by including NAFTA provisions outside Chapter Eleven as central to its ruling, thereby "legislating" new Chapter Eleven provisions; 2) the Tribunal had exceeded its powers by equating an alleged violation of domestic law to a breach of international law; 3) it had exceeded its authority by assuming powers to decide issues of Mexican law as if it were a domestic court; and 4) it had erred in its interpretations of Articles 1105 and 1110, as well as its interpretations of Mexican law (IISD 2001a, 78). The appeal was heard by the Supreme Court of British Columbia in Vancouver, B.C., in February and March 2001 (IISD 2001a, 78).

The Supreme Court determined that its review of the Tribunal's award was governed by the International Commercial Arbitration Act (International CAA) of British Columbia, which sets strict limitations on the conditions under which the Court may set aside an arbitral award. Based on the International CAA, the Supreme Court concluded that the most relevant issue for purposes of appeal was "whether the Tribunal made decisions on matters beyond the scope of the submission to arbitration by deciding upon matters outside Chapter 11." (BCSC 2001a, 16)

In May 2001, the Court issued a ruling that contained somewhat mixed conclusions (DePalma 2001a, W-1; *International Trade Daily* 10/30/01). It ruled that the Tribunal had in fact made decisions on matters beyond the scope of Chapter Eleven, by virtue of the fact that the Tribunal had based its finding of a breach of Article 1105 on the concept of transparency (BCSC 2001a, 16). The Court found:

> No authority was cited or evidence introduced to establish that transparency has become part of customary international law....Transparency is mentioned in Article 102(1) but it is listed as one of the principles and rules contained in the NAFTA through which the objectives are elaborated...(BCSC 2001a, 16)

The Court concluded that, with regard to Article 1105, "the Tribunal made its decision on the basis of transparency. This was a matter beyond the scope of the submission to arbitration because there are no transparency obligations contained in Chapter 11." (BCSC 2001a, 17)

Similarly, the Court ruled that the Tribunal had acted beyond its scope in finding that Mexico, by tolerating the behavior of the municipality, had committed an act tantamount to expropriation under Article 1110 (BCSC 2001a, 17). The Court stated that "the Tribunal's analysis of Article 1105 infected its analysis of Article 1110...The Tribunal's statement that Mexico took a measure tantamount to expropriation was directly connected to its finding of a breach of Article 1105." (BCSC 2001a, 18) Thus, the Tribunal's finding that expropriation had occurred as a result of Mexico's tolerance of the municipality's behavior was based, again, on the concept of transparency; again, the Court ruled that transparency is beyond the scope of Chapter Eleven arbitration (BCSC 2001a, 18).

However, with respect to expropriation the Tribunal had also addressed the state Ecological Decree. With no reference to transparency or any of the other issues noted in its analysis of Article 1105, the Tribunal had found that the Decree constituted an expropriation because it had the effect of barring forever the operation of the landfill (BCSC 2001a, 19-20). With respect to this finding, the Court ruled that the Tribunal was

not acting outside the scope of arbitration, and that its conclusion was not unreasonable (BCSC 2001a, 20-22). Thus, this part of the Tribunal's decision was allowed to stand (BCSC 2001a, 22-23).

Based on these findings, the Court recalculated the amount of compensation to be paid by Mexico to Metalclad. The award issued by the Tribunal had included interest accrued from December 5, 1995, the date on which the municipality had denied the construction permit (BCSC 2001a, 29). Because it concluded that the expropriation had in fact taken place with the Ecological Decree, the Court recalculated the amount of interest beginning on September 20, 1997, the date the Decree was issued (BCSC 2001a, 29).

The Supreme Court's ruling did not end the legal wrangling altogether. Mexico appealed to the Court for its refusal to set aside the award in its entirety, and Metalclad appealed for a referral back to the Tribunal to pursue the portion of interest which the Court had set aside (BCSC 2001b). A new appeal hearing was scheduled for April 8, 2002 (BCSC 2001b). However, in June 2001, Mexico offered to settle the case by paying Metalclad $15.6 million, plus $2,559 per day in interest beginning June 1 (DePalma 2001b). The payment was delayed for several months while the Mexican government sought agreement among federal agencies and the state of San Luis Potosi on how to divide the cost (DePalma 2001b). Finally, in October 2001 the government of Mexico paid just over $16 million to Metalclad, thereby ending the dispute (Sanchez 2001; Notices of Abandonment of Appeal and Cross-Appeal, 10/30/01, posted online at www.naftaclaims.com). From beginning to end, the arbitration had lasted five years.

General implications of the Metalclad case

The Metalclad case was the first arbitration to actually interpret Chapter Eleven (Dhooge 2001, 21); previous high-profile cases, such as *Ethyl* v. *Canada*, had been settled before a decision could be issued. Observers have paid close attention to the Metalclad arbitration in the hope that it will reveal some general insights into Chapter Eleven and its expected impact.

When the Tribunal first issued its decision, observers expressed alarm at the way in which the arbitral panel had broadened the scope of Article 1105 to include obligations–such as transparency–that were not found in Chapter Eleven itself (IISD 2001a; Kass, 2000, 8). We may assume that a sigh of relief went up when the Supreme Court of British Columbia effectively reined in this attempt to expand Chapter Eleven's reach. The matter was further clarified by the interpretation of Chapter Eleven issued by the FTC in July 2001. The FTC interpretation stated that the obligations of Article 1105 "do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens." (FTC 2001) It further specified that a "determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)." (FTC 2001) Those who had been alarmed at the Metalclad Tribunal's reading of Article 1105 have welcomed this statement by the FTC, which is binding on future Tribunals and may put an end to efforts to expand minimum standards of treatment beyond customary rights of fairness and due process under international law (IISD 2001b, 2-3). However, the FTC interpretation has already been challenged by

attorneys arguing that it constitutes an illegitimate attempt to *amend* Chapter Eleven (Dugan and Wilderotter 2001); it remains to be seen how future Tribunals will address the issue.

The Metalclad Tribunal's decision has also been widely noted for its broad definition of "expropriation." As the Supreme Court of British Columbia (BCSC 2001a, 21) observed:

> The Tribunal gave an extremely broad definition of expropriation for the purposes of Article 1110. In addition to the more conventional notion of expropriation involving a taking of property, the Tribunal held that expropriation under the NAFTA includes covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property. This definition is sufficiently broad to include a legitimate rezoning of property by a municipality or other zoning authority.

Dhooge (2001, 27-28) points out that the expansive definition given by the Metalclad Tribunal "may have succeeded in expanding the term 'expropriation' in directions that were arguably never anticipated by the parties (to NAFTA)." Unlike its disallowance of transparency within the scope of Article 1105, the Supreme Court of British Columbia allowed the Tribunal's definition of "expropriation" to stand, finding that "the definition of expropriation is a question of law with which this Court is not entitled to interfere..." (BCSC 2001a, 21)

The broad definition of "expropriation" is considered problematic in several ways. First, it may be seen as an obligation on governments to ensure investors' success; as Dhooge (2001, 25) observes, without such an expansive definition of expropriation,

> risks associated with foreign investment would be allocated to the investor itself, who would required (sic) to adequately ascertain their existence, potential impact upon operations, and ultimately, acceptability. NAFTA's expropriation provisions relieve

> foreign investors of these burdens through outright risk transference to host governments. At the very least, such governments become the de facto guarantors of the success of foreign investors operating within their borders.

The Tribunal's definition of "expropriation" is also considered a radical departure from the traditional understanding of the term, which allowed governments to protect the public welfare under their legitimate "police powers" (IISD 2001a, 78-79). The International Institute for Sustainable Development argues that the Tribunal's expansive definition

> not only limits the scope of the police powers rule, but also would effectively eliminate this traditional international law test from consideration in the review of an expropriation claim. Following this reasoning, regardless of the purpose, compensation must be paid if there is a significant impact. This is alarming since *any environmental law worth adopting* will affect business operations and may often end the use of, or trade in, certain products, and therefore will have a significant impact on the business in question. (IISD 2001a, 32-33, emphasis in original)

Observers have noted that if, under the expanded definition of "expropriation," compensation is required for any environmental measure affecting business operations, this would in fact constitute a reversal of the "polluter-pays" principle, which is widely accepted in environmental policy (IISD 2001a, 33; Dhooge 2001, 29).

Federalism implications of the Metalclad case

In terms of federalism, the Metalclad case raises several interesting issues. With respect to Mexican federalism specifically, the case highlights a serious weakness in the Mexican practice of *concurrencia* in environmental policy. Under *concurrencia*, when the lowest level of government fails to provide adequate regulation, jurisdiction passes to the next higher level; if that level of government likewise proves inadequate, jurisdiction passes on again to a higher level (Mumme 2000, 20). This arrangement "is rife with

ambiguities concerning the actual scope and application of governmental powers at various levels." (Mumme 2000, 20) Under these circumstances, it is perhaps not surprising that Metalclad was faced with so much uncertainty with regard to government requirements to open the landfill. Under *concurrencia*, the division of powers between Mexico's levels of government remains unclear; as the Metalclad Tribunal's ruling illustrated, this invites interpretation by outside international bodies.

The Metalclad case also carries implications with respect to federalism which are more general in their application. A number of scholars have noted the significance of the fact that the Tribunal assumed its own competence to rule on domestic legal and constitutional matters of environmental jurisdiction. Ruling against the Mexican government's arguments on the substance of Mexican law, the Tribunal based much of its decision on the finding that the municipality had exceeded its legal authority over hazardous waste (IISD 2001a, 76-77). As Dhooge (2001, 21) notes, the Tribunal's action made it clear that

> NAFTA arbitration panels will not shirk from interpreting the federal, state and local laws of the parties and from disregarding official interpretations of such laws when it suits their purposes....(T)he tribunal held that Guadalcazar exceeded its constitutional authority....The tribunal expressed no reluctance in so holding and thus construing Mexican law in a manner contrary to the interpretation held by the enacting authority itself.

In this case the issue is not whether the Tribunal was incorrect in its interpretation of Mexican environmental law and jurisdiction; indeed, hazardous waste management *is* formally a matter reserved to federal jurisdiction, although municipalities are held accountable to their constituencies to some extent by virtue of their proximity to the

problem (Mumme 2000, 33). Rather, the issue is whether a Chapter Eleven Tribunal has the jurisdiction to issue a ruling on domestic legal matters (IISD 2001a, 41, 77). As Kass (2000, 8) notes, "there is a difference between determining whether governmental conduct constitutes a taking and delineating the boundaries among federal, state and local environmental laws..." Unfortunately, the appeals decision by the Supreme Court of British Columbia did not address the question of whether the Tribunal acted within its jurisdiction in this matter; having concluded that the Tribunal acted beyond its scope with regard to the transparency issue, the Court declared that "it is...unnecessary to decide whether the Tribunal made decisions of Mexican domestic law..." (BCSC 2001a, 17). We are thus left with the situation in which, under Chapter Eleven, international Tribunals are not prohibited from interjecting themselves into determinations of domestic law and jurisdiction. This is an extraordinary expansion of power for international bodies.

Another implication of the Metalclad case with respect to federalism is the possibility that representations made by officials at one level of government may be seen as legally binding on another level of government (IISD 2001a, 29, 78). The Tribunal accepted Metalclad's assertion that the federal government had given repeated assurances that the landfill would be allowed to open, and the arbitral panel took Mexico to task for failing to override state and local actions to the contrary. Indeed, the Tribunal held that the federal governments of the NAFTA parties have a legal obligation to intervene when their subnational governments exceed their authority (Dhooge 2001, 22). Although this portion of the Tribunal's decision was overturned along with the rest of the panel's findings on Article 1105, the Supreme Court did not specifically address the question of

whether representations made at one level of government could be considered binding on the other levels. This issue may arise in future Tribunals, and there is no reason to assume that a different arbitral panel would reach a different conclusion.

Finally, findings such as those by the Metalclad Tribunal may undermine the willingness of state and local governments to adopt environmental regulations (Dhooge 2001, 27). Chapter Eleven obviously reaches beyond Mexico to the U.S. and Canada, where subnational governments have a substantial amount of jurisdiction and authority over environmental matters. As Dhooge (2001, 27) points out, the "threat posed by potential claims may chill future state and local environmental regulation, thereby freezing such regulation in its present state." It is clearly too early to predict whether such a subnational regulatory freeze will occur, and what specific effects it might have on federalism and environmental policy in general. However, the fact that an international tribunal has deigned to rule on the limits of subnational authority, and has determined that federal statements are binding on subnational governments, is surely cause for concern.

Methanex v. United States

Background

Methanex of Vancouver, B.C., is the world's largest methanol producer (Greider 2001). Approximately forty percent of the company's sales to the U.S. are used to make MTBE (IISD 2001a, 96), a methanol-based gasoline additive which, according to Methanex, reduces air pollution (Bottari 2001).

In March 1999, California Governor Gray Davis issued an executive order phasing out the use of MTBE in gasoline sold in the state by December 31, 2002 (IISD 2001a, 96;

National Wildlife Federation 2000; Bottari 2001). The order was issued after MTBE was found in thousands of groundwater sites throughout California (Greider 2001; Bottari 2001). Highly soluble in water, MTBE has been associated with potential cancer risks and health effects on humans such as dizziness, nausea and headaches (Bottari 2001; Greider 2001; National Wildlife Federation 2000; Gaines 2003, 275). A 1998 report by the University of California at Davis found no significant air quality benefit from using MTBE, and concluded that its use was putting California's water resources at risk (Bottari 2001). Several other states have since followed California's lead in banning MTBE, and the issue of a national ban has come up before the U.S. Congress (Greider 2001; IISD 2001a, 96; National Wildlife Federation 2000; Gaines 2003, 282).

Chapter Eleven arbitration

On June 15, 1999, less than three months after Governor Davis issued the order banning MTBE, Methanex filed a Notice of Intent to Arbitrate under Chapter Eleven of NAFTA (IISD 2001a, 96). This was followed by a Notice of Arbitration and a Statement of Claim in December 1999, and an Amended Statement of Claim in February 2001 (IISD 2001a, 96; Methanex case documents posted online at www.naftaclaims.com). Methanex chose to bring its case under the UNCITRAL rules of procedure (Bottari 2001). The corporation is seeking nearly $1 billion US in damages–the sum of profits it claims will be lost as a result of the MTBE ban (IISD 2001a, 96; National Wildlife Federation, 2000).

Methanex claimed that it was denied fair and equitable treatment in accordance with international law, a breach of the Article 1105 obligation (IISD 2001a, 97). In support of this claim, Methanex alleged that it was denied due process and a fair hearing,

which caused a failure to consider alternatives to banning MTBE; that the decision to ban MTBE was based on unfair and non-transparent lobbying; and that the ban violates international law because the World Trade Organization (WTO) Agreement on Technical Barriers to Trade requires the least-trade-restrictive approach which, in the corporation's view, would have been to police leaking storage tanks more strictly rather than ban MTBE (IISD 2001a, 97; Bottari 2001; California State Senate 2001a, 5). The company argues that violation of *any* international principle for the protection of trade or investment–such as the WTO Agreement on Technical Barriers to Trade–is a violation of Article 1105 (IISD 2001a, 99).

Methanex also claims that the MTBE ban constitutes an expropriation in violation of Article 1110. According to IISD (2001a, 97), this claim is based on assertions

> that the actions taken to ban MTBE go far beyond what was necessary to protect the public interest, failed to consider the legitimate interests of Methanex, and resulted from a failure to enforce other environmental laws. These failures led to a substantial interference and taking of their business and a violation of Article 1110.

In its Amended Statement of Claim, Methanex added an assertion that it is being denied national treatment in violation of Article 1102 (Mann 2002, 1, 4-5; IISD 2001a, 96-97; Bottari 2001). The corporation asserts that the ban on MTBE discriminates in favor of ethanol, a substitute product manufactured by the U.S.-based Archer-Daniels-Midland (ADM) company (Mann 2002, 1; IISD 2001a, 96-97; Bottari 2001). Methanex alleges that the decision by Governor Davis to ban MTBE was influenced by large campaign contributions by ADM (Mann 2002, 1, 4-5; IISD 2001a, 96-97; Bottari 2001).

In addition to initiating arbitration under Chapter Eleven, in October 1999 Methanex filed a submission with the Commission for Environmental Cooperation under Article 14 of the NAAEC (CEC 2001d). The submission alleged failure by the state of California to enforce its environmental laws against leaking gasoline tanks (CEC 2001d; IISD 2001a, 97). According to Methanex, the existence of MTBE in California's groundwater is really a problem of leaking underground gasoline storage tanks; it reasoned that if the law regulating such tanks were properly enforced, there would be no need to ban MTBE (IISD 2001a, 96-97). A few months later, in January 2000, a second Canadian MTBE manufacturer filed a submission on the same issue (IISD 2001a, 96-97; CEC 2001d). The NAAEC prohibits Article 14 submissions from going forward if the subject matter is being considered in another legal venue; with arbitration on the MTBE issue pending, the CEC Secretariat terminated both submissions in June 2000 (CEC 2001d; IISD 2001a, 98).

In August 2000, the International Institute for Sustainable Development petitioned the Methanex Tribunal for *amicus curiae* status (IISD 2001a, 98). This request was joined in October 2000 by a joint petition from Communities for a Better Environment, Earth Island Institute, and the Center for International Environmental Law (Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae," hereinafter Tribunal Amicus Decision, 2001, 3). The requests for *amicus* status sought permission to file written briefs, preferably after reading the submissions of the parties to arbitration (IISD 2000, 1). They also sought permission to make oral submissions, and observer status at the oral hearings (IISD 2000, 1).

The IISD based its arguments for *amicus* status on the public importance of the case and the anticipation that a Tribunal decision will have a critical impact on environmental and other public welfare laws in North America (Tribunal Amicus Decision 2001, 4). The NGO also argued that nothing in Chapter Eleven prevents *amicus* participation, and that allowing such participation would be a positive step to reassure those concerned about the closed nature of Chapter Eleven arbitration proceedings (Tribunal Amicus Decision 2001, 4). The joint petition by the other three NGOs stressed widespread public support for *amicus* participation (Tribunal Amicus Decision 2001, 5). It also argued that the case raised constitutional issues of the balance between property rights and governmental authority to regulate the environment; that the Methanex case carried implications for the willingness of governments (including subnational governments) to regulate the environment; and that the Tribunal had jurisdiction to allow the petition under the UNCITRAL rules (Tribunal Amicus Decision 2001, 5).

After the Tribunal in the Metalclad case issued its decision in August 2000, the IISD filed another submission with the Methanex Tribunal which argued increased urgency for *amicus* participation in light of the Metalclad Tribunal's failure to address environmental concerns (IISD 2000, 2-4; Tribunal Amicus Decision 2001, 4). Meanwhile, Methanex and the government of Mexico filed submissions opposing *amicus* participation; the governments of the U.S. and Canada supported the NGOs' position (Tribunal Amicus Decision 2001, 6-12).

In January 2001, the Methanex Tribunal handed down a decision declaring that it does possess the authority to accept written *amicus* briefs, but that UNCITRAL

arbitration rules prohibit the panel from allowing oral *amicus* arguments or observer status without the agreement of the litigating parties (IISD 2001a, 98-99; Tribunal Amicus Decision 2001, 21). Although the Tribunal ruled that it may accept *amicus* participation at its own discretion, it did not issue an order for such participation in the Methanex case; the Tribunal stated that, while it was "minded" to receive written *amicus* submissions, such an order would be premature in light of ongoing issues related to the Tribunal's jurisdiction, and in light of the need to develop appropriate procedures for *amicus* participation (IISD 2001a, 44, 99; Tribunal Amicus Decision 2001, 23; Gaines 2003, 266). Thus, as IISD (2001a, 99) observes, "the decision can be seen as a decision in favor of the applicants for *amicus* status, but one that was not fully executed." However, the organization remains hopeful that it will eventually receive permission to participate as an *amicus* in the Methanex case (IISD 2001c, 3).

As mentioned above, Methanex had filed its original Notice of Arbitration and Statement of Claim in December 1999; this was followed by an Amended Statement of Claim over a year later, in February 2001. The government of the United States responded in April 2001, arguing that the claims of Methanex are outside the scope of Chapter Eleven and that the Tribunal therefore lacks the jurisdiction to rule on them (IISD 2001c, 2). The United States based its argument on Article 1101, which states that Chapter Eleven covers measures "relating to" foreign investors (Mann 2002, 1; Dugan and Wilderotter 2002). As one observer from the IISD summarizes the issue:

> Methanex always faced the problem that neither it nor anything it made was directly regulated by the California regulations. Rather, a product made by others (MTBE) that Methanex supplied one component for (methanol) was regulated. (Mann 2002, 3)

The Tribunal held a jurisdiction hearing in Washington, D.C. in July 2001 (Arbitration Hearing, Volume I, 2001). On August 7, 2002, the panel issued its decision on the issue of jurisdiction (Preliminary Award on Jurisdiction and Admissibility, hereinafter Preliminary Award, 2002). In an almost complete win for the United States, the Tribunal interpreted Article 1101 as a "gateway" establishing threshold requirements that a claimant must satisfy before a Chapter Eleven Tribunal may take jurisdiction (Preliminary Award 2002, para. 106, 137). It concluded that the phrase "relating to" in Article 1101 signifies that a measure must go beyond merely affecting an investor; indeed, the phrase requires a "legally significant connection" between them (Preliminary Award 2002, para. 147). The Tribunal found that, for the most part, such a connection was lacking between Methanex and the California ban on MTBE, and the Tribunal therefore lacked the jurisdiction to hear most of the case (Preliminary Award 2002, para. 139; Mann 2002, 4).

However, the panel did leave a small door open to Methanex to pursue its claim. Referring to the allegation in the Amended Statement of Claim that Governor Davis acted with the deliberate intent of discriminating in favor of ethanol and ADM, the Tribunal indicated that, if the MTBE ban were in fact based on such intent, then the measure could be considered "related to" Methanex and the Tribunal would have jurisdiction (Preliminary Award 2002, para. 172; Mann 2002, 2). The Tribunal ordered Methanex to submit a "fresh pleading," accompanied by evidence, witness statements and expert reports, to back up its claim that Davis acted with discriminatory intent (Preliminary Award 2002, para.

163-165, 172). Methanex was given ninety days to do so (Preliminary Award 2002, para. 172).

Attorneys for Methanex, barely making the deadline, complied with the order on November 5, 2002 by filing a Re-Submitted Amended Statement of Claim (Collier 2002; Menyasz 2002; Methanex case documents posted online at www.naftaclaims.com). Assessments of the new filing are mixed. One report claims that it meets the Tribunal's requirements for evidence to support the company's allegations, providing "substantial, detailed proof that the state government's action was intended to harm foreign methanol producers" as a result of political pressure from ADM (Menyasz 2002). Another assessment reports that the submission "appeared to come up empty," failing to provide any new information (Collier 2002). Another jurisdiction hearing by the Tribunal is pending. Meanwhile, Governor Davis has indefinitely extended the December 2002 deadline to phase out MTBE, reportedly because supplies of other gasoline additives are insufficient for the California market (Gaines 2003, 276).

General implications of the Methanex case

The Methanex case is still unresolved, and a great deal of uncertainty will surround it until it reaches its legal conclusion. However, it is already a fairly well-known case, because of the large dollar amount involved and because of its direct challenge to an American subnational environmental measure (IISD 2001a, 15). From what we know of the Methanex case so far, we may draw some preliminary inferences.

The Tribunal's ruling on *amicus* participation may prove to be an important crack in the otherwise closed arbitration process. However, it remains to be seen how

significant this development will prove to be. Such participation remains purely at the discretion of each Tribunal convened on a case-by-case basis (IISD 2001a, 44). Moreover, it is still uncertain whether *amici* will be allowed full access to arbitration documents (IISD 2001a, 44).

The Methanex case also represents another attempt to expand the reach of Article 1105. As IISD (2001a, 99) notes, Methanex's argument that principles from such extraneous sources as the WTO Agreement on Technical Barriers to Trade should be included in Article 1105 "effectively seeks to expand the scope of Chapter 11 to allow the investor-state process to litigate any trade law issue." It would be a very significant development if the Tribunal were to agree with Methanex that *any* trade law issue lies within the scope of Article 1105. Traditionally, trade law disputes have been decided through a state-to-state process of international arbitration, with governments obliged to consider political and public interest factors in determining whether to initiate a case. This model is in sharp contrast to the investor-state process under Chapter Eleven, in which investors have only their self-interest to consider (IISD 2001a, 19-20). A Tribunal decision that *any* dispute of trade law lies within the scope of Article 1105–and is thus fair game for the investor-state process–would have far-reaching consequences, with the potential for governments locked into a position of constant defense against the complaints of private businesses.

As noted above, the FTC interpretation issued July 31, 2001, clarifies Article 1105 to the effect that it "prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment..." and that a "determination that

there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)." (FTC 2001) This interpretation, which is binding on NAFTA tribunals under Article 1131, would seem to resolve the issue of whether, as Methanex claims, the obligations of Article 1105 include principles found within other international trade agreements. However, in September 2001 counsel for Methanex filed a submission with the Methanex Tribunal arguing that the FTC interpretation is immaterial to the case and is, in fact, an illegitimate attempt to *amend* Chapter Eleven (Dugan and Wilderotter, 2001). The U.S. State Department responded the following month with a submission pointing out that the FTC interpretation is binding on the Tribunal and deals directly with the issues in the Methanex case (U.S. State Department 2001). A Tribunal decision on the matter is still pending.

Observers are still sorting out the implications of the Tribunal's August 2002 decision on jurisdiction, which could be significant. While environmentalists welcome the interpretation of Article 1101 as requiring a "legally significant connection," which shuts out investors only indirectly affected by a regulatory measure, they are disappointed that the Tribunal did not dismiss the case altogether (Mann 2002, 2-3; Wallach 2002; Dowd 2002). Mann (2002, 2-3) observes that, while the ruling should have some impact, its extent is uncertain because the meaning of the phrase "legally significant connection" is not clear. Indeed, he notes that the decision "confirms that measures of general application for these public welfare purposes *can* be challenged, as long as they have a legally significant connection to the investor bringing the claim." Lori Wallach, executive director of Public Citizen's Global Trade Watch, similarly laments the "narrow technical

basis" for the Tribunal's decision, which "implies that if Methanex had produced MTBE itself, it already might have won this outrageous case." On the other hand, Gaines (2003, 283) takes a more positive view, predicting in light of the ruling that the Methanex claim will be rejected; if it is, he argues, "the general value of Chapter Eleven's investor protections will be vindicated as compatible with the right of government officials to take nondiscriminatory action to protect health and the environment on a precautionary basis." However, he goes on to add: "If *Methanex* somehow results in an award of compensation, I will join the chorus of environmental critics of Chapter Eleven." Clearly, many of the general implications of the Methanex case remain to be seen.

Federalism implications of the Methanex case

As noted in Chapter Two, environmental regulation in the United States involves a great deal of federal-state overlap. There seems to be no question that, in banning MTBE, the state of California acted within its legal and constitutional boundaries of authority to pass policies safeguarding the health and welfare of its residents.

Despite this, under the rules governing Chapter Eleven arbitration, California state officials are shut out of participation in the Methanex proceedings along with the rest of the public, unless the Tribunal chooses to accept *amicus* participation. Thus, although the policy in question was enacted by California, that state's officials "must rely on the Office of the U.S. Trade Representative (USTR) to defend the interests of California residents..." (Bottari 2001). Members of the California state legislature expressed their concern over such exclusion in a letter dated January 31, 2001 to U.S. Trade Representative Robert Zoellick:

> We find it disconcerting that our democratic decision-making regarding this important public health issue is being second-guessed in a distant forum by unelected officials. This shift in governance is made even more troubling by the fact that the California Legislature has not received formal notice of the MTBE case proceedings and is not entitled to participate in any way (Keeley et al. 2001)

The state legislators' letter requested that the California Legislature be provided with regular and complete updates regarding all challenges to state laws brought under NAFTA and the WTO agreements (Keeley et al. 2001). The USTR replied that its office

> stays in day-to-day contact with the states through a State Point of Contact (SPOC) system, established pursuant to the NAFTA and Uruguay Round implementing legislation. Under this system,...the governor's office in each state designates a single state point of contact (SPOC) responsible for transmitting information to USTR, and disseminating information received from USTR to relevant state offices....Discretion is left with the state as to internal coordination of information among the branches of state government (Zoellick 2001).

Background materials indicate that the California legislators were not satisfied with this answer. An analysis of the USTR's response asked doubtfully whether a successful model exists in which a state governor's SPOC shares USTR information with the legislature (California State Senate 2001a). Apparently the issue of reporting between the executive and the legislative branches–particularly on trade matters–is a point of contention within the California state government, and legislators feel somewhat excluded from the information loop (California State Senate 2001b, 25-26). The analysis of the USTR's response also raised several other questions, including whether one point of contact is adequate to represent a plurality of views; and whether the USTR actually welcomes input from state legislatures on such matters as potential conflicts between trade rules and state law (California State Senate 2001a). California's legislators have not allowed the matter to drop; they have continued to contact the USTR with their questions

and concerns, particularly about the rights of foreign investors as raised by the Methanex case (Kuehl 2001). As of December 2001–almost a year after its initial letter to the USTR–the legislature was still not receiving information on the case to its satisfaction (California State Senate 2001b, 19), and there is no indication that this situation has changed.

The Methanex case carries implications related to the particular characteristics of U.S. federalism. The case involves an extraordinarily large amount of money: almost a billion dollars in damages sought by the Methanex corporation. Should the U.S. lose this case, the prospect of paying such a large sum will present the national government with a choice. It may be tempted to pass a law preempting the state MTBE ban, as presumably allowed under the Supremacy Clause of Article VI of the Constitution. Another scenario, given the predominance of conditions on federal grants to the states in the U.S. fiscal system, is that the national government may pressure California to repeal the ban by threatening to withhold federal funds in transportation or some other area. Alternatively, the national government may simply withhold federal funds to California in the amount equal to the award, thus passing payment on to the state.

On the other hand, the nature of U.S. federalism, in which much of the states' power is not so much legal as political, may indirectly influence the outcome of the Methanex case. The California legislature's activism in the matter has apparently caught the attention of proponents of free trade, raising the spectre of active opposition to future trade agreements by well-organized, well-funded and highly credible state governments. A loss in the Methanex case could well trigger an effective state-led backlash against

Chapter Eleven-style investment provisions in future agreements such as the Free Trade Area of the Americas (FTAA). As a recent article in *The American Prospect* points out, the fact that state legislators are getting involved and questioning the USTR "could prove a far more serious challenge to the current process of corporate-friendly globalization than any ruckus the street activists can muster." (Mooney 2001, 23)

Indeed, this appears to be happening. In response to the Methanex case, the California Senate has formed a Select Committee on International Trade Policy and State Legislation, which is leading state and local activism in opposition to expanding the provisions of Chapter Eleven to other trade agreements (Dougherty 2002). With expansion of free trade on the agendas of the President and the U.S. Congress during the past year, representatives of the National Conference of State Legislatures, the National Association of Attorneys General, the National League of Cities, the U.S. Conference of Mayors, and the National Association of Counties have engaged in intense lobbying in Washington to voice opposition to the investor rules (Roth 2002). Such opposition almost cost President Bush fast-track authority in July 2002–authority the President needs to negotiate the hemispheric FTAA and the General Agreement on Trade in Services (GATS) (Collier 2002). While the President was able to win fast-track authority, state and local activism is continuing as trade negotiations proceed. In August the California legislature passed Senate Joint Resolution 40, memorializing the Congress, the President and the USTR to leave Chapter Eleven-type investor rules out of the FTAA and GATS (Rogers 2002; Kuehl 2002). Similar resolutions have arisen in the legislatures of

Minnesota, Washington, Oregon, and Oklahoma, and the Attorneys General of Maine and New York have also weighed in.[5]

Some observers have seen such political pressure as a factor in the Tribunal's August decision to dismiss most of the Methanex case on a technicality. Public Citizen's Lori Wallach is quoted as saying that there has "been enormous political pressure to make this case go away," noting that a ruling in favor of Methanex would be a "ticking time bomb." (Collier 2002) Having predicted that the Methanex Tribunal would "throw the case in the name of political expediency" for the sake of the FTAA, Wallach has expressed particular alarm that the case was not completely dismissed in the face of such pressure (Wallach 2002).

In summary, the Methanex challenge underscores the consequences of international trade rules that intersect with areas of state jurisdiction in the U.S. federal system. The extent and intensity of these consequences remain to be seen in this case, as we await the outcome.

Sun Belt Water* v. *Canada

Background

Sun Belt Water Inc. is a corporation based in Santa Barbara, California (Luz 2000/2001, 9). In 1990, Sun Belt Water entered into a joint venture with a Canadian firm, Snowcap Waters Ltd. of Vancouver, to export water in bulk from British Columbia to California (Luz 2000/2001, 9; Public Citizen 1999, 6). Environmentalists have a number

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[5]Voluminous documentation for this statement has been compiled through membership in an online subfederal fair trade organization listserve, and is on file with the author.

of grave concerns about the consequences of bulk water export. These concerns include the possibility of irreparable damage to ecosystems; degradation of water quality; and a good deal of scientific uncertainty about other long-term impacts of bulk water removal (Baumann 2001, 5; Campbell and Nizami 2001, 2). In addition, there is a raging debate within Canada–home to about ten percent of the world's available fresh water–as to whether water should be considered a trade commodity (Baumann 2001, 3). While some Canadian financial experts predict large-scale exports of fresh water within the next decade, organizations such as the Canadian Environmental Law Association (CELA) believe that Canadian water should be characterized as a "public trust" rather than as a commodity (Baumann 2001, 3).

Water management in Canada falls under provincial jurisdiction (Baumann 2001, 5). In March 1991, the government of British Columbia enacted a moratorium on bulk water exports and revoked pre-existing water export licenses (Luz 2000/2001, 10; IISD 2001a, 91). In 1996 the provincial government settled a claim with Sun Belt's Canadian partner for $335,000 for the revocation of its water export license; however, there was no such settlement with Sun Belt (IISD 2001a, 91; Luz 2000/2001, 10).

Chapter Eleven arbitration

In November 1998, Sun Belt Water filed a Notice of Intent to Arbitrate under Chapter Eleven (IISD 2001a, 91; Luz 2000/2001, 9). A second Notice of Claim and Demand for Arbitration was filed by Sun Belt in October 1999 (IISD 2001a, 91; Baumann 2001, 6). In the first Notice of Intent, Sun Belt claimed $220 million in damages; in the

second filing, this amount was amended to include lost long-term profits, and increased to between $1.5 billion and $10 billion (IISD 2001a, 91).

British Columbia's moratorium on bulk water exports pre-dated NAFTA by almost three years. However, Sun Belt Water argues that it may arbitrate under NAFTA because the moratorium is an alleged violation of the Canada-U.S. Free Trade Agreement (CUFTA), which took effect in 1989 and is grandfathered into NAFTA (Public Citizen 1999, 6). Sun Belt claims that British Columbia violated the national treatment obligation of NAFTA's Article 1102 by settling with Snowcap Water Ltd., its Canadian partner, and not with Sun Belt itself (IISD 2001a, 91; Luz 2000/2001, 10). Sun Belt further claims a violation of minimum international standards under Article 1105, arguing that several provincial practices lacked due process and fair and equitable treatment (IISD 2001a, 91). Among these practices, according to Sun Belt, were the British Columbia government's alleged encouragement to develop a market for water, followed by a moratorium on water licenses; and a delay in processing Sun Belt's application for expansion of the license held by Snowcap, which allegedly cost the U.S. firm a contract to supply a California municipality (Campbell and Nizami 2001, 13). Finally, Sun Belt claims that British Columbia's withdrawal of the water export license and imposition of the water export ban constitutes an expropriation under Article 1110 (IISD 2001a, 92).

As of the end of 2002, no formal Notice of Arbitration had yet been filed. Until it is formally pursued to the arbitration stage, the Sun Belt Water case remains "in abeyance." In response to an emailed inquiry, a British Columbia government official stated that "the legal questions remain unresolved" and that the matter "is being handled

by the Government of Canada..." (Collins 2002) Because of the pending legal nature of the case, additional information was not forthcoming.

General implications of the Sun Belt case

As with the Methanex case, the full implications of the Sun Belt case will not be known until such time as it is resolved. However, even at this early stage the case raises some interesting and important questions. First, to what extent do NAFTA's Chapter Eleven provisions apply to government actions taken before NAFTA went into effect? As Public Citizen (1999, 6) points out, the "grandfathering" argument raises the possibility that Chapter Eleven claims will proliferate by applying retroactively to government actions taken as far back as the late 1980s, when CUFTA went into effect.

It is worth noting, however, that in this specific case Sun Belt appears to be on tenuous legal ground on the "grandfathering" issue, as the status of water under CUFTA is a matter of some question. The Encyclopedia of British Columbia, quoted in a briefing note by the Canadian parliament, notes that "both the Canada-US Free Trade Agreement and the North American Free Trade Agreement (NAFTA) failed to deal adequately with fresh-water exports." (Parliament of Canada 2001, 2) An Environmental Review of NAFTA published by the Canadian government in 1992 notes that, while the enabling legislation passed by Canada to implement CUFTA stated that the agreement did not apply to water, the issue does not appear within CUFTA itself (Government of Canada 1992, 46). Furthermore, "(t)he large-scale movement of water was neither raised nor negotiated during the NAFTA negotiations." (Government of Canada 1992, 46)

Indeed, the still-open question of whether, and how, NAFTA's provisions apply to fresh water appears to be the most important general issue raised by the Sun Belt case. In 1993 the three NAFTA parties issued a joint statement on the matter:

> Unless water, in any form, has entered into commerce and becomes a good or product, it is not covered by the provisions of any trade agreement, including the NAFTA. And nothing in the NAFTA would oblige any NAFTA Party to either exploit its water for commercial use, or to begin exporting water in any form. Water in its natural state in lakes, rivers, reservoirs, aquifers, water basins and the like is not a good or product, is not traded, and therefore is not and never has been subject to the terms of any trade agreement. (1993 Statement, quoted in Shrybman 1999, 8)

Many Canadians have grave concerns that once bulk water export is allowed by any Canadian jurisdiction, NAFTA's provisions will apply and it will be virtually impossible to retain control over this resource (Parliament of Canada 2001, 2; Campbell and Nizami 2001, 10; Shrybman 1999, 1). Such concerns are partially related to the qualifier at the beginning of the 1993 Statement quoted above: "*Unless* water, in any form, has entered into commerce and becomes a good or product..." This implies that any export of water would establish a precedent establishing it as a trade commodity subject to NAFTA's provisions. This prospect is extremely alarming to environmentalists.

Some legal experts argue that the issue of setting a precedent with respect to water export is irrelevant as far as Chapter Eleven is concerned. While such a precedent would make NAFTA's provisions applicable to water by establishing it as a "good," Chapter Eleven is not limited to trade in goods (Campbell and Nizami 2001, 7; Shrybman 1999, 4). According to Shrybman (1999, 4), the investment rules of Chapter Eleven extend to water, whether water is classified as a good or not. Under these rules, once governments allow domestic entities to withdraw water from its natural state, "as they have done on

countless occasions for purposes that range from large scale industrial use to personal consumption, the same rights must now be accorded foreign investors." (Shrybman 1999, 4). Indeed, of all the trade rules to which Canada is subject, the investment provisions of NAFTA are considered the most threatening to Canada's ability to control its water resources; the Sun Belt case illustrates that the potential for such threats is not simply theoretical (Shrybman 1999, 7, 14).

Until the Sun Belt case is resolved, a great deal of uncertainty still surrounds the issue of NAFTA's application to bulk water export. As Shrybman (1999, 5) points out, "the investment provisions of Chapter 11 represent a very significant innovation in the sphere of international trade agreements....Making predictions about the likely outcome of prospective litigation arising under these rules is a highly uncertain enterprise." Karen Campbell and Yasmin Nizami of West Coast Environmental Law concur:

> This debate will continue until clear action is taken either by a government or a trade tribunal to clarify exactly how bulk water exports will be treated under NAFTA....Until then, uncertainty about the status of our water remains, but the prospects don't look very good. (Campbell and Nizami 2001, 2)

Federalism implications of the Sun Belt case

According to Campbell and Nizami (2001, 13), the Sun Belt case "represents perhaps the most significant threat to Canadian water so far." As such, this case serves to illustrate some critical issues with respect to bulk water exports, including issues which carry significant implications for federalism.

In response to a growing awareness of the threat to Canada's water posed by free trade obligations, in 1999 the federal government of Canada announced a multi-pronged

approach to the issue of bulk water exports. As the first part of this strategy, the federal government proposed amendments to the International Boundary Waters Treaty Act (IBWTA) to prohibit bulk removal from the Canadian portions of waters that straddle the border with the United States (Campbell and Nizami 2001, 8; Parliament of Canada 2001, 1). This proposal was introduced in the Canadian Parliament in February 2001 as Bill C-6 (Campbell and Nizami 2001, 8); it passed and received Royal Assent in December 2001 (Parliament of Canada 2002). The legislation will: 1) require a license from the Minister of Foreign Affairs for projects in boundary or transboundary waters; 2) prohibit projects, except those for domestic or sanitary purposes, from obstructing or diverting any boundary water in a manner that would affect the natural flow of the water; 3) prohibit the removal of boundary water from the basins in which it is located (Parliament of Canada 2001, 1); and 4) allow exceptions at the discretion of the Minister of Foreign Affairs (Campbell and Nizami 2001, 8).

In a 1999 legal opinion on how to most effectively protect Canadian water from bulk export under free trade obligations, Steven Shrybman argued in favor of an immediate federal ban on such exports (Shrybman 1999, 13-14). Shrybman argued that "federal authority to prohibit water exports is clear under Canadian constitutional law..." (Shrybman 1999, 13) However, Bill C-6 is limited in scope to boundary waters, which comprise only fifteen percent of Canada's fresh water resources (Parliament of Canada 2001, 2). Such a limited scope is ostensibly due to the federal government's view that only boundary waters are under federal jurisdiction, with the provinces responsible for the remaining eighty-five percent (Parliament of Canada 2001, 2). A Briefing Note on Bill C-

6 developed by the Canadian Parliament expresses these constitutional sensibilities: "With provinces becoming increasingly territorial and protectionist over their provincial rights, a federal law on bulk water exports could trigger a constitutional fall out." (Parliament of Canada 2001, 2)

In recognition of the need for provincial cooperation in banning bulk water exports, the second piece of the Canadian government's strategy is development of a national accord on the matter, to be signed by the federal government and the provinces (Parliament of Canada 2001, 1; Campbell and Nizami 2001, 8). The Canada-Wide Accord for the Prohibition of Bulk Water Removal from Drainage Basins was proposed by the Canadian Council of Ministers of the Environment in November 1999 (Campbell and Nizami 2001, 10). After several years of reluctance on the part of several provinces (Parliament of Canada 2001, 1), in June 2002 all jurisdictions except Quebec signed on to the Accord with the common objective of banning bulk water removal in Canada (CCME 2002).

Legal analysts have criticized this approach on several grounds. First, the Accord is not legally binding, and there is some concern that changes in political leadership within the provinces would cause them to abandon its obligations (Campbell and Nizami 2001, 10, 11; Shrybman 1999, 10). Second, Shrybman (1999, 10) argues that the Accord is problematic from a constitutional perspective, raising questions about provincial jurisdiction over water as opposed to federal jurisdiction over international trade. Third, the Accord leaves it up to each individual jurisdiction to determine how specifically to achieve the goals of the agreement (Campbell and Nizami 2001, 10; Shrybman 1999, 11).

This may well result in a patchwork of provincial policies, which would be vulnerable to challenges under the national treatment obligations of Article 1102 (Shrybman 1999, 11). Finally, the Accord may actually expand the national treatment obligations of the provinces: while Article 1102 obligates the provinces to provide foreign investors with treatment comparable only to what they provide other investors ("best-in-province" treatment), becoming a signatory to a national Accord may expose provincial governments to requirements that they provide foreign investors with the highest level of treatment afforded to investors by any jurisdiction in the country ("best-in-Canada" treatment) (Shrybman 1999, 11). Under this scenario, "an export approval sanctioned by another province or the federal government may well set a standard with respect to which all other provinces must conform." (Shrybman 1999, 11)

For these reasons, Shrybman (1999) argues quite vigorously for abandoning the traditional "executive federalism" approach that the Accord represents and focusing efforts instead on adopting a strong federal ban on all water exports from Canada. It should be noted that such a blanket federal prohibition may be subject to challenge under international trade laws (Campbell and Nizami 2001, 10-11; Shrybman 1999, 14, 17), although "the potential for such disputes should not...be taken as an excuse for inaction." (Shrybman 1999, 14)

As for provincial responses to the water export issue, all of the provinces have developed or are developing policies to ban bulk export from waters within their jurisdictions (Campbell and Nizami 2001, 11). The issue was on the agenda of the Western Premiers' Conference in May 2001, where all of the western Premiers expressed

firm opposition to the bulk removal of water for export (Campbell and Nizami 2001, 11). British Columbia, which has the largest share of fresh water resources in Canada, followed its 1991 moratorium on bulk water exports with the Water Protection Act in 1995 (Parliament of Canada 2001, 3). This legislation prohibits large-scale transfers of water between British Columbia's nine major watersheds, as well as removal of water (with limited exceptions) from the province (Parliament of Canada 2001, 3).

In addition to the issues involving water export, the Sun Belt case raises federalism-related questions over how an arbitral award would be handled should a Tribunal rule against Canada. Canadian constitutional scholar Mark Luz (2000/2001) has examined the issue of whether the federal government can compel a province responsible for a breach of Chapter Eleven to pay an arbitral award. He concludes that, pursuant to its general trade and commerce power under the Canadian constitution, the federal government may pass legislation requiring the provinces to pay such an award. He cautions, however, that Canada's courts will be likely to review each case on its own merits and, in some cases, "it is very possible that the Supreme Court would find that the intrusion into provincial powers is simply too great to be justified under the federal trade and commerce power." (Luz 2000/2001, 20) Where a domestic court finds that requiring a province to pay an arbitral award poses an unacceptable threat to the federal-provincial balance, the federal government may have to bear the financial burden itself (Luz 2000/2001, 20).

Again, the federalism implications of the Sun Belt case will not be fully known until it is resolved. However, a Tribunal for this case–if one is ever constituted–will have to consider at least some of the federalism-related issues discussed above.

Conclusion

Although two of the three cases presented in this chapter are as yet unresolved, the Metalclad, Methanex and Sun Belt cases raise interesting questions and provide some important revelations with respect to the NAFTA regime's impacts on the subnational governments of the three parties. This concluding section will discuss how these cases illustrate some of the specific aspects of federalism within each party; what the cases reveal in terms of the impacts of Chapter Eleven on states and provinces; and the extent to which federalism arrangements within each Party mediate those impacts to produce variations.

Each case presented herein serves to highlight specific characteristics peculiar to the federalism arrangements of the party involved. When we examine the Metalclad case, the practice of *concurrencia*, and the problems which result, are clearly revealed. Early in the history of this case–indeed, before Metalclad had purchased the landfill site from COTERIN–the municipality had rejected the application for a construction permit; despite this, the federal government subsequently approved construction. These contradictory actions by two levels of government lead to the question which frequently arises from the practice of *concurrencia*, that is: who's in charge? As previously noted, *concurrencia* creates a great deal of ambiguity as to where the authority lies over specific policy areas. This ambiguity is further seen in the fact that, even as the municipal and state governments

were vigorously opposing the landfill, the federal government approved a ten-fold expansion of its operations. As noted in Chapter Two, environmental responsibilities have been slowly devolving to the state and local levels in Mexico. The Metalclad case illustrates that, as this devolution is carried out, there is an urgent need for improved communication and cooperation between the levels of government, which will hopefully result in greater clarity with respect to environmental policies.

The Metalclad case also highlights the need to build the capacity of state and local governments. As proof of its claim that Guadalcazar had exceeded its authority in denying a construction permit, Metalclad pointed out that the municipality did not even have an agency responsible for processing applications and issuing permits. This reveals a weakness in environmental administration in Mexico, especially as devolution progresses. If the state and local governments are to gain in responsibility for administering environmental policies, they must develop the capacity required to effectively carry out this function. The lack of capacity, coupled with the practice of *concurrencia*, creates a disincentive for the state and local governments in Mexico to shoulder responsibility for protection of the environment: they know that, under *concurrencia*, responsibility will pass to a higher level of government if they fail to develop adequate environmental policies. Given their current lack of capacity, responsibility for effective environmental administration is excessively burdensome for state and local governments; it is often easier to "pass the buck" to federal authorities.

Finally with respect to Metalclad, the way in which the award was ultimately paid is illustrative of fiscal arrangements within Mexico. Recall from Chapter Two that fiscal

federalism in Mexico is highly centralized, with the states strictly limited in revenue-generating capacities, and thus highly dependent on the federal government. Although, as noted above, there was apparently some discussion of how to divide payment of the award, ultimately the entire amount was paid by the federal government (TCPS 2003). Since most state and local funds come from the federal government anyway, this is not a surprising outcome. It is unknown at this time whether the federal government has withheld funds from the state of San Luis Potosi, and/or the municipality of Guadalcazar, to recoup its losses.

As for the Methanex case, we find that it illustrates specific aspects of federalism in the U.S. Most striking is the activism of California state officials in response to the Methanex challenge. As noted above, state legislators have repeatedly contacted the USTR with questions and concerns over the impacts of Chapter Eleven on state authority and sovereignty. In addition, California legislators have been quite vocal in the media and with the public in voicing their concerns, and have led the way in mobilizing state governments and the intergovernmental lobby to oppose expansion of Chapter Eleven's investment rules to other trade agreements. These tactics are illustrative of the U.S. federal system, in which state interests are pursued largely through political means.

In addition, the question of how an award in the Methanex case would be handled serves to highlight certain federalism characteristics in the U.S. Under the rules of Chapter Eleven, the award would be lodged against the federal government. As mentioned above, under the Supremacy Clause of the Constitution, the U.S. Congress could avoid payment by passing legislation pre-empting California's ban on MTBE.

Alternatively, the federal government could pressure California to repeal the ban by threatening to withhold federal funds. Failing that, the federal government may be able to recoup its loss by withholding funds to California in an amount equal to the award. While the states in the U.S. have substantial authority to raise revenues on their own, and are thus not nearly as dependent on federal funds as their counterparts in Mexico are, the loss of nearly $1 billion in federal funds–the amount of damages that Methanex is claiming–would put significant pressure on the state budget. The prospect of such a loss could be extremely persuasive in bringing the state into line with federal wishes.

Turning finally to the Sun Belt case, again we see illustrations of federal arrangements peculiar to Canada. This case involves a head-on clash of two spheres of constitutional authority: provincial authority over natural resources, including water, versus federal authority over international trade. Considering the relatively high level of decentralization in Canadian federalism–where a great deal of authority lies with the provinces, which guard that authority jealously–it is truly anybody's guess as to what the eventual fallout of this case will be. Such uncertainty is typical of Canadian federalism which, as noted in Chapter Two, has been characterized as based on pragmatic accommodation and, less politely, as muddling through. To date, conflicts and overlaps in federal and provincial powers in Canada have been resolved primarily through executive federalism, an approach illustrated by the Accord on bulk water exports. However, for reasons expressed above, this tried-and-true approach may not work in this case. As Shrybman (1999) argues, a nationwide federal-level ban may be necessary, but this would

almost certainly offend provincial sensibilities, may be subject to constitutional challenge, and would probably still be vulnerable to claims under Chapter Eleven.

As with the other two cases, the Sun Belt case also raises the question of payment of an award, should a Tribunal find against Canada. As noted above, at least one constitutional scholar has concluded that the federal government could compel a province–in this case British Columbia–to pay the award. Recall from Chapter Two that the provinces do have autonomous taxing authority, but are somewhat dependent on the federal government for revenues. Like California, the province of British Columbia faces the threat of having federal funds withheld if a Tribunal finds in favor of Sun Belt; with the company demanding between $1.5 billion and $10 billion, such a development would be devastating to the provincial government's budget.

These cases, then, serve to highlight specific aspects of federalism that are peculiar to each party. However, the cases also reveal some universal impacts of Chapter Eleven in all three countries. The subnational governments in all three cases face common constraints. A revelation of what these cases have in common is arguably the most significant finding of this look at Chapter Eleven.

First, the federal governments of all three parties are accountable for the actions of their subnational governments under the rules of NAFTA. This is not a new finding; it is, as mentioned above, widely accepted under traditional international law, and is restated in NAFTA's Article 105. However, it bears repeating here because these cases illustrate that investors will not hesitate to sue federal governments based on the actions of states and provinces, and–as shown in the Metalclad case–Tribunals will not hesitate to hold federal

governments responsible. Thus, it makes no difference whether the government being challenged is centralized Mexico, decentralized Canada, or the United States, which generally lies between the two in terms of centralization: in all cases, the federal governments are highly motivated to pressure their subnationals to stay within the bounds of Chapter Eleven, even though the subnational governments themselves are not signatory parties to NAFTA. This is bound to put new strains on federal relationships, especially in the U.S. and Canada, where the states and provinces are accustomed to a certain degree of autonomy; as for Mexico, it could effectively stall the process of devolution.

A second common aspect of these cases is that, in all three, there is some uncertainty as to the intersection of subnational and federal authority. This uncertainty was most pronounced in the Metalclad case, involving *concurrencia* in Mexico, but it also exists in the other two cases, especially Sun Belt. What exactly is the extent of British Columbia's authority to ban export of its water? Restated, this question becomes: Which authority is dominant when provincial authority over natural resources clashes with federal authority over international trade? The Sun Belt case raises the very real possibility that a NAFTA Tribunal will determine the answer. It is somewhat telling that Canada, which lies at the decentralized end of the spectrum, may be just as vulnerable to a Tribunal interpretation of its domestic constitutional matters as centralized Mexico was. As for the Methanex case, there is no doubt that California was acting within its authority to ban MTBE; however, the fact that this product is produced by a Canadian manufacturer–combined with the novel investor protections of Chapter Eleven–puts state

authority over the health and welfare of its people on a collision course with federal authority over international trade.

Third, in all three of these cases, subnational officials are shut out of the proceedings, despite the fact that they involve subnational policies. This leaves state and provincial governments in an exeedingly vulnerable position: even Gaines (2003, 267), who takes a more positive view of Chapter Eleven than many observers, notes:

> Provincial/state and local government actions have given rise to several Chapter 11 claims, but because the federal government is the defending entity, the states and localities are unable to fight their own battles. It is reasonable to worry that the federal governments may not aggressively or effectively represent regional or local interests. It can also happen that a sub-federal jurisdiction has interests contrary to the federal government defending a federal action.

A comprehensive examination of materials discussing the Metalclad case reveals no participation by officials of San Luis Potosi or Guadalcazar and, indeed, no attempts by these entities to participate. As for the Methanex case, despite repeated expressions of concern and requests for information, California state legislators apparently are not even receiving materials related to the case, let alone being allowed to participate. The USTR has assured them that the state SPOC is being kept informed; however, it is not clear whether, and to what extent, the SPOC is participating or receiving information (an emailed inquiry to the SPOC had not been answered as of December 21, 2002). In any event, it is questionable whether a single individual can adequately represent state interests in such an important case, in which almost $1 billion is at stake. While the threat of organized state opposition to fast-track authority and the FTAA may, as mentioned above, have an effect on the outcome of the Methanex case, such an impact would be indirect at

best. As for Sun Belt, it is not clear whether provincial officials are getting involved behind the scenes of the litigation; the only clue to the matter is a terse email from the British Columbia Intergovernmental Relations Secretariat to the effect that the "NAFTA aspect is being handled by the Government of Canada..." (Collins 2002) Whether or not the subnational governments in any of these cases have attempted to influence their outcomes behind the scenes, under the arbitration rules of ICSID and UNCITRAL these entities may not be represented in the proceedings themselves.

These cases reveal, then, that the subnational governments of the U.S., Canada and Mexico all face common constraints arising from Chapter Eleven: the potential for heavy pressure by their federal governments to refrain from violating investment protection rules; uncertainty over where the boundaries of their authority lie, raising the spectre of constitutional interpretation by outside Tribunals; and exclusion from arbitral proceedings in which the fate of their policies will be decided and monetary damages that could significantly impact their budgets may be awarded. These add up to the potential for a fourth constraint: environmental regulatory "chill" at the subnational level. The new obligations of Chapter Eleven, especially in light of the tendency by recent Tribunals to expand the meaning of compensable "expropriation," will necessarily cause governments at all levels to think twice before enacting environmental policies that could be challenged by foreign investors. Subnational governments, which have so much to lose as discussed above, may feel the pressure to freeze environmental regulation more acutely than those at the federal level. In Mexico, where the state and local governments have only just begun to assume responsibility for environmental protection, this consequence may be hardly

noticed. However, the states and provinces of the U.S. and Canada have developed comprehensive institutions and regulatory schemes that have been responsible for a great deal of innovative and effective environmental policy. Regulatory chill by these subnational governments would be a significant loss to environmental protection.

Finally, given these impacts of Chapter Eleven on the states and provinces of the U.S., Canada and Mexico, how are these impacts mitigated by federalism arrangements? Luz (2000/2001, 3-4) argues that investors contemplating the use of Chapter Eleven to press a claim against a government should be familiar with the complications of federalism in the host country before they do so, since "even if they win an arbitration award, the enforcement of that award trenches upon a minefield of difficult constitutional and political questions that have no clear answers." However, given the commonality of constraints on subnational governments, is this really true? Do the federalism arrangements of a given party to NAFTA make a difference, from an investor's point of view, in how Chapter Eleven is carried out? Considering what we have seen so far in the three cases presented in this chapter, I disagree with Luz. From the most centralized federal system in North America to the most decentralized, the states and provinces have been universally limited in how they can respond to Chapter Eleven challenges. Regardless of where the power traditionally lies in these federal systems, the subnational governments of all three have thus far not been able to significantly mediate the implementation of Chapter Eleven.

This is necessarily a tentative conclusion, pending the outcome of the two cases that are still unresolved. In the meantime, based on what we have seen so far, we have

little reason to anticipate that the federalism arrangements of a given party will have a significant impact on how Chapter Eleven is implemented. Considering the differences in federalism arrangements between the three countries, detailed in Chapter Two, this finding comes as a surprise. I approached this examination of Chapter Eleven expecting that its implementation would vary according to degrees of centralization among the three parties, and according to divisions of authority over environmental protection. Based on my observation of these three cases, however, it appears that Chapter Eleven is a phenomenon which will play out in a certain way, regardless of federalism arrangements. Under Chapter Eleven, federalism appears to be largely irrelevant. This is indeed a surprising conclusion.

CHAPTER FIVE

Introduction

Continuing our examination of the NAFTA/NAAEC environmental regime's impacts on the states and provinces of the United States, Canada and Mexico, we turn now to another important component of the regime. As discussed in Chapters One and Three, the North American Agreement on Environmental Cooperation (NAAEC) is the environmental side agreement to NAFTA, developed in response to environmentalists' concerns over trade liberalization. At the center of the NAAEC is the citizen submissions process, established by Articles 14 and 15 and administered by the Commission for Environmental Cooperation (CEC).

An integral part of the NAAEC's preoccupation with adequate enforcement of environmental laws, the Article 14/15 submissions process provides a venue for civil society to perform a watchdog role, shining a spotlight on the parties' enforcement practices. The process is widely regarded as a striking and ambitious innovation in international environmental law (Raustiala 1996, 722, 725; Richardson 1998, 8; Johnson and Beaulieu 1996, 152; Stevis and Mumme 2000, 29; DeMestral 1998, 175, 176, 178). As Johnson and Beaulieu (1996, 165-166) observe, the fact that "NAAEC provides for public submissions and factual reports is a crucial advance for NGO involvement in the North American environmental dialogue." Accordingly, Articles 14 and 15 "generated the

greatest attention from stakeholders and observers of the Agreement's negotiating process and early implementation." (DiMento and Doughman 1998, 681) It continues to be the NAAEC feature which receives the most attention among environmental activists (Graubart 2002, 3).

This chapter takes a look at the impacts, both potential and real, of the Article 14/15 submissions process on the states and provinces of the United States, Canada and Mexico. It begins with an overview of Articles 14 and 15, including some discussion of how scholars and other observers have assessed the procedure to date. I then examine the submissions involving subnational governments that have been advanced thus far. The chapter concludes with an analysis of what these submissions illustrate with respect to the impacts of the NAAEC Article 14/15 process on the states and provinces of the three NAFTA parties.

Articles 14 and 15: An Overview

Article 14 of the NAAEC, titled "Submissions on Enforcement Matters," provides for the beginning stages of the submissions process. The opening sentence of Article 14(1) lays the initial groundwork:

> The Secretariat may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law...[NAAEC, Article 14(1)]

The CEC Secretariat has been obliged to provide interpretations of several terms in this opening sentence. First, the phrase "is failing" has been interpreted as a temporal requirement, meaning that the failure to enforce must be ongoing. While the Secretariat has found that the NAAEC does not apply retroactively to enforcement failures that

occurred prior to its entry into force on January 1, 1994, submissions arising out of actions before that date may be considered if they address continuing environmental problems where no effective enforcement action has been taken (Markell 2000, 5-6; MacCallum 1997, 409-410).

Second, much scrutiny and debate has been devoted to the meaning of "effectively enforce." The most important question here has been: what actions, by which branches of government, may be considered a failure of enforcement? The first two submissions provided the Secretariat with an early opportunity to address this question. Filed in 1995 against the United States, both submissions concerned riders attached to legislation by Congress mandating suspended enforcement of environmental laws (CEC 1995a, 1995b).[6] Both were summarily dismissed by the Secretariat, which interpreted the phrase "effectively enforce" to include only actions by the executive branch (CEC 1995a, 1995b). Referring to Article 3 of the NAAEC, which recognizes the right of the NAFTA parties to establish their own levels of environmental protection and to modify their laws accordingly, "the Secretariat unequivocally concluded that under Article 14, a Party's failure to enforce its environmental laws cannot arise out of a legislatively mandated suspension of those laws." (MacCallum 1997, 404-405)

This interpretation was a bitter disappointment to many environmental activists, who viewed it as a case of the Secretariat construing its mandate in an overly technical and formalistic way (Graubart 2002, 15-16) in violation of the spirit of the NAAEC (Coatney

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[6]Documents related to citizen submissions under Articles 14 and 15 are available on an online registry maintained by the CEC Secretariat, and may be accessed at www.cec.org.

1997, 8-9; MacCallum 1997, 405-406). Under this interpretation, "governments can easily escape CEC scrutiny under Articles 14 and 15 by simply passing a law eliminating funding for enforcement." (Blair 1999, 5)

However, several observers have argued that the Secretariat's refusal to examine legislative action was the correct interpretation, asserting that the limitation lies in fact in the language of the NAAEC itself (DiMento and Doughman 1998, 695-696). In an in-depth analysis of these first two submissions, Raustiala (1996) examines the constitutional separation of powers in the United States, concluding that Congress cannot be considered responsible for enforcement or other execution of the laws. Looking at the issue from a more political than constitutional perspective, McKinney (2000, 100) notes that "had the secretariat pursued these submissions to the level of a factual record the political fallout would have been severe." The NAAEC's failure to address legislative action is considered by some to be a regrettable weakness which may result in a submissions process destined to have little impact (DiMento and Doughman 1998, 696; Raustiala 1996, 757-760).

The phrase "environmental law" is the third and final term within the opening sentence that has been the subject of considerable analysis and interpretation. For purposes of Article 14(1), the NAAEC defines "environmental law" as follows:

> (a) **"environmental law"** means any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health....
>
> (b) For greater certainty, the term **"environmental law"** does not include any statute or regulation, or provision thereof, the primary purpose of which is managing the commercial harvest or exploitation, or subsistence or aboriginal harvesting, of natural resources.

(c) The primary purpose of a particular statutory or regulatory provision for purposes of subparagraphs (a) and (b) shall be determined by reference to its primary purpose, rather than to the primary purpose of the statute or regulation of which it is part. [NAAEC, Article 45(2)]

The exclusion of natural resources management from the definition of "environmental law" is considered unusual (Block 1997, 4) and has been the source of some criticism. For example, Coatney (1997, 5) argues that this exclusion is inconsistent with the spirit of the NAAEC as embodied in the Preamble and the Objectives, to the extent that it "could nullify the entire agreement..." (Coatney 1997, 2) However, Knox (2001, 34-35) points out that, under subparagraph c, *parts* of natural resource laws can be included in the definition if the primary purpose of those parts is environmental protection.

Another exclusion to the term "environmental law" is not found within the definition above, but has been determined by Secretariat interpretation. The Secretariat has dismissed submissions that sought to extend the definition to include international treaty commitments, finding that such obligations cannot be considered domestic environmental law unless they have been imported into domestic law through statute or regulation (CEC 1997b, 1998a; Graubart 2002, 20). Thus far, two submissions involving international treaty commitments have been accepted by the Secretariat, having met this criterion[7].

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[7]The Metales y Derivados submission (SEM 98-007) against Mexico, involving in part an extradition treaty between the U.S. and Mexico that had been incorporated into Mexico's Federal Criminal Code, survived Article 14(1) scrutiny; but this portion of the submission was later dropped from consideration for a factual record after the party's response. The Migratory Birds submission (SEM 99-002) against the U.S. involved nonenforcement of the Migratory Bird Treaty Act, which implemented various international conventions; a factual record is currently underway for this submission.

In addition to the requirements found in its opening sentence, Article 14(1) lists six criteria for a submission to pass initial screening by the Secretariat. First, it must be in writing in a language designated as acceptable by the party involved [NAAEC, Article 14(1)(a)]. According to the Guidelines issued by the CEC on citizen submissions, they may be in English, French or Spanish (CEC 2000a, 10). Second, the submission must clearly identify the person or organization making the submission [NAAEC, Article 14(1)(b)]. Third, it must include sufficient information to allow the Secretariat to review it, including any documentary evidence on which the submission may be based [NAAEC, Article 14(1)(c)]. Markell (2000, 6) observes that, as interpreted by the Guidelines, this requirement "includes the obligation to identify the applicable environmental statute or regulation allegedly not being effectively enforced."

The fourth requirement listed under Article 14(1) is that the submission appear to be aimed at promoting enforcement rather than at harassing industry [NAAEC, Article 14(1)(d)]. Under the CEC Guidelines, to determine whether a submission satisfies this criterion, the Secretariat will consider whether it "is focused on the acts or omissions of a Party rather than on compliance by a particular company or business; especially if the Submitter is a competitor that may stand to benefit economically from the submission..." (CEC 2000a, 11) All of the submissions filed to date have focused on the actions of a party and not on those of individual businesses, "though in some situations, such as state-owned companies, the distinction is a fine one." (Markell 2000, 7)

The fifth Article 14(1) criterion is that the submission must indicate that the matter has been communicated in writing to the relevant authorities of the party involved, and the

party's response, if any [NAAEC, Article 14(1)(e)]. Finally, to be admissible the submission must be filed by a person or organization residing or established in the territory of a party [NAAEC, Article 14(1)(f)]. This provision, allowing any individual or NGO residing in any one of the member countries to file a submission against any of the NAFTA parties, has been hailed as quite liberal (Graubart 2002, 5) and a mechanism for citizens of all three countries "to behave as though they are North American environmental citizens." (Richardson 1998, 8)

The listed Article 14(1) requirements for admissibility are considered relatively straightforward, and not unreasonable (Knox 2001, 25; Markell 2000, 6; Graubart 2002, 6). While some substantive analysis by the CEC is required at this stage, recent revisions to the Guidelines indicate the Secretariat's recognition that submitters may have limited capacity to provide details (Markell 2000, 8). At Markell (2000, 7) observes, the "Secretariat indicates that, at least conceptually, an Article 14(1) review is not intended to be unduly searching, and the requirements contained in Article 14 are not intended to place an undue burden on submitters."

The next level of analysis is established by Article 14(2). At this stage, the Secretariat determines whether the submission merits requesting a response from the party alleged to be failing in its enforcement efforts. The NAAEC provides four factors to "guide" the Secretariat in making this determination. First, the Secretariat considers whether the submission alleges harm to the person or organization making it [NAAEC, Article 14(2)(a)]. This consideration echoes the common rule of standing in domestic law (Knox 2001, 25). However, subsequent clarifications by the Secretariat have broadened

the concept beyond the individual, particularized notion of harm generally required for standing in domestic courts. According to the Guidelines, in making an Article 14(2)(a) determination, the Secretariat will consider whether the alleged harm relates to protection of the environment or preventing danger to human life or health, and whether the alleged harm is due to the asserted failure to effectively enforce environmental law (CEC 2000a, 13). Further clarification was provided by the Secretariat's request for a response from Mexico in the Cozumel submission, which was the third submission overall and the first to go all the way through the process to publication of a factual record. In its request for a response, the Secretariat explicitly recognized the public interest nature of environmental concerns (Markell 2000, 9). This broad approach to the issue of harm has been widely applauded by environmentalists (Markell 2000, 9).

The second Article 14(2) consideration is whether the submission raises matters whose further study would advance the goals of the NAAEC [NAAEC, Article 14(2)(b)]. Knox (2001, 26) notes that, while this factor may be necessary in light of the Secretariat's limited resources, it comes at the expense of submitters who will not be able to second-guess the Secretariat's priorities. The Guidelines provide no direction on this factor; it is left to the submitters to do their best to relate the issues they raise to the goals of the NAAEC as stated in the Preamble and Objectives.

The third consideration is whether private remedies available under the party's law have been pursued [NAAEC, Article 14(2)(c)]. This factor, which echoes but does not exactly duplicate the "exhaustion-of-local-remedies" rule commonly found in international law, has been the subject of considerable speculation by legal scholars and observers. Use

of the term "pursued" rather than "exhausted" indicates a lower standard for consideration than that applied by other international tribunals (Lord 1997, 5; Block 1997, 4; Knox 2001, 26). MacCallum (1997, 411) argues that a lower threshold is most consistent with other provisions of the NAAEC, since a "strict requirement to first exhaust all private legal remedies would not be in accord with the NAAEC's objective of 'promoting transparency and public participation...'" Lord (1997, 8) seems to concur, arguing that the terminology found in Article 14(2)(c) was almost certainly deliberate:

> ...the body of international law establishing the 'exhaustion' standard dates back many decades, and the drafters of the NAAEC were presumably aware of it. Their decision to use 'pursued' over 'exhausted' cannot be taken lightly against this background.

The CEC Guidelines have provided some clarification of this factor to the effect that it appears to be aimed at procedural efficiency. Under the Guidelines, the Secretariat will consider whether further action on the submission "could duplicate or interfere with private remedies that are being pursued or have been pursued by the Submitter;" furthermore, the Secretariat will consider whether "reasonable actions have been taken to pursue such remedies prior to making a submission, bearing in mind that barriers to the pursuit of such remedies may exist..." (CEC 2000a, 14)

The fourth and final factor at the Article 14(2) stage is consideration of whether the submission is drawn exclusively from mass media reports [NAAEC, Article 14(2)(d)]. Under the Guidelines, with respect to this aspect of a submission the Secretariat will determine whether other sources of information relevant to the matter were reasonably available to the submitter (CEC 2000a, 14). As Markell (2000, 10) notes, this factor "has received relatively little attention to date. Submissions that are drawn exclusively from

mass media reports are probably less likely than others to warrant further consideration, other factors being equal."

Observers have pointed out the difference between the Article 14(2) considerations above and those listed under Article 14(1). While the Article 14(1) criteria are threshold requirements– failure to satisfy just one will lead to dismissal of the submission–those in Article 14(2) are only guiding factors; at the Article 14(2) stage, the Secretariat has considerable discretion in deciding how much weight each factor will carry (Markell 2000, 8; Knox 2001, 25).

If, at this point, the Secretariat determines that no response from the party is merited, it so notifies the submitter, who then has thirty days to provide additional information in an attempt to change the Secretariat's decision (CEC 2000a, 14). If no additional information is received by the Secretariat, or if such information is received but is unpersuasive, the Secretariat will terminate the submission (CEC 2000a, 14). If, on the other hand, the Secretariat determines that the submission warrants a response, it will request a response from the NAFTA party involved, and will forward a copy of the submission and any supporting information to the party along with the request [NAAEC, Article 14(2)].

Under Article 14(3), after the request for a response is delivered, the party has thirty days to reply; in exceptional circumstances, this period may be extended to sixty days on notification of the Secretariat [NAAEC, Article 14(3)]. In its response, the party should advise the Secretariat as to whether the subject matter of the submission is pending a judicial or administrative proceeding, "in which case the Secretariat shall proceed no

further..." [NAAEC, Article 14(3)(a)] The term "judicial or administrative proceeding" is defined, for purposes of Article 14(3), as a domestic judicial, quasi-judicial or administrative action pursued by the party; examples of such an action include mediation, arbitration, licensing, and seeking sanctions, indicating that it should be aimed at achieving effective enforcement of the law cited in the submission [NAAEC, Article 45(3)]. "Judicial or administrative proceeding" is further defined to include international dispute proceedings to which the country involved is a party [NAAEC, Article 45(3)].

The party's response may include any information that the party wishes to submit [NAAEC, Article 14(3)(b)]. The NAAEC urges the parties to indicate in their responses "whether the matter was previously the subject of a judicial or administrative proceeding" [NAAEC, Article 14(3)(b)(i)] and "whether private remedies in connection with the matter are available to the person or organization making the submission and whether they have been pursued." [NAAEC, Article 14(3)(b)(ii)] Legal scholars have been largely silent on these two provisions; presumably, they are intended to help answer any questions that may be lingering from the original submission as the Secretariat considers whether to recommend preparation of a factual record. According to the Guidelines, the party may also include in its response "whether environmental policies have been defined or actions have been taken in connection with the matter in question." (CEC 2000a, 15) In general, the parties have used this stage of the process to tell their side of the story; their responses to date have tended to follow a pattern, indicating support for the submissions process itself but arguing that the particular submission at hand should be dismissed for a variety of reasons.

Article 15 continues the process through the factual record stage. First, the Secretariat considers whether, in light of the party's response, the submission warrants development of a factual record [NAAEC, Article 15(1)]. Neither the NAAEC nor the Guidelines provide direction as to how this determination should be made; one observer speculates that "whether the submission raises matters whose further study would advance the goals of the Agreement would seem to be of key importance in deciding whether a factual record is warranted." (Knox 2001, 27) If the Secretariat decides at this point that no factual record is warranted, it will notify the submitter and the Council of this decision and provide an explanation of its reasons, effectively terminating the submission (CEC 2000a, 15).

If the Secretariat determines that the submission calls for development of a factual record, it will so inform the CEC Council and explain its reasoning [NAAEC, Article 15(1)]. Under recent amendments to the Guidelines, the Secretariat must issue public notice of both the recommendation for development of a factual record and its reasons for this determination within five working days after the Council has received the recommendation (CEC 2001b).

The Secretariat will prepare the factual record if the Council instructs it to do so; this decision may be made by a two-thirds vote, precluding a veto by the party named in the submission [NAAEC, Article 15(2)]. The only guidance provided by the NAAEC at this stage is found in Annex 41(2). As discussed in Chapter Three, Annex 41 establishes a scheme for the Canadian provinces to accede to the NAAEC, with Canada setting out in a

declaration a list of provinces that have agreed to be bound to the dispute resolution provisions of the Agreement. Section 2 of the Annex states as follows:

> When considering whether to instruct the Secretariat to prepare a factual record pursuant to Article 15, the Council shall take into account whether the submission was made by a non-governmental organization or enterprise incorporated or otherwise organized under the laws of a province included in the declaration...[NAAEC, Annex 41(2)]

It is not clear to what end the Council is required to take the submitter's location within an acceding province into account (MacCallum 1997, 420-421). Presumably, submitters from non-acceding provinces might be expected to have less chance that their submissions will be turned into factual records (Acheson and Hanak 2002). However, several factual records have resulted from submissions presented by NGOs headquartered in non-acceding provinces[8].

Other than this rather oblique reference, there are no guiding factors for the Council to consider in deciding whether to call for the preparation of a factual record; however, the Council members are presumably aware of the possible political consequences of appearing to undermine the process by going against the Secretariat's recommendations. To date, the Council has authorized development of a factual record in every case, except two, where the Secretariat has recommended it.[9] Under recent

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These submissions include BC Hydro (SEM 97-001), BC Logging (SEM 00-004), BC Mining (SEM 98-004), and Migratory Birds (SEM 99-002), all of which featured NGOs from non-acceding provinces among their submitters.

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On May 16, 2000, the Council rejected the Secretariat's recommendation for a factual record in the Quebec Hog Farms case (SEM 97-003), for reasons that will be discussed later in this chapter. On December 10, 2002, the Council refused to authorize a factual record in the Cytrar II case (SEM 01-001) because it is the subject of an international

Guideline revisions, if the Council does decide against a factual record, it must provide a public statement explaining that decision (CEC 2001b).

Once the factual record is authorized, the Secretariat undertakes the work of developing it. In preparing a factual record, the Secretariat is to consider relevant information from a wide range of sources, including the NAFTA parties, the public, any interested NGOs or individuals, the JPAC, independent experts, and any information developed by the Secretariat itself [NAAEC, Article 15(4)]. Knox (2001, 28) points out that, "(i)n practice, the Secretariat has broad discretion to decide what facts are relevant and should be included." The factual record should contain a summary of the submission that initiated the process; a summary of the response, if any, provided by the concerned party; a summary of any other relevant factual information; and the facts presented by the Secretariat with respect to the matters raised in the submission (CEC 2000a, 17). The factual record is intended to be an objective, comprehensive evaluation of the facts; it is not supposed to contain any explicit findings of fault or recommendations (Graubart 2002, 6; MacCallum 1997, 402).

Once a draft factual record is complete, it is submitted by the Secretariat to the Council, and the parties are given forty-five days to comment on its accuracy [NAAEC, Article 15(5)]. The Secretariat is directed to incorporate, "as appropriate," any such comments in the final factual record before submitting it to the Council [NAAEC, Article 15(6)]. The Council then decides, again by a two-thirds vote, whether to make the final

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trade dispute. See the CEC Registry of Citizen Submissions, online at www.cec.org (last visited December 2002).

factual record publicly available [NAAEC, Article 15(7)]. Of the three factual records completed to date, the Council has approved publication of all of them (CEC Registry, last visited December 2002). As Knox (2001, 28) points out, this is hardly surprising:

> Public outcry would result from a Council attempt to suppress a final report relevant to compliance by one of the state parties with its obligation to effectively enforce. And given the number of people who would have knowledge of the report in and out of the three governments, it would be extraordinarily difficult in any event to keep a factual record truly confidential. As a result, it seems unlikely that the Council would ever decline to make a factual record public.

Publication of the final factual record is the concluding stage in the submissions process.

Articles 14 and 15 have been subjected to considerable scrutiny and analysis by legal scholars and observers. Some have attempted to categorize the submissions process within the general context of international law. For example, Raustiala (1997) discusses the procedure as an example of a recent trend in international environmental law towards greater participation by NGOs. Knox (2001) examines it as a model of complaint-based monitoring, and compares it to similar procedures found in human rights agreements. Others have focused on the implications of the submissions process for sovereignty. Richardson (1998, 7) observes that, while Articles 14 and 15 "have no de jure impact on sovereignty, in practice this new trilateral regime has the potential to influence a Party's behavior should it become the focus of such a submission." However, both she and MacCallum note the respect for sovereignty evident in the Secretariat's early refusal to consider submissions involving legislative action (Richardson 1998, 8; MacCallum 1997, 405-408).

As of December 2002, a total of thirty-six submissions had been received by the Secretariat: eight against the United States, twelve against Canada, and sixteen against Mexico.[10] Of these, ten have resulted in authorization of a factual record: three have been published, and seven are currently in various stages of development. Two cases have recently been recommended for factual records by the Secretariat and are awaiting Council authorization. Eleven submissions suffered early termination under Article 14(1) or 14(2), without a party response requested by the Secretariat. In seven cases, the Secretariat decided against recommending a factual record after considering the party's response: three were terminated under Article 14(3) because of pending legal proceedings, and four were terminated under Article 15(1) because the party's response persuaded the Secretariat that a factual record was not warranted. Two submissions have been recommended for a factual record, but the Council has refused authorization. One submission is currently being considered by the Secretariat for a factual record recommendation. Of the remaining three, one was withdrawn by the submitters; one is awaiting the party's response; and a very recent one is undergoing Article 14(1) scrutiny (see Table 5-1, pages 273-275).

Scholars and others have made several observations about the submissions and their handling by the Secretariat to date. Some have noted the wide variations among submissions in terms of their levels of sophistication (Wilder 2000, 888-889; Graubart

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The information in this paragraph and the table on the following page was compiled by the author based on extensive review of the CEC Registry of Citizen Submissions on Enforcement Matters, online at www.cec.org (last visited December 2002).

TABLE 5-1
Submissions under NAAEC Articles 14 & 15
January 1994 - December 2002
(in chronological order)

Entries in **bold type** indicate those discussed in this chapter, and address either alleged nonenforcement of subnational laws or subnational involvement in alleged failures to enforce federal laws.

Date	SEM#	Submission	Party	Status as of December 2002
6/30/95	95-001	Spotted Owl	U.S.	Terminated under Article 14(1) 9/21/95
8/30/95	95-002	Logging Rider	U.S.	Terminated under Article 14(1) 12/8/95
1/17/96	96-001	Cozumel	Mexico	Factual record published 10/24/97
3/20/96	**96-002**	**Aage Tottrup**	**Canada**	**Terminated under Article 14(2) 6/1/96**
9/9/96	**96-003**	**Oldman River I**	**Canada**	**Terminated under Article 14(3) 4/2/97**
11/14/96	96-004	Fort Huachuca	U.S.	Withdrawn by submitters 6/5/97
3/15/97	97-002	Rio Magdalena	Mexico	Factual record in development
4/2/97	97-001	BC Hydro	Canada	Factual record published 6/11/00
4/9/97	**97-003**	**Quebec Hog Farms**	**Canada**	**Council rejected Secretariat recommendation for factual record 5/16/00**
5/26/97	97-004	Env'l Defence Fund (CEDF)	Canada	Terminated under Article 14(1) 9/24/97
7/21/97	97-005	Biodiversity	Canada	Terminated under Article 14(1) 6/25/98
10/4/97	**97-006**	**Oldman River II**	**Canada**	**Factual record in development**

10/10/97	97-007	Lake Chapala	Mexico	Terminated under Article 15(1) 7/14/00
10/14/97	98-002	Ortiz Martinez	Mexico	Terminated under Article 14(1) 3/18/99
1/9/98	98-001	Guadalajara	Mexico	Terminated under Article 14(1) 1/11/00
5/28/98	98-003	Great Lakes	U.S.	Terminated under Article 15(1) 10/5/01
6/29/98	**98-004**	**BC Mining**	**Canada**	**Factual record in development**
8/11/98	98-005	Cytrar I	Mexico	Terminated under Article 15(1) 10/26/00
10/20/98	98-006	Aquanova	Mexico	Factual record in development
10/23/98	98-007	Metales y Derivados	Mexico	Factual record published 2/11/02
10/18/99	**99-001**	**Methanex**	**U.S.**	**Terminated under Article 14(3) 6/30/00**
11/19/99	99-002	Migratory Birds	U.S.	Draft factual record submitted to Council 11/28/02 for 45-day comment period
1/21/00	**00-002**	**Neste Canada**	**U.S.**	**Combined with Methanex submission; terminated under Article 14(3) 6/30/00**
1/27/00	00-001	Molymex I	Mexico	Terminated under Article 14(1) 6/8/00
3/2/00	00-003	Jamaica Bay	U.S.	Terminated under Article 14(1) 5/12/00
3/15/00	**00-004**	**BC Logging**	**Canada**	**Factual record in development**
4/6/00	00-005	Molymex II	Mexico	Factual record in development
9/6/00	00-006	Tarahumara	Mexico	Factual record recommended to Council 8/29/02
2/14/01	01-001	Cytrar II	Mexico	Council rejected Secretariat recommendation for factual record 12/10/02

4/12/01	01-002	AAA Packaging	Canada	Terminated under Article 14(1) 4/24/01
6/14/01	01-003	Dermet	Mexico	Terminated under Article 14(1) 10/19/01
2/6/02	02-001	Ontario Logging	Canada	Factual record recommended to Council 11/12/02
2/7/02	**02-002**	**Mexico City Airport**	**Mexico**	**Terminated under Article 15(1) 9/25/02**
5/8/02	**02-003**	**Pulp and Paper**	**Canada**	**Factual record under consideration**
8/23/02	02-004	El Boludo	Mexico	Party response requested 11/26/02
11/25/02	02-005	Alca-Iztapalapa	Mexico	Being reviewed under Article 14(1)

2002, 16-17). Submissions also vary in their substantive content, with some focusing on localized issues and others addressing broader problems related to structural deficiencies in enforcement (Graubart 2002, 16).

Several observers have pointed out an apparent imbalance in the procedure's outcomes for the three parties thus far, with the U.S. faring better than the other two parties. Not only are fewer submissions lodged against U.S. enforcement practices; those submissions that do target the U.S. tend not to proceed as far as those submitted against Canada and Mexico (Knox 2001, 45-46). A look at the ten factual records authorized thus far illustrates this point: of those, five are against Mexico, four against Canada, and only one against the U.S. (CEC Registry, last visited December 2002). Mexican officials are reportedly somewhat aggrieved by this imbalance, which they see as proof that the process was set up primarily to monitor Mexico (Blair 1999, 3-4; Wilder 2000, 893). DiMento and Doughman (1998, 688), conceding that environmentalists "had perceived Mexican non-enforcement of its own environmental laws as one of the central reasons for pursuing an Agreement in the first place," found that these same environmentalists consider the submissions process a success to the extent that it has targeted Mexico.

It is interesting to note that Canada is not far behind Mexico, in terms of both total submissions lodged against it and the number of factual records authorized. This is a somewhat unexpected outcome, considering that Canada is generally considered more or less equal to the United States in quality of environmental legislation and enforcement. The reasons for this seeming anomaly are not immediately clear, but the analysis of submissions that follows in this chapter may shed some light on the matter.

As for the way in which the CEC has handled the submissions to date, several observers have noted the delicate balancing act required of the Secretariat, between its environmental constituency on the one hand and the governments of the parties on the other (Graubart 2002, 19, 28; Block 1997, 4; Knox 2001, 40-41, 53). The Secretariat has received high marks for its proficiency in walking this tightrope, adopting a somewhat liberal approach in accepting cases for review, but not rubber-stamping them either (Graubart 2002, 19-20; Markell 2000, 13). As Knox (2001, 53) points out: "By making well-reasoned, neutral decisions based on careful interpretations of the NAAEC, the Secretariat has avoided alienating either states or submitters."

The process is not without its critics. Some worry that its focus on enforcement may result in governments lowering environmental standards themselves (Raustiala 1996, 760; Markell 2000, 15; DiMento and Doughman 1998, 710; Johnson and Beaulieu 1996, 209). There has also been some complaint that the submissions procedure is cumbersome, making it available only to large NGOs with ample resources (Wilder 2000, 888), although other observers disagree with this assessment (Knox 2001, 33).

In addition, a number of scholars have pointed out that the three NAFTA parties enjoy an unfair advantage in the process. Governments have greater resources than do the individuals or organizations making the submissions (Bennett and Herzog 2000, 983). They also enjoy much greater access to the Secretariat, through both formal and informal lines of communication (Bennett and Herzog 2000, 983; Graubart 2002, 21). Knox (2001, 38-39) points out that, through the Council, the governments control two key decision points: the decision whether to prepare a factual record, and the decision whether

to make it public. Parties can also affect the process through long delays in responding to Secretariat requests for information, or through assertions of confidentiality (Graubart 2002, 21). Even when a factual record is authorized, its preparation will probably require information that only the investigated party can provide (Johnson and Beaulieu 1996, 155-156).

A frequently voiced criticism of the process is that it lacks teeth. Even the most successful submission will ultimately result in nothing more than an objective evaluation of the facts of the matter. Many consider the lack of sanctions or binding provisions to be a serious shortcoming of the process (Markell 2000, 15; Graubart 2002, 29-30; Block 1997, 4; MacCallum 1997, 421; DiMento and Doughman 1998, 697).

On the other hand, observers have noted positive aspects of the procedure as well. Although there is nothing in the NAAEC to induce a party to improve its enforcement practices as a result of a factual record, there is some recognition of the value of shame to motivate such an improvement (Coatney 1997, 5; Graubart 2002, 24; Block 1997, 4; Knox 2001, 36-37). However, several observers have pointed out that the success of the submissions process depends for the most part on what activists make of it: submissions may shine a spotlight on governments, embarrass them and motivate them to change, but only if environmental activists use the procedure as part of an overall strategy of domestic political pressure (Graubart 2002, 24; Block 1997, 4; Knox 2001, 36-37).

One positive outcome of the submissions process is the information that is generated in those cases where the Secretariat requests a response from the party. As DeMestral (1998, 178) notes, submissions that survive early screening "have resulted in

solid and interesting analysis of the environmental problem and its causes." Because the process requires governments to provide information and explanations of enforcement practices that would not otherwise be available to the public, "several submitters have observed that this information-gathering from a perceived neutral and credible source is the most valuable aspect of the process." (Graubart 2002, 25)

The process has also been hailed as a boon to citizens of Mexico, who historically lack domestic recourses (Knox 2001, 46-47; Graubart 2002; Wilder 2000). As Graubart (2002, 26) points out, environmentalists in Mexico use the submissions mechanism as

> an outside counterweight to the historically unresponsive system at home to environmental issues. Filing these submissions has put the Mexican Government on notice that it can no longer readily ignore environmental issues....The availability of a respected outside mechanism offers more status to environmentalists, whom, like other independent actors, have long been marginalized in Mexico.

The procedure's value as an alternative forum for Mexican activists is amply illustrated by the Magdalena River submission. In that case, the submission elicited a substantive response from the Mexican government within twelve months, after environmental activists had been requesting assistance in the matter for about sixteen years (Wilder 2000, 892).

Turning back to the focus of this dissertation, we return now to the question: what impact, if any, does the citizen submissions process have on the subnational governments of the parties? As discussed in Chapter Two, responsibility for environmental regulation is shared to varying degrees within all three federations. In the United States, environmental policy is an area of concurrent state and federal jurisdiction, with most federal environmental programs designed to be implemented by the states. In addition,

some states in the U.S. have undertaken significant legislative initiatives on the environment, dominating policy areas such as waste management, groundwater protection, and coastal zone management; states also often exceed national standards in protecting health and safety. In Canada, environmental policy is made in the context of jurisdictional overlap, with each level responsible for different aspects: the federal government has jurisdiction over the seacoasts, inland fisheries, navigation and shipping, trade, and export marketing of resources, while the provinces are responsible for natural resources, public lands, local works and projects, infrastructure, and most energy production. Within this context, environmental regulation is developed through the executive federalism pattern of federal-provincial consultation and bargaining. Implementation and enforcement are largely left to the provinces; however, there have recently been calls among Canadian environmentalists for a stronger federal role. Finally, in Mexico environmental policy is relatively centralized. Most environmental issues are covered by the federal General Law of Ecological Equilibrium and Protection of the Environment (*Ley General del Equilibrio Ecologico y la Proteccion al Ambiente*, or *LGEEPA*). While attempts to decentralize environmental policy to the states and municipalities have been ongoing since the 1990s, these efforts remain more in the realm of intention than actual fact as state and local governments continue to lack sufficient institutional capacity. Moreover, the Mexican practice of *concurrencia*–in which failure at a lower level of government to exercise authority in a policy area will result in the next higher level becoming responsible–provides a disincentive to the states and municipalities to shoulder environmental responsibilities.

To the extent that subnational governments are held accountable for effective environmental enforcement under Articles 14 and 15, this mechanism arguably represents a constraint on those governments, potentially pressuring them into enforcement practices that they might not otherwise undertake. It is from this perspective that we turn now to an examination of actual cases. Of the thirty-six submissions to date, ten have involved either subnational legislation or significant subnational involvement in failures to enforce federal law (see Tables 5-2 and 5-3, pages 282-283). These ten submissions have achieved varying levels of success, with some terminated at an early stage, others recommended for factual records, and still others yet to be determined. In the following sections, I will describe and discuss these ten submissions in an effort to discern whether, and to what extent, the submissions process has a constraining impact on the states and provinces. Because some are more straightforward in their involvement of federalism than others, I have divided them into two categories. First, I will look at the submissions which directly involve enforcement of subnational laws, and thus illustrate the most straightforward potential constraint on the states and provinces. This will be followed by an examination of the cases where subnational governments are involved in alleged failures to enforce federal laws.

Cases: Submissions Alleging Nonenforcement of Subnational Laws

To date, there have been five submissions that have directly targeted subnational governments for alleged nonenforcement of their own environmental laws.

TABLE 5-2
Submissions Alleging Nonenforcement of Subnational Laws

SEM#	Submission	Party/ Subnational	Issue	Status as of December 2002
96-002	Aage Tottrup	Canada/Alberta	Wetlands pollution	Terminated under Article 14(2)
99-001	Methanex	U.S./California	Leaking underground gas storage tanks	Terminated under Article 14(3)
00-002	Neste Canada	U.S./California	Leaking underground gas storage tanks	Combined with Methanex case; Terminated under Aricle 14(3)
97-003	Quebec Hog Farms	Canada/Quebec	Animal waste pollution	Recommended for factual record; Terminated by Council
02-002	Mexico City Airport	Mexico/Federal District	Noise pollution	Terminated under Article 15(1)

TABLE 5-3
Submissions Involving Federal Laws with Subnational Involvement

SEM#	Submission	Party/ Subnational	Issue	Status as of December 2002
96-003	Oldman River I	Canada/ Inland provinces	Fisheries Act prosecutions	Terminated under Article 14(3)
97-006	Oldman River II	Canada/ Inland provinces	Fisheries Act prosecutions	Factual record in development
98-004	BC Mining	Canada/ British Columbia	Fisheries Act violations by copper mines	Factual record in development
00-004	BC Logging	Canada/ British Columbia	Fisheries Act violations by logging operations	Factual record in development
02-002	Pulp & Paper	Canada/Quebec by paper mills	Fisheries Act violations consideration	Factual record under

Aage Tottrup: The first was filed on March 20, 1996 by Aage Tottrup, a professional engineer residing in the province of Alberta (CEC 1996a)[11]. Tottrup, who filed the submission as an individual, asserted that the governments of Alberta and Canada had failed to effectively enforce laws including the federal Fisheries Act, Department of Environment Act, and Clean Water Act, as well as the provincial Environmental Protection and Enhancement Act and the Waste Water and Storm Drainage Regulation (CEC 1996a). The submission alleged that failure to enforce these environmental laws had resulted in contamination of Alberta wetlands, specifically those in the area of Big Lake, to the detriment of fish and migratory bird habitat (CEC 1996a). Furthermore, the submission claimed that Alberta provincial officials had been unresponsive to complaints by Tottrup, whose property included wetlands adjacent to Big Lake (CEC 1996a). In addition to filing the submission, Tottrup initiated a civil action to recover compensation for environmental damage to his lands (CEC 1996a).

Although the submission was accepted under the Article 14(1) criteria, the Secretariat terminated it under Article 14(2) because of the civil case that was then pending (CEC 1996b, 3). The Secretariat determined that the "outcome of that pending judicial proceeding is likely to impact directly on the issues raised in the submission and, should the Submitter prevail, may resolve most or all of these issues." (CEC 1996b, 3) The Aage Tottrup submission was thus dismissed on May 28, 1996, without a response requested from officials in Canada.

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See documents related to the "Aage Tottrup" submission in the CEC Registry of Citizen Submissions on Enforcement Matters, *supra* note 5.

Methanex/Neste Canada: Another case that was dismissed relatively early involved two combined submissions. As mentioned in Chapter Four, the citizen submissions process was used by Methanex Corporation as part of a strategy to defeat California's ban on MTBE. Methanex filed a submission on October 14, 1999, alleging that California was failing to effectively enforce state environmental policies relating to underground storage tanks, causing gasoline to be released into water sources (CEC 1999b). A similar submission was filed on January 21, 2000 by Neste Canada, another producer of MTBE (CEC 2000b). Shortly thereafter, the Secretariat determined that the submissions met the criteria for further consideration under Article 14(1) and that, pursuant to the Guidelines, the two should be combined (CEC 2000c, 1). The Secretariat requested a response from the party, which it received on May 30, 2000 (CEC 2000c, 1).

The response appears to have been drafted at the federal level, with substantial supporting documentation from California. It argued that–contrary to the assertions in the submission–California was effectively enforcing its environmental laws, and went on to describe some of the enforcement actions being taken by the state with respect to underground storage tanks (CEC, 2000c, 3). More significantly, the response notified the Secretariat of the pending NAFTA Chapter Eleven arbitration on the same subject as the submission (CEC, 2000c, 2-3). Because Article 14(3) requires the Secretariat to "proceed no further" on a submission when it involves an issue which is the subject of such a proceeding, the Secretariat terminated the case on June 30, 2000 (CEC, 2000c, 4-7).

Quebec Hog Farms: Of the submissions to date that have directly targeted failures to enforce subnational law, the only one that has proceeded as far as a factual record

recommendation was the Quebec Hog Farms submission (CEC 1997c)[12]. No less than eighteen Quebec-based environmental NGOs filed the submission on April 9, 1997, complaining of widespread non-enforcement of various provincial laws governing livestock operations (CEC 1999c, 1-3). According to the submission, officials in Quebec were allowing–even subsidizing–livestock operations to engage in practices including production of unauthorized animal units in excess of permits; illegal manure-spreading; operation of noncompliant manure storage facilities; and noncompliance with record-keeping requirements (CEC 1999c, 4-5). The submission argued that this failure to enforce provincial environmental laws was polluting water supplies and causing significant harm to the environment and to human populations, especially those residing near large concentrations of livestock operations (CEC 1999c, 4). The submitters relied heavily on a report by the Quebec Auditor General to the National Assembly of Quebec (CEC 1999c).

The Secretariat determined that this submission satisfied the criteria in Article 14(1) and 14(2), and requested a response from Canada. The Canadian government submitted its response to the Secretariat on September 9, 1997 (CEC 1999c, 3). Quebec is one of three provinces that have signed the Canadian Intergovernmental Agreement Regarding the North American Agreement on Environmental Cooperation (CIA), which states:

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See documents related to the "Quebec Hog Farms" submission in the CEC Registry of Citizen Submissions on Enforcement Matters, *supra* note 5. The submission itself and several other documents are in French, but the Secretariat's factual record recommendation and the Council resolution on the recommendation are in English.

> With respect to matters arising under Articles 14 and 20 of the NAAEC, the Canadian Representative will immediately convey to provincial and territorial governments any submission or question that relates to an enforcement practice in Canada. The government concerned will prepare an appropriate response, consulting with interested governments. [CIA, Article 5(3)]

Thus, the response to the Quebec Hog Farms submission was apparently drafted by the government of Quebec, in consultation with federal officials, and forwarded to the Secretariat by the federal government.

The primary argument in the response was that preparation of a factual record would be inappropriate because Quebec had recently adopted a new regulatory scheme designed to improve control of agricultural pollution (CEC 1999c, 5). The Secretariat, however, determined otherwise:

> The Secretariat does not believe that, as a general matter, submissions alleging failures to enforce effectively should be automatically terminated on the ground that new standards have been adopted. The enactment of the new Regulation does not address the allegations of a failure to enforce the previous Regulation between 1994 and 1997 (CEC 1999c, 20).

In particular, the Secretariat considered that a factual record would be useful to examine the details of Quebec's new regulatory scheme, evaluate its effectiveness, and "improve the state of knowledge about ongoing enforcement of laws regulating livestock waste in Quebec." (CEC 1999, 21) On October 29, 1999, the Secretariat issued a notification to the CEC Council that development of a factual record was warranted.

On May 16, 2000, the Council rejected the Secretariat's recommendation by a two-thirds vote (CEC 2000d). This was the first of only two cases to date in which the Council has decided against a factual record recommendation. The two parties voting against preparation of a factual record were Canada and Mexico (Garver 2002a). A few

days later, the Centre Quebecois du Droit de L'Environment (CQDE), the lead submitter in the case, wrote to the CEC Council requesting an explanation of the vote (Garver 2002a). A representative of the NGO also attended the June 2000 annual public session of the Council and raised the issue there (Cardenas 2001). Over a year later, these inquiries were answered by the Alternate Representative for Mexico (Cardenas 2001). Olga Ojeda Cardenas explained in a letter to the CQDE that the decision was based on the fact that Quebec, prompted by the Auditor General's report, had "made significant changes to its livestock waste management." (Cardenas 2001) Because of these changes, the opinion of the Canadian and Mexican representatives was that "a factual record of the previous Quebec legislative framework on which the submission was based would not serve any purpose, other than to document issues of historical interest which had already been extensively covered by the Auditor's review." (Cardenas 2001)

Mexico City Airport: The Mexico City Airport submission is the most recent one filed that directly involves enforcement of subnational laws[13] (CEC 2002d). The submission was filed on February 7, 2002, by a group of neighbors in the area surrounding the airport (CEC 2002e). It asserted that Mexico is failing to effectively enforce its environmental laws governing noise emissions, resulting in noise levels at the airport exceeding those established by law (CEC 2002e). Among the laws allegedly not being enforced, the submission cites Articles 80 through 84 of the Environmental Law of the Federal District–local statutes–as well as several laws at the federal level (CEC 2002e).

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See documents related to the "Mexico City Airport" submission (all in Spanish) in the CEC Registry of Citizen Submissions on Enforcement Matters, *supra* note 5.

The submission survived Article 14(1) and 14(2) scrutiny and the Secretariat requested a response from Mexico (CEC 2002e). In its response, Mexico stated that the 1994 federal law cited by the submission as setting noise emission limits does not apply to mobile noise sources such as aircraft (CEC 2002f). The response indicated that a 2000 law sets the standards for noise emissions from aircraft; that thirty percent of the nation's air fleet has reduced emissions within the time frames provided by that law; and that Mexico has therefore effectively enforced its environmental laws (CEC 2002f). There was no apparent reference in Mexico's response to the local statutes cited in the submission.

On September 25, 2002, the Secretariat dismissed the submission in light of Mexico's response (CEC 2002g). Its determination noted that "the Secretariat is not convinced" that the federal law is inapplicable to the airport; however, the original submission had relied heavily on an August 2001 study of airport noise that failed to account for the impacts of the 2000 law (CEC 2002g). The Secretariat concluded that, in light of the resulting uncertainty, a factual record was not warranted in this case (CEC 2002g).

Cases: Submissions Involving Federal Laws with Subnational Involvement

Five submissions to date have dealt with subnational involvement in alleged failures to enforce federal laws. Two of these addressed the same issue, and will be combined for purposes of this discussion. Interestingly, all of the submissions in this category involved Canada.

Oldman River I & II: The two earliest submissions in this category are the two that addressed the same issue. On September 9, 1996, the Friends of the Oldman River

filed a submission alleging that Canada was failing to effectively enforce parts of the federal Fisheries Act and the Canadian Environmental Assessment Act[14] (CEC 1996c). After requesting and receiving a response from Canada, the Secretariat dismissed the submission on the grounds that a court case was pending on the matter (CEC 1999d, 4).

On October 4, 1997, having discontinued the litigation, the Friends of the Oldman River reintroduced the submission[15] (CEC 1997d). It voiced several complaints about the way in which the federal government of Canada was enforcing these two laws; to illustrate its assertions, it described the case of the Sunpine Forest Products Forest Access Road, a project that would cross 21 streams in Alberta (CEC 1999d, 6). The most relevant allegation for our purposes involved prosecutions under Section 35(1) of the Fisheries Act, which prohibits harm to fish habitat. Noting a dearth of federal prosecutions of Section 35(1) violators, the submission alleged a "de facto abdication of legal responsibilities by the Government of Canada to the inland provinces." (CEC 1997d) Further, it asserted that "the provinces have not done a good job of ensuring compliance with or enforcing the Fisheries Act." (CEC, 1997d)

Canada's response, received by the Secretariat on July 13, 1998 (CEC 1999d, 4), seemed to confirm this assessment. As summarized by the Secretariat in its factual record recommendation, the response indicated that

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See documents related to the "Oldman River I" submission in the CEC Registry of Citizen Submissions on Enforcement Matters, *supra* note 5.

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See documents related to the "Oldman River II" submission in the CEC Registry of Citizen Submissions on Enforcement Matters, *supra* note 5.

> (i)t is misleading to look only at federal enforcement prosecutions because the provinces, under provincial law, address, including prosecute, some activities that constitute violations of Section 35(1). While (the federal Department of Fisheries and Oceans) has primary responsibility for enforcing the habitat protection provisions of the Fisheries Act, provinces, particularly the inland provinces, also have the authority to enforce these provisions. (CEC 1999d, 10)

Canada's response noted that often provincial prosecution is chosen as the most appropriate course of action by federal enforcement officers (CEC 1999d, 10).

On July 19, 1999, the Secretariat issued a notification to the CEC Council that a factual record is warranted in this case (CEC 1999d, 1). Among the issues recommended for analysis was the matter of prosecutions (CEC 1999d, 18). The Secretariat noted that Canada's response, even while asserting the important provincial role in prosecutions under the Fisheries Act, had provided little information on provincial enforcement activity (CEC 1999d, 18). The Secretariat's recommendation stated that, "(b)ecause of Canada's apparent view that provincial prosecutions are an integral element of the effort to enforce Fisheries Act Section 35(1), information concerning the provinces' prosecution efforts is relevant...and should be developed." (CEC 1999d, 18).

Council action on this recommendation was delayed pending, once again, a court case on the matter (CEC 2001e). On November 16, 2001, the Council voted unanimously in favor of a factual record (CEC 2001f). However, rejecting the Secretariat's recommendation for a broad factual record covering all issues in the submission, the Council directed the Secretariat to limit the scope of the factual record to the Sunpine Forest Access Road case (CEC 2001e). The Secretariat is currently in the process of developing the factual record as ordered by the Council (CEC 2002h). It is unclear

whether, and to what extent, the factual record will examine the issue of provincial prosecutions.

BC Mining: The next submission concerning subnational involvement in enforcing federal law pertained to mining in British Columbia[16] (CEC 1998b). The BC Mining submission, filed with the Secretariat on June 29, 1998 by three BC-based environmental NGOs, alleged a systemic failure by the government of Canada to enforce section 36(3) of the federal Fisheries Act (CEC 2001g: 2). Section 36(3) prohibits the deposit of a deleterious substance in water frequented by fish (CEC 2001g, 2). The submission asserted that Canada has failed to enforce this provision by allowing toxic substances generated by mining to flow into water systems, causing harm to fish and fish habitat (CEC 2001g, 2).

While the submission claimed a widespread failure to enforce the Fisheries Act with respect to mining, it focused on three particular copper mines to illustrate this allegation. The Mt. Washington Mine and the Britannia Mine have both been abandoned for decades; the Tulsequah Chief Mine ceased operating in 1957, but the owner has recently been granted permission to develop it (CEC 2001g, 7-9). All three are alleged to be discharging high levels of toxic substances, in particular zinc, lead and copper, into nearby fish habitat (CEC 2001g, 3). The submission claims that, despite government knowledge of these ongoing violations of the Fisheries Act, the federal government has

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See documents related to the "BC Mining" submission in the CEC Registry of Citizen Submissions on Enforcement Matters, *supra* note 5.

never laid charges against the owners or operators of any of the three mines (CEC 2001g, 3).

The submission attributes Canada's failure to enforce the Fisheries Act partly to a shortage of staff and resources, noting that Environment Canada's budget and enforcement staff have suffered severe decreases in recent years (CEC 2001g, 3-4). The submission also cites federal devolution of responsibility for enforcing environmental laws to the provinces, asserting that such devolution has decreased transparency and accountability and has ultimately contributed to Canada's failure to enforce the Fisheries Act (CEC 2001g, 4).

The BC Mining submission met the Article 14(1) and 14(2) criteria, and the Canadian government submitted its response to the Secretariat on September 8, 1999 (CEC 2001g, 2). In its response, Canada claimed that it is protecting fish and fish habitat through a broad range of enforcement actions, both generally and with respect to the three mines noted in the submission (CEC 2001g, 4).

Significantly for our purposes, the Canadian response highlighted the constitutional division of responsibilities between the federal and provincial governments with respect to environmental matters (CEC 2001g, 5). It noted that regulation of the mining industry is shared between the two levels of government: although the federal government retains responsibility for the habitat and pollution prevention provisions of the Fisheries Act, mining is regulated primarily by the province under various pieces of provincial legislation (CEC 2001g, 5). The response referred briefly to the applicable provincial statutes in British Columbia, the Waste Management Act and the Mines Act (CEC 2001g, 5). As

summarized by the Secretariat's factual record recommendation, Canada's response

> asserts that under this legislative framework, compliance promotion and enforcement activities are carried out by both federal and provincial environmental regulatory agencies and that, in practice, the federal and provincial governments cooperate in setting goals, enacting complementary legislation, and achieving compliance in a manner that most effectively avoids gaps, overlaps or conflicts in government enforcement action. (CEC 2001g, 5)

With respect to the three mines described in the submission, Canada claimed in its response that it has taken actions that constitute pending judicial or administrative proceedings within the meaning of Article 14(3)(a), and that the Secretariat should therefore proceed no further with the submission. Specifically, the response noted a series of studies undertaken by Environment Canada and the British Columbia Ministry of the Environment, Lands and Parks to ascertain the feasibility of a treatment plant to address the problems at the Britannia Mine; this effort culminated in British Columbia's issuance of permits to construct the treatment plant (CEC 2001g, 7-8). As for the Mt. Washington Mine, Canada referred to its participation in studies to find a solution to the problems there, and noted that it sent a letter to the mine's owners advising them that the discharges from the mine violate section 36(3) of the Fisheries Act (CEC 2001g, 8). Finally, with respect to the Tulsequah Chief Mine, the Canadian response noted a number of actions including an environmental assessment related to the owner's request to develop the mine, a provincial order to construct a temporary water treatment plant as a condition of that development, and a warning letter from the federal government to the mine owner following a federal inspection that revealed violations of the Fisheries Act (CEC 2001g, 9).

On May 11, 2001, the Secretariat issued a notification to the CEC Council that development of a factual record is warranted in the BC Mining submission. The Secretariat did not accept Canada's arguments that it should proceed no further due to pending administrative or judicial proceedings. With respect to the Britannia Mine, the Secretariat noted that the permitting process cited by Canada had already been completed with the issuance of permits in 1999, and thus could no longer be considered a "pending" proceeding (CEC 2001g, 16). Canada's participation in studies related to the Mt. Washington Mine, and its letter to the mine's owners, failed in the Secretariat's view to meet NAAEC's definition of "administrative or judicial proceeding" because those actions were "not designed to reach a compliance agreement or to culminate in a specific decision or ruling within a specified time." (CEC 2001g, 16) The Secretariat reached similar conclusions on the government actions that Canada had cited with respect to the Tulsequah Chief Mine (CEC 2001g, 17).

The Secretariat observed that the Canadian response, while describing various enforcement activities the government had undertaken with respect to mining, had failed to answer critical questions about the actual impacts of these actions on pollution of fish habitat (CEC 2001g, 23). The Secretariat therefore concluded that

> the lack of information concerning Canada's actual use of various enforcement and compliance tools and their effectiveness in achieving and maintaining compliance with section 36(3)...supports developing additional information through the factual record process. (CEC 2001g, 26-27)

It recommended developing a factual record to obtain, among other things, "information regarding investigations, prosecutions or other enforcement action taken by the federal

government or British Columbia in response to findings of non-compliance with section 36(3) of the Fisheries Act..." (CEC 2001g, 25)

The Council ruled on this recommendation on November 16, 2001, unanimously authorizing preparation of a factual record in relation to the BC Mining submission (CEC 2001h, 1). In its resolution providing instruction to the Secretariat, the Council noted that "it would be inappropriate...to direct the preparation of a factual record on matters in the submission that are subject to pending judicial or administrative proceedings" and that "proceedings relating to the Tulsequah Chief and Mt. Washington Mines are still pending..." (CEC 2001h, 1). Accordingly, the Council instructed the Secretariat to limit the factual record to the alleged failure to effectively enforce the Fisheries Act with respect to the Britannia Mine (CEC 2001h, 2). Development of the factual record is currently underway.

BC Logging: In the Oldman River and BC Mining submissions, issues relating to subnational involvement in federal regulatory schemes were secondary, included almost incidentally among other complaints of federal nonenforcement of environmental laws. However, this was not the case with the next submission we will examine. In the BC Logging submission[17] filed on March 15, 2000, the notion of federal versus provincial regulation was the primary issue.

The BC Logging submission alleged that Canada was failing systemically to enforce sections 35(1) and 36(3) of the Fisheries Act in connection with logging

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See documents related to the "BC Logging" submission in the CEC Registry of Citizen Submissions on Enforcement Matters, *supra* note 5.

operations in British Columbia (CEC 2001i, 1). Noting that salmon populations are seriously declining in the province, and that the harmful effects of logging have contributed substantially to this decline, the submission asserted that harmful logging activities are allowed system-wide in British Columbia under provincial forestry laws and regulations (CEC 2001i, 2). Moreover, the submission claimed that, in its reliance on those provincial laws and regulations, Canada has abandoned its enforcement responsibilities under the federal Fisheries Act (CEC 2001i, 2). To illustrate these allegations, the submission described logging activities by TimberWest on private forest lands adjacent to the Sooke River; in Martins Gulch; and on De Mamiel Creek (CEC 2001i, 6). All three logging operations are located in the Sooke watershed (CEC 2001i, 2).

Specifically, the BC Logging submission asserted that, although the federal government retains jurisdiction and responsibility under the Fisheries Act to protect fish and fish habitat, it relies heavily on British Columbia's regulation of forest practices under the provincial Forest Practices Code to ensure compliance with the Fisheries Act by logging operations (CEC 2001i, 2). According to the submission, this amounts to a failure of enforcement because the Forest Practices Code routinely allows logging practices that result in violations of the Fisheries Act (CEC 2001i, 2). The submission described in detail how practices allowed under the provincial Forest Practices Code–including clearcutting along stream banks, logging of landslide-prone areas, and falling and yarding of trees across fish-bearing streams–cause harm to fish and fish habitat (CEC 2001i, 3-4). Despite this, according to the submission, the government of Canada has left the

protection of fish and fish habitat to the provincial government (CEC 2001i, 5). The submitters provided documentation to the effect that the Canadian government has adopted as a matter of general policy, in light of the province's 1995 adoption of the Forest Practices Code, only a limited oversight role with respect to logging in British Columbia (CEC 2001i, 5). For illustration, the submission cited harmful logging practices by TimberWest in the Sooke watershed, noting that although the federal government has been made aware of these activities, it has taken no action against TimberWest (CEC 2001i, 5).

The Secretariat found the submission admissible under Article 14(1) and determined that it merited a response from Canada under Article 14(2), which it received on July 6, 2000 (CEC 2001i, 2). Canada did not respond to the alleged systemic failure to enforce the Fisheries Act with respect to logging in British Columbia, limiting its response to the three logging operations by TimberWest in the Sooke watershed (CEC 2001i, 6). The response described the enforcement activities taken in those three instances. It asserted that the federal government had investigated TimberWest's logging operations on the lands adjacent to the Sooke River; sent the logging company a warning letter on June 27, 2000; and conducted a subsequent inspection in July 2000 that did not reveal any harmful impact on fish habitat at the site (CEC 2001i, 6-7). With respect to the operations at Martins Gulch, Canada claimed it had conducted inspections in March 1999 and July 2000 which indicated no damage to fish habitat (CEC 2001i, 7). As for De Mamiel Creek, Canada stated that it could not comment on the submission's assertions about logging in

this location because it was the subject of a criminal investigation under the Fisheries Act (CEC 2001i, 7).

On July 27, 2001, the Secretariat issued a notification to the Council that a factual record is warranted in the BC Logging submission. In its recommendation, the Secretariat noted that it considered Canada's reliance on provincial regulation of forest practices as a means to enforce the Fisheries Act to be the central issue of the submission (CEC 2001i, 8-9). It took Canada to task for failing to respond to this allegation of systemic failure to enforce its environmental law:

> In short, Canada provides no information on its overall approach for enforcing the Fisheries Act in the context of logging on public and private land in British Columbia or on whether that approach is effective. This lack of a response leaves unanswered the central questions that the Submission raises regarding Canada's reliance on provincial regulation of forestry as a means for enforcing the Fisheries Act in relation to logging throughout British Columbia (CEC 2001i, 14).

Accordingly, the Secretariat recommended a broad factual record to answer questions regarding Canada's exercise of its responsibilities under the Fisheries Act, and in particular, how the federal government fulfills those responsibilities in tandem with provincial authorities (CEC 2001i, 14-15). With respect to the specific allegations concerning logging activities by TimberWest, the Secretariat concluded that it would be inappropriate to include the activities at DeMamiel Creek in a factual record at the risk of interfering with the criminal investigation cited in Canada's response (CEC 2001i, 15-17). It also found that a factual record is not warranted in relation to logging activities at Martins Gulch, having been persuaded by the Canadian response that those activities have little or no impact on fish habitat (CEC 2001i, 18). However, the Secretariat did

recommend including the Sooke River logging operation in the factual record to determine whether Canada's enforcement actions there have been effective (CEC 2001i, 18).

The Council handed down a mixed response to the Secretariat's recommendation for a factual record on November 16, 2001 (CEC 2001j). Voting unanimously, the Council flatly rejected the Secretariat's reasoning that a factual record is warranted to examine systemic issues of federal reliance on provincial regulations in enforcing the Fisheries Act (CEC 2001j). Noting that it had been informed by the government of Canada that the proceedings related to De Mamiel Creek are no longer pending, the Council instructed the Secretariat to develop a factual record limited to the specific allegations concerning logging operations at De Mamiel Creek and Sooke River (CEC 2001j). The Secretariat is currently in the process of preparing a factual record limited to these specific operations.

Pulp and Paper: The most recent case involving a subnational role in alleged nonenforcement of federal laws is the Pulp and Paper submission.[18] This submission was filed with the Secretariat on May 8, 2002 by six environmental NGOs from the U.S. and Canada (Sierra Legal Defence Fund, hereinafter SLDF, 2002). It asserted that Canada is failing to effectively enforce the federal Fisheries Act as well as the federal Pulp and Paper Effluent Regulations (PPER) in Quebec, Ontario and the Atlantic provinces, resulting in thousands of violations by pulp and paper mills there (SLDF 2002, 1). The submission noted that, although pulp and paper mills have deposited large amounts of chemicals and

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See documents related to the "Pulp and Paper" submission in the CEC Registry of Citizen Submissions on Enforcement Matters, *supra* note 5.

solid organic waste in waterways in violation of these policies, the Canadian government has consistently failed to bring prosecutions against them (SLDF 2002, 2-10).

According to the submission, the problem is especially egregious in Quebec, where the federal and provincial governments have entered into administrative agreements on pulp and paper regulation since 1994 (SLDF 2002, 7). Under these agreements, the province "collects information to determine compliance with provincial legislation and forwards the information to Environment Canada, which must satisfy itself that there has been compliance with the federal legislation." (SLDF 2002, 7) The submission noted that these agreements "do not relieve the industry from the obligation to comply with the Fisheries Act and federal regulations, such as the PPER." (SLDF 2002, 7) The submitters conducted research that revealed thousands of violations by pulp and paper mills in Quebec since 1995; despite this, they found no federal prosecutions that had taken place during that time, "although there have been some prosecutions under the provincial Environmental Quality Act." (SLDF 2002, 8)

The Secretariat found the submission admissible under Article 14(1), and pursuant to Article 14(2), requested a response from the Canadian government on June 7, 2002 (CEC 2002i). Canada submitted its response on August 6, 2002 (Government of Canada 2002). It was drafted at the federal level–appropriately, given that the submission targeted federal laws and that several of the provinces mentioned are not signatories to the CIA. The response provided a wealth of detailed information regarding federal and, in Quebec, provincial enforcement actions involving the mills cited in the submission (Government of Canada 2002). It briefly mentioned the administrative agreements between the federal

government and the province of Quebec (Government of Canada 2002, 17). The detailed descriptions of enforcement actions taken in Quebec indicate extensive federal-provincial consultation (Government of Canada 2002, 18-27). The Secretariat is currently considering Canada's response to determine whether a factual record is warranted (CEC 2002j).

Conclusion

Having examined the submissions involving subnational governments to date, what conclusions can be drawn about the constraints posed by the Article 14/15 process to the states and provinces? Recall from the overview of these NAAEC provisions above that this mechanism does not include "teeth" in the form of binding obligations; its value lies solely in the potential of shaming the governments involved into changing their behavior. The question before us at this point, then, is: to what extent have the submissions described herein shamed the states and provinces involved into taking actions that they might not otherwise take?

Looking first at the submissions directly involving nonenforcement of subnational laws, one is first struck by the fact that not one of these submissions has been the subject of a factual record. The only one that came close was the Quebec Hog Farms submission, which was rejected by the Council because a new regulatory scheme had been adopted by the province, thus making the submission, in the Council's view, moot. It would be tempting to think that the submission was the motivating force behind the changes, but according to the letter sent to the submitters explaining the Council's decision, the modifications were triggered by the Quebec Auditor General's review of the regulatory

regime and came into effect at about the same time that the submission was filed (Cardenas 2001).

While the Mexico City Airport submission advanced to the Article 15(1) stage of consideration for a factual record before it was terminated, the subnational laws cited in that case constituted a very small portion of the submission and were not even addressed by the federal government's response. The others in this category, as described above, were dismissed at an early stage, presumably too soon to have any effect on the subnational governments involved.

However, this is not to say that submissions alleging nonenforcement of subnational laws *cannot* result in factual records. Those to date were all terminated without a factual record, but in each case, the dismissal was for reasons unrelated to the fact that the submission addressed subnational regulation. It would be incorrect to conclude at this point that subnational governments are immune from complaints about their environmental enforcement practices. On the contrary, these five submissions demonstrate that environmentalists will not hesitate to file such complaints, and the Secretariat will give them the same consideration as those submitted against the federal governments.

Moreover, in two out of three cases in this category where a response from the party was requested, the subnational governments involved have been obliged to defend themselves. While the party response in the Methanex/Neste Canada case appears to have been developed at the federal level, it contained extensive documentation that could only have been generated by the California state government. The response in the Quebec Hog

Farms case was presumably, under the terms of the CIA, drafted primarily by the provincial government in consultation with federal officials. This was not the case with the Mexico City Airport response, but that is hardly surprising since the submission dealt primarily with nonenforcement of federal laws. The submissions process impacts subnational governments when it forces them to justify their procedures and to generate supporting documentation. This adds a layer of accountability to the status quo, in effect making subnational governments answerable to an international body, with the continental environmental community looking on. Such scrutiny will be even more intense and significant when the time inevitably comes that a submission alleging nonenforcement of subnational law does result in a factual record.

The Article 14/15 process, then, poses a potential constraint in the form of shaming states and provinces into at least defending, and at most changing their practices enforcing subnational laws. The fact that none of the submissions in this category to date has reached the factual record stage does not negate the possibility.

Turning now to submissions concerning nonenforcement of federal laws with subnational involvement, we find something of a puzzle. As noted earlier in this chapter, the approach at the outset of this research was based on the fact that in the U.S. and Canada, and to a much lesser extent Mexico, implementation of federal environmental policy is often left to the subnational governments. Therefore, the assumption was that there would be submissions complaining of state or provincial nonenforcement of federal laws. To the extent that state or provincial officials were held accountable by the

submissions process for failures to enforce federal policies, the process could be considered a constraint on subnational governments.

The submissions filed thus far do not bear out this assumption. Not a single submission has been filed complaining of subnational failure to enforce federal laws. The five submissions concerning Canada's federal Fisheries Act, described above, at first glance appear to meet this description, but a closer look reveals something else entirely. These submissions were not targeted at the enforcement practices of provincial governments; rather, they all complained of federal failures to enforce. Subnational involvement in these cases lies in the fact that the federal government allegedly abandoned enforcement of the Fisheries Act by deferring to provincial law; as best illustrated by the BC Logging case, the problem with this approach is that a substantial gap exists between federal and some provincial environmental standards. Submitters were precluded from complaining about the comparatively lax provincial laws because, as mentioned above, environmental laws themselves are immune from the submissions process. They therefore focused on the failure of the federal government to live up to its enforcement obligations under federal law.

While these five submissions do not live up to initial assumptions, they nevertheless provide some interesting insights. First, although the initial submissions themselves did not appear to hold the provincial governments accountable, Canada's responses focused to varying degrees on provincial responsibility. For example, the response in the Oldman River case alluded to provincial prosecutions, and the response in the BC Mining submission pointed out that the provinces hold primary responsibility over

mining. There would appear to be some finger-pointing going on here, with the Canadian government attempting to defend itself by placing the focus on provincial roles. A broad factual record in light of such a response could conceivably address the issue of provincial responsibility, and thus ultimately hold the province accountable. In fact, this was the recommendation of the Secretariat, especially in the Oldman River and BC Logging cases; unfortunately, the Council has in each instance restricted the scope of the factual record to specific Fisheries Act violations. It remains to be seen whether such limited factual records will address the issue of provincial accountability.

These cases also help to solve the puzzle of why so many submissions have been filed, and so many factual records ordered, against Canada. It is probably no coincidence that every case against Canada described in this chapter involved the federal Fisheries Act. Clearly, this is a key piece of environmental legislation, and there is intense and widespread dissatisfaction with the way in which it is being enforced. Better enforcement of this one law would almost certainly decrease submissions against Canada, so that it more closely resembles the United States than Mexico in terms of the number and success of submissions against it.

Moreover, the high number of submissions involving Canada reflects the nature of Canadian federalism. As discussed in Chapter Two, the provinces hold a great deal of responsibility for environmental regulation, especially as compared to the states of the U.S. and Mexico. As these cases reveal, leaving so much up to the provinces can in fact lead to major gaps in environmental protection and thus set the stage for complaints by environmental NGOs.

This examination of Article 14/15 submissions raises some interesting questions. First, why have there not been more submissions involving nonenforcement of subnational laws? In the case of Mexico, this is not surprising: the low incidence of submissions against Mexico with any hint of subnational involvement–only one out of ten, while total submissions against Mexico number 16 out of 36 overall–may be interpreted as a reflection of Mexican federalism, highlighting the centralization of environmental policy. It is ironic that the Mexican states, by virtue of their lack of environmental authority and capacity, are somewhat shielded from the submissions process. This situation is likely to change as decentralization of environmental policy progresses in Mexico.

By contrast, the states and provinces in the U.S. and Canada have passed hundreds of environmental laws at the subnational level. This substantial body of legislation would seem to present a large target for potential submissions, but very few have been filed. Why? A possible explanation is that the subnational governments have been consistently effective in enforcing their environmental laws; another (more likely) answer is that environmental NGOs have simply not yet thought to focus on the subnational level. A systematic attempt to solve this puzzle is not within the scope of this chapter, but the question does present an opportunity for further research.

Second, and similarly, why have there been no submissions concerning subnational enforcement of federal laws? As mentioned above, implementation and enforcement in Canada is largely left up to the provinces; however, every submission involving nonenforcement of Canadian federal law has complained of federal–rather than provincial–failures to enforce. Likewise, in the United States, where the norm is state

implementation of federal environmental policy, such issues would seem likely to arise. Despite this, there have been no such submissions targeting the United States.

In conclusion, this look at the Article 14/15 submissions process shows that this mechanism clearly has the potential to impact the states and provinces. The process potentially poses a constraint on subnational governments by forcing them to defend their enforcement practices and by shaming them into changing those practices. At this point, that potential has yet to be fully realized. However, it bears noting that the NAAEC is relatively young and not fully developed. As the regime matures and solidifies, it is likely that the states and provinces will increasingly find themselves targeted by submissions.

As noted at the beginning of this chapter, the submissions process is a vehicle for transparency and participation, providing civil society with opportunities to hold governments accountable. It offers the potential for citizens and NGOs to bring pressure to bear at all levels of government. It is only a matter of time before environmentalists grasp the full promise of the Article 14/15 process within the context of federalism in North America. When they do, we will likely witness a surge of submissions targeted at subnational governments. Only then will the submissions process reach its full potential, holding the states and provinces accountable and thus promoting the enhancement of environmental protection continent-wide.

CHAPTER SIX

Introduction

We have been examining the impacts of the NAFTA/NAAEC environmental regime on the states and provinces of the U.S., Canada and Mexico. Thus far, such impacts have been discussed in terms of constraints on the subnational governments. However, the regime does include some potentially enabling aspects that may be helpful to the states and provinces in furthering their environmental goals. Such positive aspects of the regime are found in the NAAEC, particularly the CEC and its activities. This chapter will examine the opportunities provided by the CEC and the extent to which they have been utilized by the states and provinces thus far.

In a world in which subnational governments are increasingly drawn into international relations, it is helpful to identify the institutional opportunities that become available as the new face of international relations takes shape. International organizations such as the CEC add a layer to the institutional landscape and, as such, may offer new opportunities to states and provinces. Whether or not the subnational governments take advantage of them, it is worth mapping out the potential ways in which the CEC may have an enabling impact.

Recall from Chapter One that regime theory points to several aspects to consider in this regard. First, institutions such as the CEC may provide opportunities to the

subnational governments by providing forums in which they can communicate with one another, exchange information, form coalitions, and influence policy agendas to their own best interests (Keohane and Nye 1974, 1977; Keohane, Haas, and Levy 1993; Levy, Keohane, and Haas 1993). Second, the CEC may increase the capacities of states and provinces by providing information and technical assistance (Keohane, Haas, and Levy 1993).

This chapter examines each of these aspects of the CEC. It begins with a look at the forums provided by the organization to the states and provinces, and discusses the extent to which such forums have been utilized by the subnational governments to date. It continues with a discussion of the capacity-building aspects of the CEC, with particular emphasis on the wealth of information that the organization has generated. In some instances, the CEC may serve as a catalyst to subnational governments for action on difficult environmental problems, and the chapter includes a section that briefly examines some cases of this. Finally, the chapter concludes with a summary discussion of the CEC's potential to provide states and provinces with opportunities within the NAFTA/NAAEC environmental regime.

Providing Forums

The CEC promotes itself as a forum on environmental issues:

> The CEC constitutes a unique regional forum for exploring trends, bringing key players together to develop solutions or simply exchanging views on important issues of environmental protection, conservation and sustainability. Because the CEC involves the three North American governments as well as the public, through its Council, advisory committees, and Joint Public Advisory Committee, the institution is ideally positioned to play the role of the "honest broker"—to convene stakeholders from the public and private sector, and build bridges of understanding that can facilitate environmentally-preferred results. (CEC 2000e, 1)

This section examines the extent to which this statement holds true for the state and provincial governments.

Article 18 Committees

The most obvious place to look for a potential subnational forum is Article 18 of the NAAEC. Included in the section on "Advisory Committees" in the part of NAAEC that creates the CEC, Article 18 states:

> Each Party may convene a governmental committee, which may comprise or include representatives of federal and state or provincial governments, to advise it on the implementation and further elaboration of this Agreement. (NAAEC, Article 18)

Thus, Article 18 authorizes each NAFTA party to form an optional Governmental Advisory Committee (GAC), presumably to address concerns that arise under the NAAEC with respect to the party's federal system of government (DiMento and Doughman 1998, 701). Such committees, provided with credibility by their establishment within the NAAEC, could serve as useful forums for the states and provinces to further their own environmental agendas.

The United States formed a GAC in 1994 (Joyce 2002a). Its charter allows for 12 members: six from state government, four from local, and two from tribal governments (Joyce 2002a). However, difficulties in recruiting GAC members have resulted in only an eight-member roster: currently, the GAC consists of three state government officials, four from local government, and one from a Native American tribe (Joyce 2002a; CEC 2002k). Members, who serve for staggered two-year terms, are appointed from a list of nominees by the Administrator of the U.S. EPA (Joyce 2002a). The federal government is represented on the committee by a Designated Federal Officer from the EPA, whose

role is to provide support for the GAC and ensure that it serves federal interests (CEC 2002k; Joyce 2002a, 2002b).

The U.S. GAC meets two to three times per year (Joyce 2002a). Its meetings are open to the public (Joyce 2002b). Meetings focus on any and all topics falling under the purview of the NAAEC and the CEC, with the GAC providing advice to the EPA Administrator acting as the U.S. representative to the CEC Council (Joyce 2002a). Particular attention has gone to the Article 14/15 submissions process (Joyce 2002a). However, the GAC's role in this regard is limited to broad questions of policy; it does not become involved in individual submissions (Joyce 2002a). While the GAC has been briefed on activity among U.S. states with respect to NAFTA Chapter 11 issues, this has not been a major topic of discussion (Joyce 2002a).

A few years ago, Dimento and Doughman (1998, 701-702) noted the U.S. GAC as an apparently effective player in the NAFTA/NAAEC environmental regime, wielding considerable influence on the actions of the CEC. Indeed, they reported that members of the JPAC had "complained that the 'second team,' by which they presumably mean the GAC, has acted to try to gain control of the CEC agenda in order to assure that actions inconsistent with their views of acceptable domestic policy are not taken." (DiMento and Doughman 1998, 718-719) The federal representative to the GAC recently refuted this characterization, noting that the JPAC and the GAC perform very different functions and that relations between the two bodies have been "collegial" (Joyce 2002a).

The U.S. GAC deals solely with issues relating to NAFTA, the NAAEC and the CEC; it is not used as a forum to discuss other environmental issues closer to home

(Joyce 2002b). Other bodies, such as the National Conference of State Legislatures and the Environmental Council of the States, are considered the proper forums to address such issues (Joyce 2002a). The Designated Federal Officer for the GAC asserts that it is a useful forum in light of the realities of liberalized trade and the critical role that subnational governments should have in implementing trade agreements (Joyce 2002a). The GAC Chair similarly extols its usefulness, arguing that it is the only "formal mechanism to discuss, address and attempt to resolve issues associated with the environmental implications of NAFTA." (Ferguson-Southard 2002) However, the accuracy of this statement is rendered doubtful in light of the fact that, to date, the most important environmental implications of NAFTA for the states have been found in the investment provisions of Chapter 11. These implications have not been addressed by the GAC, but by organizations such as the U.S. Conference of Mayors, the National Association of Attorneys General, and individual state legislatures (U.S. Conference of Mayors 2002; National Association of Attorneys General 2002; Rogers 2002).

Canada has established a Governmental Committee in accordance with the Canadian Intergovernmental Agreement Regarding the North American Agreement on Environmental Cooperation (CIA). As discussed in Chapter Three, the CIA was developed in 1994 as the mechanism for provincial accession to the NAAEC under Annex 41 (Johnson and Beaulieu 1996, 229). It provides for a Governmental Committee "to develop and manage Canada's involvement in the NAAEC including...the establishment of Canada's positions and approaches as well as the preparation for, participation at and follow-up to meetings of the Council of the Commission for

Environmental Cooperation..." [CIA, Article 3(1)]. The Governmental Committee is comprised of the environment ministers from the signatory provinces, as well as the federal Environment Minister of Canada [Garver 2002; CIA, Article 3(2)]. This places it at a higher level of authority than the U.S. GAC.

Alberta was the first province to join the federal government on the Governmental Committee by signing the CIA in August 1995 (Province of Alberta 1995). Quebec followed suit over a year later, signing on in December 1996 (Province of Quebec 1996). Manitoba became the third and, to date, last province to join, signing the CIA in January 1997 (Province of Manitoba 1997). Representatives of all three provinces have indicated that their reasons for joining include support for NAFTA and its side agreements, a spirit of federal-provincial cooperation, and a desire to participate fully in the implementation and management of the NAAEC (Province of Alberta 1995; Province of Quebec 1996; Province of Manitoba 1997; Governmental Committee 1998; Acheson and Hanak 2002).

Article 5(1) of the CIA charges the Governmental Committee with providing "a forum for the on-going mutual exchange of information between and among the federal government and the provincial and territorial governments regarding issues related to the NAAEC." The Governmental Committee is to meet at least once a year and as necessary [CIA, Article 3(2)]; its first meeting was held in January 1998 (Governmental Committee 1998). Its duties include discussion and comment on any cases arising under the dispute resolution aspects of the NAAEC (CIA, Article 7). The Governmental Committee is also responsible for appointing members to the National Advisory Committee established under NAAEC Article 17 (CIA, Article 10).

Participants in the Governmental Committee consider its mandate to go beyond the merely advisory role envisioned under Article 18. Rather, the Committee provides participating provinces with a fully equal management role in implementing NAFTA's environmental side agreement (Acheson and Hanak 2002; Lapierre 2002). For example, the signatory provinces are intensely involved in all Article 14/15 submissions filed against Canada; through the Governmental Committee, they analyze the submissions and help to develop the Canadian response (Acheson and Hanak 2002). In addition, Canadian delegations to CEC Council meetings are determined by the Governmental Committee, with the federal Minister of the Environment joined by a representative of at least one other signatory government (CIA, Article Article 4). Furthermore, "(p)articipation in the Council working groups and other bodies of the Commission for Environmental Cooperation will be established by the Governmental Committee." (CIA, Article 4)

In its management role, the Governmental Committee clearly differs from the U.S. GAC, which is only advisory. Provincial representatives to the Governmental Committee explain this difference by pointing to the more decentralized nature of Canadian federalism, in which the federal government cannot bind the provinces to international commitments on issues falling within provincial jurisdiction (Acheson and Hanak 2002). It is also worth noting that the Governmental Committee acts as a collective body to reach all decisions involving the NAAEC and the CEC (Lapierre 2002), in the collegial style of decision-making characteristic of executive federalism.

However, the Governmental Committee does not apparently serve as a forum for discussion of environmental issues beyond the NAAEC and the CEC. Its only purpose is to provide for management and implementation of the NAAEC (Acheson and Hanak 2002; Lapierre 2002). Other environmental issues—those closer to home, and thus presumably more important to the provinces–are discussed within the Canadian Council of Ministers of the Environment (CCME). By all accounts, the CCME is the primary forum used by the provinces to further their environmental goals (Acheson and Hanak 2002; Lapierre 2002).

As for Mexico, no committee has been formed under the auspices of Article 18. For a country with Mexico's long-standing tradition of centralization, in which the voices of state governments have historically been muted, this is hardly surprising.

Informal venues

In addition to the formal committees established under Article 18, the work of the CEC may offer more informal forum opportunities to the states and provinces. For example, in 1998 the CEC launched a pilot initiative involving the Atlantic provinces and northeastern states in discussions of transboundary ozone. This project and its resulting report were hailed by CEC Executive Director Janine Ferretti as "a good example of the type of work that has allowed further dialogue on transboundary air pollution between the provinces and the states." (Governmental Committee 1998, 3)

Out of about two dozen current CEC work projects, a handful involve subnational participation. For example, a CEC initiative in "Cooperation on the Protection of Marine and Coastal Ecosystems" features ad hoc committees which include representatives of all

three levels of government along with indigenous groups, academia, and NGOs (CEC 2000e, 48-49). State and local officials are also participants in the CEC project "Facilitating Trinational Cooperation in Air Quality Management," which allows for exchange of information among air quality officials (CEC 2000e, 79-80).

Since 1995, the CEC's work program has included an "Enforcement Cooperation" project, "whose general goals include providing a forum for North American cooperation in environmental enforcement and compliance..." (Knox 2001, 51). As part of the Enforcement Cooperation program, in 1996 the CEC established a North American Working Group on Environmental Enforcement and Compliance (EWG), composed of senior-level environmental enforcement officials designated by the NAFTA parties (Knox 2001, 51). The EWG provides a regional forum for dialogue and information exchange among national, state and provincial environmental and wildlife enforcement agencies (Richardson 1998, 6; Knox 2001, 51).

However, a closer look at the EWG shows minimal participation by the subnational governments. Its most current membership roster includes only three subnational officials out of 20. Canada's six members include one from Manitoba Conservation; one from the Quebec Environment Ministry; and the remaining four from Environment Canada. Of the seven members from the U.S., one is a representative of the Arizona Attorney General's Office and the other six are from the federal Environmental Protection Agency. All of Mexico's seven members are from PROFEPA, the federal-level environmental department (CEC 2001a, 112). Although the CEC has expressed an intent to expand the EWG to include more "state- and provincial-level agencies that are

exploring their priority issues and needs for ensuring effective enforcement" (CEC 2000e, 124), such outreach efforts have apparently not been fruitful.

In summary, the NAAEC and the CEC clearly offer the potential for subnational forums to be established, both formally through Article 18 and informally through the work program of the CEC. To date, however, that potential is largely unfulfilled. The committees established under Article 18 do not address issues beyond management of the NAAEC, leaving it to other venues to serve as subnational forums to further domestic environmental goals. Few informal venues are offered to subnational governments by the states and provinces.

Capacity-Building

We turn now to a look at aspects of the CEC that may provide opportunities to the states and provinces through capacity-building. In the context of environmental policy, capacity may be defined as "a society's ability to identify and solve environmental problems." (OECD 1994, 8) Utilizing this broad definition, Janicke (2002) conceptualizes environmental capacity as a complex interaction of several factors. According to Janicke's framework, a society's environmental capacity is constituted by the strength, competence and configuration of organized proponents of environmental protection–both within and outside government—and the systemic conditions in which proponents act (Janicke 2002, 7). Such systemic conditions include the generation of knowledge and public awareness of environmental issues; political-institutional conditions such as constitutional and legal structures and rules for interaction; and economic performance and technological advancement (Janicke 2002, 5-6).

This conceptualization of capacity encompasses factors in civil society, particularly opportunities and abilities of non-governmental actors to participate in environmental policy-making (Janicke 2002, 10). However, it asserts the critical importance of competent, integrated governmental institutions, noting that the "establishment of such institutions may plausibly be regarded as the necessary condition for successful measures." (Janicke 2002, 8)

Capacity-building is considered an important part of the CEC's mission: as stated in the organization's current three-year program plan,

> (p)ublic participation and capacity building in North America are central to the realization of many of the goals and objectives of sustainable development....The three-year program plan attempts to integrate capacity building and public participation activities directly into the project descriptions...(CEC 2000e, 3)

As part of this effort, the CEC "builds capacity building mechanisms, such as training, scientific and technical exchange and education, directly into" its projects (CEC 2000e, 3).

The CEC's role in capacity-building lies primarily in the generation of useful information. Other potential capacity-building activities include technical assistance through training seminars and workshops and involvement in transboundary programs. In addition, some narrowly focused CEC capacity-building efforts are targeted specifically toward Mexico.

Generating information

As mentioned in Chapter Three, the information and reporting achievements of the CEC are considered by some to be its most significant accomplishment and its

greatest source of legitimacy (DiMento et. al. 2001, 293; Johnson and Beaulieu 1996, 149; Block 1997, 6). The organization recently asserted:

> As a regional center of research on policy and the scientific aspects of regional environmental issues, the CEC continues to provide objective, science-based information and guidance to policymakers and the public-at-large....CEC reports, factual records, and databases empower citizens and governments by providing important regional information on our shared environment and the policies employed to protect it. (CEC 2000e, 2)

Greg Block, until recently the organization's Director of Programs, recently noted that the information is key to the CEC's mission: that with little money and no judicial authority, one of the only ways for the CEC to influence policy is to develop an authoritative voice (Block 2002b).

As we have seen, some of the CEC's fact-finding mission is related to the Article 14/15 submissions process; however, since we have already devoted a chapter to Articles 14 and 15, we will focus here on the information and reporting functions established by Article 13.

Article 13 of the NAAEC provides that the "Secretariat may prepare a report for the Council on any matter within the scope of the annual program." [NAAEC Article 13(1)] As Knox (2001, 23) observes, the CEC's annual program is always organized into four subject matters (Environment, Economy and Trade; Conservation of Biodiversity; Pollutants and Health; and Law and Policy) "which, construed broadly, cover the vast majority of environmental topics." Furthermore, the Secretariat may prepare a report "on any other environmental matter related to the cooperative functions of this Agreement," with notice to the Council, unless the Council objects by two-thirds vote within 30 days of such notification [NAAEC Article 13(1)]. The only limit to this provision is that the

Secretariat may not prepare an Article 13 report on the question of whether a party has failed to enforce its environmental laws and regulations [NAAEC Article 13(1)], since such questions are handled under Articles 14 and 15. All Secretariat reports prepared under Article 13 are submitted to the Council and are made publicly available within 60 days following submission, unless the Council decides otherwise [NAAEC Article 13(3)].

Knox (2001, 24) notes that the effect of Article 13 "is to give the Secretariat independent discretion to prepare reports on its own initiative on virtually any environmental matter it chooses except a party's enforcement of its laws." Comparing the provisions of Article 13 with those of Articles 14 and 15, he observes:

> (T)he Article 13 procedure is almost entirely within the discretion of the Secretariat and outside the control of the state parties....In contrast to the Article 14-15 submissions procedure, which requires Council approval by a two-thirds vote before the Secretariat may prepare and publish factual records, Article 13 gives the Council no power to veto a Secretariat decision to prepare an Article 13 report on an issue within the scope of the annual program..., and allows the Council to veto a report on any other topic only within thirty days of Secretariat notification....The Article 13 procedure is thus less susceptible than the submissions procedure to concerns that state parties could veto or shelve controversial reports in order to protect themselves. (Knox 2001, 49)

In a potentially significant departure from the submissions process–which is limited to examining enforcement actions only–under Article 13 the Secretariat may consider problems arising from inadequate domestic environmental laws themselves (Knox 2001, 48).

In preparing an Article 13 report, "the Secretariat may draw upon any relevant technical, scientific or other information," including information submitted by NGOs,

individuals, the JPAC, a NAFTA party, or information that is publicly available, generated through venues such as conferences and seminars, or developed by the Secretariat or independent experts [NAAEC Article 13(2)]. Furthermore, when first deciding whether to prepare a report, the Secretariat may consider suggestions from outside parties; an early example is the 1995 report on waterfowl deaths at Silva Reservoir in Mexico, prepared at the request of several NGOs (Knox 2001, 48). However, in contrast to the submissions process, the Secretariat is not *required* to consider such suggestions (Knox 2001, 49).

Article 13 is considered an important and somewhat precedent-setting aspect of the NAAEC and the CEC. As former CEC director Greg Block (1997, 5) stated:

> In practice, Article 13 allows the Secretariat to identify issues with important regional environmental considerations – issues which may not garner the unanimous support of all parties to the Agreement. Judicious use of Article 13 presents a unique opportunity to address important issues which traditionally could not be examined by an international organization. While we have no authority to coerce or regulate, Article 13 does allow us to address issues of regional importance.

Acting under its reporting mandate, the CEC has generated a wealth of information. It has produced and published dozens of reports and other documents. CEC publications targeted to government officials include the 1999 report *Tracking and Enforcement of Transborder Hazardous Waste Shipments in North America: A Needs Assessment*, which identifies difficulties in tracking and enforcement related to hazardous waste and suggests options for resolving the problems (CEC 2001a,105). In addition, as part of its work to enhance the enforcement efforts of wildlife officers, the CEC issued two trilingual information bulletins on forensic investigative techniques for distribution to officers and inspectors throughout North America; published a Directory of North

American Forensic Laboratories; and distributed the 1999 report *Indicators of Environmental Enforcement: Proceedings of a North American Dialogue* (CEC 2001a, 105).

The Secretariat maintains the North American Pollutant Release and Transfer Registry (PRTR), which "makes available in a trilateral publication information collected by the national governments on the pollutant releases of some of the most important industries in the region." (Richardson 1998, 10) Utilizing the data in the PRTR, the CEC annually releases an updated edition of *Taking Stock: North American Pollutant Releases and Transfers*. This publication analyzes pollutants released by state and province, as well as by substance (CEC 2002L; Ferretti 2002). It also includes discussions of ways in which communities can use PRTR data to address pollution problems (CEC 1999e, 343). At its meeting in June 2002, the CEC Council approved plans to improve the PRTR by pursuing comparability of data collected by the three countries, and by supporting Mexico's efforts to move from a voluntary to a mandatory PRTR system (CEC 2002b).

One of the most recent CEC reports was prepared in response to deregulation of the energy market: *Environmental Challenges and Opportunities of the Evolving North American Electricity Market* was submitted to the Council in April 2002 (Ferretti 2002). Indeed, energy issues are currently a primary focus of the CEC in fulfilling its information and reporting mandate. As part of its emphasis on energy and environment, in June 2002 the Council decided to conduct a comparative study of the air quality standards, regulations, planning, and enforcement practices at the national,

state/provincial, and local levels in the three NAFTA countries; conduct a survey to obtain information on the comparability of North American standards governing construction and operation of electricity generating facilities; explore issues related to conditions under which emissions trading systems might evolve; and continue the Secretariat's work on renewable energy (CEC 2002b).

Another CEC focus is environment-related health issues. At its most recent meeting in June 2002, the Council directed the Secretariat to select and publish a core set of children's environmental health indicators for North America; develop information on risk assessment, with a view to increasing collaboration on addressing risks posed by toxic substances; and enhance understanding of the economic impacts of children's environment-related illnesses (CEC 2002b).

In addition, the CEC's Law and Policy program is expected soon to complete and disseminate a comparative study of North American laws and policies relating to intensive agriculture practices (CEC website, 6/23/02). The study will form the basis for identifying best practices and providing federal, state, provincial, and local authorities with approaches employed by other jurisdictions (CEC website, 6/23/02).

Not all CEC publications are directed toward government officials. Each publication is targeted to a specific audience, which varies depending on the nature of the report and the context in which it arose (Governmental Committee 1998, 4). However, as the sampling above indicates, much of the information generated by the CEC is intended to provide assistance to governments in North America.

In addition to publications, the CEC develops and maintains several online databases. These provide information on a variety of topics, including electricity, coffee certification, and sustainable tourism (CEC website, 6/23/02). The CEC also maintains the online Summary of Environmental Law in North America, which summarizes the environmental laws of each of the three countries and allows users to access other databases to retrieve the full text of statutes and regulations (CEC website, 6/23/02; Block 1997, 6). In addition, the online Transboundary Agreements Infobase provides an inventory of both formal and informal transboundary environmental agreements among the NAFTA parties (CEC website, 6/23/02; Block 1997, 6).

Finally, the CEC publishes *Trio*, an online quarterly newsletter which follows the organization's work with the NAFTA countries in protecting the shared North American environment. The eighth and latest issue (Autumn 2002) includes articles on pesticide risk assessment, renewable energy certificates, and ecotourism (CEC 2002m). The newsletter, apparently intended to be somewhat light reading, generally lacks the depth of the CEC's other publications and databases.

Despite the wealth of information generated by the CEC, the subnational governments apparently do not regard it as a particularly useful resource. As Louise Lapierre of the Quebec Ministry of the Environment—Quebec's representative on the Governmental Committee—put it: "We have our own experts....The information CEC produces is not news to us." (Lapierre 2002) Officials from Alberta expressed the same sentiment. In a telephone interview, they mused that the CEC's recent report on electricity may be helpful to Alberta, since electricity is an important issue for the

province; thus far, however, nothing generated by the CEC has been particularly useful to Alberta (Acheson and Hanak 2002). This appears to be true of other states and provinces in North America as well.

Former CEC Director of Programs Greg Block explains that the organization faces logistical problems and financial limitations in distributing CEC-generated information to the states and provinces (Block 2002b). However, he notes an exception in the information related to energy and electricity, which has "trickled" to the subnational governments and may have an impact (Block 2002b). Block believes that the CEC information on energy is receiving particular attention because it is especially timely (Block 2002b). In addition, the energy reports were developed with the involvement of the Natural Resources Defense Council, industry representatives, and a ten-term Congressman—influential people who have been effective in promoting the information (Block 2002b). While the CEC data has not apparently impacted subnational energy policy to date, Block predicts that it will, especially with respect to harmonizing definitions of renewable energy (Block 2002b).

Training seminars and workshops

In addition to generating information, the CEC helps build state and provincial capacity by providing technical assistance through training seminars and workshops.

Out of all of the organization's initiatives, to date the Enforcement Cooperation Program has been the most active in this regard. It has engaged in efforts to enhance the abilities of governments to track and regulate the transboundary movement of hazardous waste (Knox 2001, 51; CEC 2001a, 105). The Enforcement Cooperation Program has

also sponsored training seminars for wildlife enforcement officers (Knox 2001, 51; CEC 2001a, 104). Subnational officials have found these workshops, which brought together officials from all governmental levels in all three NAFTA countries, to be particularly useful (Acheson and Hanak 2002).

The CEC sponsored a workshop on groundwater in January 2002. The workshop was organized in recognition of the fact that "water management in North America is spread out among dozens of regional, provincial, state, and federal agencies" and that most information on groundwater is highly localized, with aggregate data at the regional and national levels lacking (CEC 2002n). The workshop focused on groundwater from the larger North American perspective. It brought together officials and experts from the three NAFTA countries to help the CEC begin to define its role in facilitating transborder cooperation in water management (CEC 2002n).

The CEC also occasionally participates in workshops convened by others. For example, CEC staff participated in a panel on regulation of electricity at a workshop on North American Energy Trade that was sponsored by the Western Governors' Association (WGA website, 6/30/02).

CEC involvement in transboundary programs

As discussed in Chapter Two, the border states and provinces of the three NAFTA countries engage extensively in transboundary environmental programs. Sometimes they do so under the auspices of an international organization, such as the International Joint Commission (IJC) on the U.S.-Canada border, or the International Boundary and Water Commission (IBWC) and Border 2012 (formerly Border XXI) on

the U.S. border with Mexico. At other times, state and provincial officials form their own issue-specific bilateral alliances, independent of other organizations. This section examines the extent to which the CEC engages in capacity-building for the subnational governments by lending assistance through participation in transboundary initiatives in which border states and provinces are involved.

A major focus of the CEC since 1995 has been its Sound Management of Chemicals (SMOC) program, which embodies ongoing efforts to reduce the risks of persistent toxic substances to human health and the environment (CEC 2000e, 88). Through the SMOC program, the CEC Secretariat "has developed active partnerships with other regional and binational initiatives, including those of the International Joint Commission, the Binational Strategy under the Great Lakes Water Quality Agreement, and the New England Governors and Eastern Canadian Premiers." (CEC 2000e, 88) In addition, members of the CEC Council recently held discussions with representatives of the IJC and the IBWC for the first time; they discussed where coordination could be useful, and instructed the Secretariat to strengthen its working relationships with these organizations at the staff level and explore possibilities for collaborative activities (CEC 2002b). The CEC was also instrumental, as mentioned above, in discussions of transboundary ozone between the Atlantic provinces and the northeastern states (Governmental Committee 1998, 3).

On the other hand, there are many transboundary projects involving states and provinces that do not include the participation of the CEC. For example, in 1999 the U.S. Environmental Protection Agency published a *Compendium of EPA U.S.-Mexico Border*

Activities that listed over 60 projects involving and/or benefiting state governments on both sides of the border. Not a single project listed named the CEC among the participants (U.S. EPA 1999).

A similar situation is seen on the U.S.-Canada border, specifically with respect to regulation of water levels in the Great Lakes. This is an on-going point of contention between the U.S. and Canada, and tensions over water levels in the lakes have increased recently due to a prolonged drought in the region (Bentz 2002, 1, 8). The IJC has primary authority over the matter, and the Great Lakes states and provinces are participants in several initiatives and in ongoing discussions (Bentz 2002, 8; Elwell 2001, 6). Given the fact that dropping water levels in the Great Lakes carry significant environmental implications which would make the issue a candidate for CEC involvement, Bentz (2002) undertook a study to determine the extent to which the CEC has impacted the IJC's management in this arena. She found that, while both organizations have expressed an interest in collaboration on the issue, this has not yet happened in any concrete way. Thus far, the CEC has not become involved in IJC management of water levels in the Great Lakes–despite the importance of this issue–and its overall contact with the IJC remains minimal (Bentz 2002). However, as trade integration deepens, this situation may change. The trade environment under NAFTA has placed stresses on the Great Lakes which, by some accounts, the IJC has been ill-equipped to handle (Elwell 2001). There have been calls for the CEC to step in with badly needed information, and to take a leadership role in transboundary efforts with respect to the Great Lakes (Elwell 2001).

Currently, one of the most contentious transboundary issues is environmental impact assessment. Under Article 10(7) of the NAAEC, the CEC Council is mandated to develop recommendations for an agreement between the three NAFTA parties with respect to:

(a) assessing the environmental impact of proposed projects subject to decisions by a competent government authority and likely to cause significant adverse transboundary effects, including a full evaluation of comments provided by other Parties and persons of other Parties;

(b) notification, provision of relevant information and consultation between Parties with respect to such projects; and

(c) mitigation of the potential adverse effects of such projects.

The Council was to develop recommendations for a transboundary environmental impact assessment (TEIA) agreement within three years after the NAAEC came into force—a deadline of January 1, 1997, which has been missed by six years [NAAEC Article 10(7)].

To be sure, the process for meeting this goal started out well:

> In October 1995, in one of its first resolutions, the Council adopted overarching principles to guide the implementation of Article 10(7). The Secretariat prepared background papers comparing the domestic EIS laws of the parties and describing international precedents for transboundary EIA (Knox 2003, 117).

In June 1997 the Council issued a resolution stating its intentions to complete a legally binding TEIA agreement by April 15, 1998 (Knox 2003, 117). The parties convened an expert group which released a draft agreement in 1997 (Knox 2003, 117).

Scholarly observers of TEIA processes have cautioned that federalism, with variations in jurisdictional arrangements, might be a factor in the outcome of TEIA negotiations (Jones, Duncan and Mumme 1997, 90). Indeed, the North American TEIA negotiation process became mired in federalism issues that continue to stand in the way

of an agreement. The primary sticking point is that the U.S. and Canada only require environmental impact assessment—and thus are inclined to require *transboundary* EIA—for federal projects (Knox 2003, 116, 118). This leaves a large category of state and provincial projects with potentially significant transboundary impacts, for which no TEIA would be required (Wirth 2002, 6, 8; Knox 2003, 118). In Mexico, on the other hand, any project with the potential for transboundary impacts falls under federal jurisdiction (Wirth 2002, 7). Thus, Mexico is insisting that the U.S. and Canada include state and provincial projects in any TEIA agreement, "in order to make the obligations of the parties more closely equivalent." (Knox 2003, 118)

However, the subnational governments have been unwilling to have their projects regulated under a comprehensive trilateral TEIA agreement (Wirth 2002, 9). As we have seen, Canada may not legally bind the provinces to international obligations in matters that fall under provincial jurisdiction. While the federal government of the U.S. most likely has the constitutional authority to extend TEIA obligations to the states on the basis of an international agreement requiring it to do so, it is "doubtful...that such an effort by the U.S. government would receive the necessary political support." (Knox 2003, 118) Application of TEIA requirements to the states would most likely involve an expansion of the National Environmental Policy Act (NEPA) by Congress (Block 2002c). To date, the political will has been lacking in Congress to consider such an expansion (Block 2002b). According to the former Director of Programs for the CEC, individual members of Congress can see little political benefit to be gained from advancing the issue (Block 2002b). Federalism issues thus leave the U.S. and Canada

without a viable negotiating position with Mexico, and the impasse continues. As expressed by one first-hand observer of the TEIA negotiations, at the federal level "Article 10(7) is currently a dead duck in the water." (Niemeyer 2002)

With the three federal governments unable to come to agreement over TEIA, in 1998 the CEC—following a suggestion by the Western Governors' Association (WGA)—recommended that states and provinces negotiate their own bilateral arrangements (Wirth 2002, 9; Niemeyer 2002). The hope was that the subnational governments would serve as laboratories to gain experience with cross-border environmental impact assessment, and that state and provincial arrangements would someday complement a trilateral agreement at the federal level (Block 2002b; Wirth 2002, 9). The WGA issued a document agreeing to develop a notification protocol among the subnational governments, and expressed an interest in pooling resources with the CEC to help the states and provinces toward this goal (Block 2002b, 2002c). However, the WGA conditioned its support on progress at the federal level, bringing the situation back to stalemate (Block 2002b, 2002c). In addition, Mexico has balked at the direct subnational approach (Wirth 2002, 9; Niemeyer 2002).

The model for subnational agreements is the 1999 memorandum of understanding between British Columbia and the state of Washington (Wirth 2002, 10, 14). To date, this is the only full TEIA agreement at the subnational level (Block 2002c). In a potentially ground-breaking development, the state of California recently invited residents of neighboring Baja California Norte (BCN) to participate in an EIA for a new electricity generating facility (Wirth 2002, 10). It is currently unclear whether, and to

what extent, the federal government of Mexico will allow BCN to work with California as proposed (Wirth 2002, 10). Recently the six Mexican and four U.S. border states of the Ten States Association agreed to notify each other of projects with potential adverse transboundary effects (Wirth 2002, 9). It should be noted that this "is a simple notification protocol, rather than a full EIA review." (Wirth 2002, 9-10) Again, the extent to which the Mexican federal government will embrace this effort is unclear (Niemeyer 2002).

The CEC could play an effective role in advancing TEIA at the state and provincial level. That role might best include training and capacity-building workshops (especially for those states and provinces that currently lack EIA requirements within their own laws); development of tri-lingual notification protocols; and on-line notification databases (Block 2002c). The CEC has earmarked $20,000 for TEIA in the organization's 2002 budget (CEC 2001k), an amount considered insufficient to provide meaningful assistance to the subnational governments (Block 2002b). The organization's staffing restrictions have also hindered progress: with TEIA lumped into the CEC program budget along with other "specific obligations," nobody at the Secretariat has been assigned to take the considerable initiative required to advance the matter (Block 2002b).

While the current situation does not seem promising for TEIA and Article 10(7), Wirth (2002) notes that the federal governments have recently come under new pressure from several quarters—including the CEC advisory bodies—to complete an agreement. Such pressure is likely to intensify as the result of an anticipated major increase in

electricity demand and generation along the borders, which may create an environmental crisis that will highlight the need for transboundary cooperation (Wirth 2002). Former CEC director Greg Block agrees, noting that the siting of energy facilities on the borders may be the catalyst to generate the political will necessary to accomplish a TEIA agreement (Block 2002b).

Capacity-building in Mexico

Not surprisingly, some CEC capacity-building efforts are targeted specifically toward Mexico, the lone developing country in the NAFTA partnership. Richardson (1998, 10) notes that the CEC is undertaking "important capacity-building initiatives...in Mexico including cooperation on strengthening the environmental management capacity in the State of Guanajuato and developing a Natural Protected Areas System." In addition, the CEC Council recently decided to undertake a pilot project on electronic tracking of hazardous waste between Mexico and the U.S., with particular attention to capacity-building in Mexico (CEC 2002b; CEC 2001a, 105). However, it is too soon to tell whether any of the latter effort will be targeted specifically to Mexico's state governments (Shantora 2002).

In summary, the capacity-building aspects of the CEC—at least with respect to the subnational governments—once again present a picture of great potential that is largely unfulfilled. An enormous amount of environmental information has been generated, some of which would appear to be useful to state and provincial governments; however, with the exception of recent reports on energy, to date this data has been more or less ignored by subnational officials. At the same time, most of the transboundary

efforts in which the CEC could lend a helping hand to the states and provinces are lacking in CEC involvement. Only in the provision of training seminars and workshops has the capacity-building potential of the CEC been accessed by the subnationals to any noticeable degree.

Acting as Catalyst

In some instances, the CEC may serve as a catalyst to subnational governments to address difficult environmental problems. This section looks at one case in which the CEC directly performed this function, as well as a case where the organization's role as a catalyst has been indirect.

Silva Reservoir[19]

Between November and December 1994, residents of the area around the Mexican municipality of San Francisco del Rincon in the state of Guanajuato began reporting large numbers of bird carcasses at nearby Silva Reservoir. In a massive die-off that attracted wide media attention, between 20,000 and 40,000 waterbirds died. In response, in June 1995 three environmental NGOs asked the CEC to prepare an Article 13 report examining the causes and circumstances of the die-off.

The CEC organized a group of nine experts—three from each NAFTA party—to identify the probable causes of the incident and to propose alternatives to keep it from being repeated. In October 1995, the group presented a report to the Council that included a diagnosis and a series of recommendations. They concluded that the die-off

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[19] The information for this section on Silva Reservoir comes from the Commission for Environmental Cooperation, *Silva Reservoir: An Example of Regional Cooperation in North America*, 1999.

was due primarily to an outbreak of avian botulism, which is a naturally occurring periodic phenomenon. However, the experts had found the presence of pollution that might have exacerbated the effects of the outbreak.

In response to the report, the CEC undertook several initiatives in partnership with Guanajuato state authorities. A Council for Public Participation was created to enhance transparency and public involvement in state environmental procedures. In addition, the CEC worked closely with state officials to further study the environmental conditions of the area, and provided environmental training courses to the public as well as to governmental, industrial and business personnel. The CEC provided assistance to the state in developing a five-year State Environmental Program and in creating a System of Protected Natural Areas, including a protected natural area at Silva Reservoir.

In conjunction with establishment of the Silva Reservoir Protected Natural Area, the state of Guanajuato established the Silva Reservoir Management Program. Based on studies carried out with the help of the CEC, the management program established guidelines for maintaining the Silva Reservoir ecosystem, reutilizing water used in agriculture, and recharging the local aquifer. As part of the management program, an early report had examined sediment contamination in the reservoir and called for dredging of the most contaminated areas. The report had recommended confining the dredged sediments around the periphery of the reservoir, but at this point state officials took the initiative based on local conditions and needs:

> (T)he environmental authorities of Guanajuato decided to place (the dredged sediments) all on the inside of the existing retaining wall in huge stone-and-concrete containers. This allowed the most contaminated sediments to be placed on the bottom and effectively capped with uncontaminated soil and, on the top, with vegetation.

> This procedure allowed the remediation work to be done at less cost, while still achieving the desired environmental objective. It also favored the development of ecotourism, which, it is hoped, will add value to the environmental objective and help defray the cost of the project. (CEC 1999f, 4)

The sediment containers "function to reinforce the original retaining wall of the reservoir, which was seriously deteriorated." (CEC 1999f, 4) Five local villages formed an NGO in charge of administering the Protected Natural Area at Silva.

The CEC does not hesitate to boast about its role as a catalyst in the Silva Reservoir project, noting that it

> demonstrates what can be achieved by strengthening local management capacity and making use of local resources and organizations. The work undertaken in the wake of this waterfowl die-off shows that, through international cooperation, public participation, the commitment of business, and the vision of local government and the CEC joining forces, it is possible to transform an environmental problem into an opportunity for local community development. (CEC 1999f, 4)

San Pedro River

The San Pedro River flows north from its source near Cananea in the Mexican state of Sonora into southeastern Arizona (Arias 2000, 199-200; Varady, Moote and Merideth 2000, 223-224; Liverman et. al. 1999, 616). The Upper San Pedro River Basin encompasses approximately 1,875 square miles; the binational population of the basin is about 114,000 (Browning-Aiken et al. 2002, 389). On the Mexican side of the border, the basin's residents are concentrated in the municipalities of Cananea and Naco; about 10 ejidos are also located in the region (Browning-Aiken et al. 2002, 389). On the U.S. side, the city of Sierra Vista is the largest population center, with 40,000 residents (Browning-Aiken et al. 2002, 389). The land in the region has historically been devoted to agriculture, cattle grazing, mining, and recreation; however, these are being supplanted

by increasing urbanization, particularly in the Sierra Vista area (Varady and Browning-Aiken 2001, 2).

The San Pedro watershed is a critically important ecosystem for the southwest, noted for its outstanding native biodiversity (Arias 2000, 207). Supporting riparian forests larger than the forests of the Colorado, Rio Grande, Gila and Pecos rivers combined—including one of the largest surviving expanses of southwestern cottonwood-willow forest—the San Pedro provides one of the most important migratory bird habitats in North America (Southwest Center for Biological Diversity 2002; CEC 1999g, 1-2). Between one million and four million songbirds annually use the San Pedro riparian habitat as they migrate between their wintering grounds in Mexico and Central America and their breeding grounds in the U.S. and Canada; indeed, "roughly half of the birds that breed in this arid region are dependent upon it." (CEC 1999g, 2) In addition, the ecosystem "harbors several endangered species of reptiles, amphibians, and plants." (Liverman et. al. 1999, 616) In order to maintain the ecosystem in a healthy state, it is necessary to maintain perennial flow in some reaches of the upper San Pedro (CEC 1999g, 4).

The river is fed by an aquifer that, through most of the twentieth century, has experienced increasing pressures from groundwater pumping. On the U.S. side of the border, the principal water users are evapotransporation of the riparian vegetation; the city of Sierra Vista, Arizona and its primary employer, the nearby U.S. Army base at Fort Huachuca; domestic wells in unincorporated Cochise County, Arizona; and irrigated agriculture (Arias 2000, 211; CEC 1999g, 4; Liverman et al. 1999, 616). In Mexico, the

primary users are municipal and domestic consumption; irrigated agriculture; and the Cananea copper mine (Varady and Browning-Aiken 2001, 2-3; Browning-Aiken et al. 2002, 390). Increasing copper production accompanied by periodic expansion and modernization of the mine over the last 20 years has increased water extraction by approximately 50 percent in the Mexican portion of the basin (Browning-Aiken et al. 2002, 390).

Extensive research by a number of hydrologic teams indicates that groundwater consumption has significantly reduced the water table, diminishing baseflow in the San Pedro to the extent that only a few perennial reaches remain (Varady, Moote and Merideth 2000, 224; CEC 1999c, 4-5; Liverman et al. 1999, 616; Arias 2000, 209). Records kept by gauges on the river show that the flow has been steadily decreasing since 1935 (CEC 1999g, 4). As of 1999, the groundwater deficit in the aquifer was approximately 7,000 acre-feet per year (CEC 1999g, 4-5). Even without future population growth, this deficit is considered unsustainable, with dire consequences for the San Pedro and its riparian habitat projected not far into the future (CEC 1999g, 5; Southwest Center for Biological Diversity 2002). As Arias (2000, 210) explains:

> If the baseflow coming from the aquifer is reduced, the phreatophytes will be affected and with it the migratory bird corridor, which would be a continental disaster. Such a reduction would not only endanger the environment but also the economy of Sierra Vista and the neighboring communities, since bird watching there is a three million dollar per year business.

In recognition of the value of the San Pedro and the pressures threatening it, in 1988 the U.S. Congress created the 7,280-acre San Pedro National Riparian Conservation Area (SPNRCA) (Arias 2000, 207; Southwest Center for Biological Diversity 2002;

Browning-Aiken, Varady and Moreno 2002, 7). Within the Conservation Area's boundaries, livestock grazing, mining, water diversion and off-road vehicles are prohibited (Southwest Center for Biological Diversity 2002). At the same time, the Bureau of Land Management and the Nature Conservancy bought then-existing irrigation water rights, and retired irrigation on what had historically been agricultural land (Varady, Moote and Merideth 2000, 231; CEC 1999g, 5). However, agricultural pumping has since renewed in the area, with significant impacts on the aquifer (CEC 1999g, 5). On the Mexican side of the border, in 1992 a similar reserve was proposed for the southern portion of the San Pedro basin (Arias 2000, 208; Varady and Browning-Aiken 2001, 6). However, local opposition led by rural landowners and mining interests have prevented this proposal from being carried out (Browning-Aiken, Varady and Moreno 2002, 13-14; Browning-Aiken et al. 2002, 392; Browning-Aiken 2002).

While the two sides of the border share the San Pedro watershed and its problems, there are important differences between them that complicate the situation. On the U.S. side, substantial consensus exists among scientists as to the hydrology of the basin, the physical nature of the problem, and ways to solve it (CEC 1999g, 1, 73). The geohydrology of the Mexican portion of the basin, however, has not been extensively studied and the relationship between groundwater consumption and surface water flows is not well understood (Browning-Aiken 2002; Varady and Browning-Aiken 2001, 5, 7). In addition, the residents of the two sides of the border have different interests and concerns: while Mexican residents—facing water-supply and water-quality problems—are primarily concerned with an assured supply of potable water, residents on

the U.S. side are mainly concerned about the water deficit and its impacts on the health and viability of the San Pedro riparian habitat (Browning-Aiken, Varady and Moreno 2002, 17; Varady and Browning-Aiken 2001, 7-8). Finally, the situation is complicated by mutual suspicion: Mexican residents commonly perceive the town of Sierra Vista demanding conservation in Mexico to promote their own urban development, while U.S. residents are worried that water use in Mexico will dry up the SPNRCA and contaminate the surface water flowing into the U.S. (Browning-Aiken et al. 2002, 390; Varady and Browning-Aiken 2001, 8). The latter concern is aggravated by the fact that, unlike the Colorado and Rio Grande Rivers, the San Pedro originates in Mexico and U.S. residents have historical reasons for anxiety over the quality and quantity of water flowing north (Browning-Aiken, Varady and Moreno 2002, 17; Browning-Aiken 2002).

Political obstacles have historically stood in the way of solutions on both sides of the border. In Mexico, as Browning-Aiken et al. (2002, 393) point out, "environmental policy frequently runs counter to Mexican economic policy in the critical importance attached to development, especially in mineral resources and *maquiladoras* along the northern border." With mining an engine of economic development, the mining interests in Cananea frequently hold sway over policy on the San Pedro (Browning-Aiken 2002).

In the U.S., access to the aquifer that feeds the San Pedro is virtually unregulated by either water or land-use controls in the area (CEC 1999g, 99). Exacerbating the problem is the nature of Arizona water law: "Whereas the water allocation laws of most western states have evolved to recognize the hydrologic connection between ground and surface waters, Arizona continues to draw an artificial legal distinction between them."

(CEC 1999g, 99) In Arizona, surface water rights are governed by the prior appropriation doctrine; groundwater rights are governed by the "reasonable use" doctrine that allows a landowner to consume unlimited quantities of groundwater as long as it is used on the overlying land (CEC 1999g, 99, 102).

In addition, solutions in the U.S. have been stymied by political and economic conflicts to the point of polarization (CEC 1999g, 1, 73; Liverman et al. 1999, 616-617; Varady, Moote and Merideth 2000, 225). Those interested in preserving the San Pedro include environmentalists, conservationists, recreationists and birders, for whom the river has become a cause celebre (Varady, Moote and Merideth 2000, 225, 230). These interests frequently and passionately denounce continued urban development in the area (Varady, Moote and Merideth 2000, 230). In recent years local preservation efforts have been supported and joined by national and international environmental NGOs that have placed the San Pedro on their top-priority lists for action (Varady, Moote and Merideth 2000, 231). At the same time, the issue of growth management is highly controversial in Arizona (CEC 1999g, 69), and there is serious opposition to limiting economic growth in the Sierra Vista area for the sake of the riparian forests (Arias 2000, 212). Staunchly opposing those who want to preserve the San Pedro are

> long-time rural landowners and developers who see their water and development rights menaced by proposed zoning restrictions. On the U.S. side of the border, the Wise Use Movement and property-rights advocates are strong in Cochise County, and the Sierra Vista area supports an active local chapter of People for the U.S.A.!, which argues vehemently that outside (national or international) public-sector involvement in local land and water issues is "un-American" interference in local matters....Many have not forgotten nor forgiven the creation of the San Pedro National Riparian Conservation Area and the Bureau of Land Management's decision to retire irrigation and grazing...(Varady, Moote and Merideth 2000, 230-231)

In 1996 the Southwest Center for Biological Diversity, an environmental NGO based in Tucson, Arizona, filed an Article 14 submission with the CEC. The submission alleged that the U.S. EPA was failing to enforce the National Environmental Protection Act (NEPA) by not requiring the Army base at Fort Huachuca to file an Environmental Impact Assessment related to a proposed expansion (Varady, Moote and Merideth 2000, 225-228). The petition claimed that "the fort was harming the river and the adjacent national riparian conservation area by causing growth in civilian communities within the basin and increasing groundwater extraction that would further diminish flow in the stream." (Varady, Moote and Merideth 2000, 228)

The CEC Secretariat determined that the submission merited a response from the U.S.; such a response was requested and received from the EPA (Varady, Moote and Merideth 2000, 228). However, in May 1997 the Secretariat announced that it would produce a study of the San Pedro under Article 13, and the Southwest Center for Biological Diversity withdrew its Article 14 submission (Varady, Moote and Merideth 2000, 228).

The CEC stated that the Article 13 report would look broadly at the San Pedro and its associated riparian habitat as an important migratory bird corridor (Varady, Moote and Merideth 2000, 228). One purpose of the study was to provide an example of the problems of transboundary watersheds and how to protect them (Varady, Moote and Merideth 2000, 228). However, as stated in the final report, its primary objective was clearly to break the local deadlock and thus clear the way for local solutions:

> Our purpose is to improve the quality and expand the bounds of the discussion among the stakeholders about possible courses of action to sustain and enhance the riparian

> habitat of the upper San Pedro basin on both sides of the border. The ultimate policy decisions lie not with us, but with the San Pedro basin communities and their local, state and national governments. (CEC 1999g, 10)

The study had three phases. First, a binational team of six experts conducted a study and prepared a report characterizing the physical and biological conditions required to save the bird habitat on the river (Varady, Moote and Merideth 2000, 229). Second, in response to local demands for input, the CEC held a 60-day public comment period on the study (Varady, Moote and Merideth 2000, 29). Third, an advisory panel reviewed the report and public comment, and developed policy recommendations (Varady, Moote and Merideth 2000, 29). This resulted in a final report that was presented to the CEC Council in March 1999 (CEC 1999g).

After examining a number of options for preserving and restoring the San Pedro and its ecosystem, the experts who authored the report concluded that "the most hydrologically effective and institutionally practical conservation initiatives include the aggressive pursuit of water conservation and recycle/recharge programs and the reduction of current agricultural extractions from the aquifer." (CEC 1999g, 6) The study team argued vigorously for eliminating or sharply reducing agricultural irrigation on both sides of the border (CEC 1999g, 6-7), a proposal with serious social implications that was criticized by U.S. and Mexican farmers (Arias 2000, 214). In terms of conservation measures to address non-agricultural uses of water, the study team suggested a range of actions to include:

> rezoning to control the location of growth and/or to provide for a maximum density of population, purchase of conservation easements, setting a moratorium on building or drilling new wells, limiting or setting a moratorium on new water connections,

> implementing a maximum aquifer withdrawal level per year, establishing a water market for efficient allocation, etc. (CEC 1999g, 9)

In addition, the CEC team recommended reconsidering the proposal to create a Mexican reserve to protect the San Pedro riparian habitat (Arias 2000, 214-215).

Looking beyond the merely physical aspects of the problem, the report stated that all of the suggestions it contained would require local support (CEC 1999g, 69). Noting the many entities with interests in the San Pedro, the report commented:

> At present, there exists no process or structure to integrate and produce coordinated plans of action for these entities. This lack of a coordinating structure has inhibited the development of a common view of the nature and dimensions of the hydrologic problem....While the expert team hopes this report will advance that objective, ultimately the action agencies and the stakeholders themselves will need to concur on the problem, the solutions, and how the cost of the solutions can be spread and absorbed equally. (CEC 1999g, 73)

Accordingly, the expert team strongly advocated "the creation of a structure and process for constructive engagement of all interests in the basin" as "the first and indispensable step" in solving the problems of the San Pedro (CEC 1999g, 73). It suggested a binational Coordinated Resource Management Program to minimize conflicts, bridge gaps among government agencies, private landowners and resource users, and develop a water management plan for the basin (Varady and Browning-Aiken 2001, 3-4; Arias 2000, 214).

Even while the Article 13 study was still underway, local and state officials on the U.S. side of the border objected to what they saw as interference by the CEC. The Cochise County Board of Supervisors adopted a resolution calling on the Governor and Arizona's Congressional delegation to fight the study (Varady, Moote and Merideth 2000, 228). The Governor called the CEC's action an "environmental drive-by shooting"

and sent a letter to the CEC Council, asking its members to withdraw the study (Varady, Moote and Merideth 2000, 228). A member of the Sierra Vista City Council called the CEC "an arrogant group of internationalists coming here telling us what to do." (Varady, Moote and Merideth 2000, 228-229)

On the surface, it would appear that such opposition has prevented the Article 13 report from making any tangible difference to date, and that the situation in the San Pedro watershed remains much the same as it was when the Southwest Center for Biological Diversity first filed its submission. Most of the recommendations in the CEC report have yet to be adopted by government officials on either side of the border. However, the CEC has arguably served as a catalyst in building up the civil society aspect of environmental capacity as conceptualized by Janicke (2002). Indeed, the voices of NGOs have become dominant in discussions of watershed management on the San Pedro (Varady and Browning-Aiken 2001, 9).

In the U.S., the dominant group is the Upper San Pedro Partnership, "formed in 1998 to meet water needs in the Sierra Vista subbasin and to sustain the viability of the protected riparian area." (Varady and Browning-Aiken 2001, 3). The Partnership includes a variety of stakeholders including state agency heads, municipal elected leaders, and representatives of NGOs (Browning-Aiken et al. 2002, 392). It should be noted that the Partnership's formation was not a response to the CEC report; the Arizona Department of Water Resources provided initial funding and played a strong role in its formation as part of its existing Rural Watershed Initiative (Sundie 2002). However, the group has developed a $34 million Conservation Plan to eliminate deficit water use in the

Sierra Vista sub-basin (Browning-Aiken et al. 2002, 392), which incorporates most of the non-agricultural water conservation measures recommended by the CEC (Browning-Aiken 2002).

In Mexico, the dominant group is ARASA, the Asociacion Regional Ambiental de Sonora y Arizona (Sonora-Arizona Regional Environmental Association), formed in Cananea in 2001 to address regional environmental issues (Varady and Browning-Aiken 2001, 6; Browning-Aiken et al. 2002, 391). Unlike the Partnership, which is dominated by government officials, ARASA is a grassroots effort (Browning-Aiken, Varady and Moreno 2002, 14). The group is currently gathering scientific knowledge of the geohydrologic conditions in the San Pedro basin, compiling research from both sides of the border (Browning-Aiken et al. 2002, 392-393).

Alone, each of these developments in civil society may be insufficient to solve the problems of the San Pedro. However, the CEC report has stimulated binational coordination; and this is where the true value of its involvement as a catalyst may be found. The Udall Center at the University of Arizona was a participant in the CEC's San Pedro initiative, providing for public input into the final report and conducting binational hearings where discussion centered on the solutions proposed by the CEC team (Varady and Browning-Aiken 2001, 3; Arias 2000, 212). As an extension of this involvement, the Udall Center is now facilitating transboundary efforts between ARASA and the Partnership (Varady and Browning-Aiken 2001, 7; Browning-Aiken 2002). Several observers have noted that such binational coordination is the best chance for the problems of the San Pedro to be resolved (Arias 2000, 216; Browning-Aiken et al. 2002,

393). By drawing increased attention to water issues in the San Pedro region, the CEC stimulated discussions and interactions among local groups on both sides of the border, and the "rise and vigor of these dialogues offers some room for optimism that a binational yet local, basin-wide strategy could emerge to help overcome the present deadlock." (Varady, Moote and Merideth 2000, 234-235).

On the other hand, the case of the San Pedro reveals the limits of the CEC's abilities to act as a catalyst. In essence, this case demonstrates the importance of local—as opposed to outside—initiatives to solve local watershed problems. When the CEC came into the area and conducted its report, state and local officials put up a wall of resistance to such "interference." Only with the development of home-grown solutions through civil society is progress being made, and the CEC involvement in this development is indirect.

Conclusion

What, then, can we conclude about the opportunities provided to the subnational governments by the CEC and its activities? Following regime theory, we may expect that such opportunities would be found through the provision of forums where the states and provinces may communicate with one another, exchange information, form coalitions, and influence policy agendas to their own best interests; and through capacity building by providing information and technical assistance. The CEC may also provide opportunities by serving as a catalyst to address difficult environmental problems. We will address each of these in turn.

In terms of providing a forum, the most obvious place to look is the Governmental Advisory Committees established by Article 18 of the NAAEC. However, we do not find this aspect of the regime providing a forum in the sense anticipated by regime theory. Mexico has yet to form such a committee, and both the U.S. GAC and the Canadian Governmental Committee are limited in scope to matters relating directly to the NAAEC itself. Representatives to both committees have admitted that such issues are not high priorities for the states and provinces (Ferguson-Southard 2002; Acheson and Hanak 2002). For those matters that are considered important by these entities, other forums exist, such as the CCME for Canadian provinces, and NCSL and the Environmental Council of the States for the U.S. states.

Differences in federalism are evident with respect to the Article 18 committees. While the U.S. GAC is only advisory, the Canadian Governmental Committee is constituted at a high level of political authority and manages all issues related to the NAAEC in the collegial manner characteristic of executive federalism. As for Mexico, as noted above, no such committee has been formed, and there does not appear to be any movement toward developing one. This is both expected and ironic. To the extent that Mexican federalism has historically been centralized, with the subnational governments wielding minimal authority and playing a relatively limited role in governance, it is not surprising that an Article 18 committee would fail to materialize in Mexico. On the other hand, the states of Mexico do not have the equivalent of the long-standing forums, mentioned above, that are available to the U.S. states and Canadian provinces to make their voices heard. In the sense that the Mexican states may have the most to gain from

an Article 18 committee in filling this void to provide an effective forum, it is ironic that this is the country where no such committee has been formed.

Informal venues developed through the CEC's work program are likewise lacking in provision of a forum to the states and provinces. As we have seen, there are few of these and they are not widely accessed by subnational officials. As illustrated by the North American Working Group on Environmental Enforcement and Compliance (EWG), such venues are heavily weighted with federal officials. This is seen across the board: while Mexico, again, has the least subnational participation in the EWG with no state representatives, the U.S. fares only slightly better with one, and Canada with two. It bears repeating, however, that Canada's low level of provincial participation in CEC activities is related to the rather unique requirement of provincial accession to the NAAEC, which only three provinces have accepted to date.

Turning to capacity-building, again we find a situation of significant potential that is largely unfulfilled. While there has been some benefit to the states and provinces through training seminars and workshops provided, these activities are only a minor aspect of the organization's mission and work program. The greatest capacity-building potential of the CEC lies in its generation of information. The organization has in fact been quite prolific in producing large volumes of potentially useful data, but to date this information, with few exceptions, has not been accessed by the states and provinces. This appears to be due to a combination of inability to promote and distribute the materials on the part of the CEC, and a perception on the part of the subnational governments that such information is irrelevant to their own specific environmental

agendas. Once again, the states of Mexico, lacking the capacity to generate information that the subnational governments of the U.S. and Canada possess, probably have the most to gain from this aspect of the CEC's mission.

As for capacity-building through participation in transboundary efforts involving states and provinces, the CEC is, with a few exceptions, absent from such initiatives. The organization could play an important role in assisting the states and provinces with transboundary environmental impact assessment: considering that TEIA is a requirement of the NAAEC, and stalemate at the federal level has shifted the action to the subnational governments, this would appear to be a significant opportunity for the CEC to work with the states and provinces. However, strict limitations in resources and political support have so far frustrated this endeavor. On the other hand, if some observers are correct, sheer necessity may soon change this situation as a boom in border electricity facilities leads to an environmental crisis demanding TEIA. It remains to be seen whether such progress will be made at the federal or subnational level.

It seems clear that the states of Mexico stand to benefit most from the capacity-building aspects of the NAFTA/NAAEC environmental regime. This may be most clearly seen in the examples of the CEC working as a catalyst to resolve difficult environmental problems. In the case of Silva Reservoir, the organization partnered with Guanajuato state authorities to study the causes of the die-off and come up with concrete long-term solutions. The case of the San Pedro is somewhat different in that capacity-building by the CEC has occurred through the strengthening of civil society—as exemplified by the formation of ARASA—rather than through direct impacts on

governments. Such initiatives in civil society are historically lacking in Mexico; their development may prove to have significant impacts in solving environmental problems at the state and local level. In addition, the San Pedro case may yet serve as an example of the power of binational coordination between groups such as ARASA and the Upper San Pedro Partnership. To the extent that the CEC served as a catalyst in such coordination, it can be said to have played an important role in stimulating progress on the San Pedro.

In sum, the CEC provides an illustration of the difficulty of building new regimes, particularly in the midst of a dense thicket of jurisdictions. What we find here may be not so much a failure to fulfill potential as a conscious effort by the CEC to avoid duplication and find its own niche. Early on, the organization determined not to replicate the functions and activities of existing domestic and binational agencies (Mumme and Duncan 1997, 53). With other organizations such as the CCME and NCSL on the domestic front, and the IJC and IBWC to deal with transboundary issues, perhaps the CEC is not the proper venue to look for intense involvement with the states and provinces.

However, the potential exists for this situation to change. The CEC is a very young organization, with a unique trinational mandate. As such, perhaps it is not surprising that it still is seeking its niche or that the subnational governments have not yet embraced what it has to offer. As the North American experience with trade integration deepens, with increasing impacts on the states and provinces and participation by them, the CEC's relevance may become more apparent to these governments; the case of the Great Lakes may turn out to be the first significant example of this. While the

NAFTA/NAAEC environmental regime cannot, at this time, be said to provide significant opportunities to the subnational governments in the sense anticipated by regime theory, the CEC's continuing effort to fill gaps and add value to existing institutions is likely to be the best strategy to establish its relevance in the diverse context of North American federalism.

CHAPTER SEVEN

Introduction

This dissertation has compared the impacts of new international trade and environmental rules on subnational governments within federal systems, focusing on the NAFTA/NAAEC environmental regime. This concluding chapter summarizes the findings resulting from this research, and offers some insights into what this study may imply for federalism in the current state of international affairs.

Such considerations are important to keep in mind as the world changes, creating new contexts for old political arrangements such as federalism. Within a new and evolving international context that includes trade liberalization, interdependence, and a growing number of international environmental regimes, subnational governments within federations are being increasingly impacted by foreign affairs. Moreover, considering that systems vary widely in federal arrangements, such impacts are likely to manifest themselves differently from federation to federation, with varying consequences. If an understanding of federalism is still important within the scholarly field of comparative politics, we need to begin to understand how federalism interacts with this new international context.

These issues are also relevant for practitioners of federalism. As discussed in Chapter One, subnational officials have expressed concern over the constraints that may

be presented by international trade and environmental rules such as GATT and the NAFTA/NAAEC regime. This dissertation represents an initial systematic attempt to address their concerns and answer some of the questions they raise. In addition, it identifies some of the new institutional opportunities becoming available as the new face of international relations takes shape.

The NAFTA/NAAEC regime provides the best opportunity to examine these issues. The regime embodies the changing international landscape in its unprecedented attempts to deal with emerging conflicts between liberalized trade and environmental issues, and in its creation of an international environmental organization. In addition, all three NAFTA parties are federations, with wide variations in federal arrangements, levels of centralization, environmental jurisdiction, capacities and processes. This agreement, then, allows us to look at how new developments in international relations can impact subnational governments, and how such impacts may be altered by variations in federalism.

Given this focus on the NAFTA/NAAEC regime, the research question driving this dissertation has been: How does the regime impact subnational environmental roles and responsibilities within the three NAFTA countries? Specifically, what constraints and opportunities have been presented by the regime to the states and provinces, and how have these varied according to federal arrangements?

Constraints are found in the trade disciplines within the main NAFTA text, under which subnational environmental measures are subject to challenge as barriers to free trade. Of these, the investment rules under Chapter 11 have thus far given rise to the most

activity challenging subnational laws. Another potentially significant constraint is found in the citizen submissions process established by Articles 14 and 15 of the NAAEC, which endeavors to shame governments into effective enforcement of their environmental laws. Accordingly, our discussion of constraints focused on these two aspects of the NAFTA/NAAEC regime.

Opportunities presented by the regime are anticipated by regime theory. They include the potential to provide a forum to the states and provinces to exchange information, form alliances, make their voices heard and pursue environmental policy goals. Regime theory also anticipates the potential for capacity-building opportunities provided by institutions. The Commission for Environmental Cooperation (CEC), which forms the institutional heart of the NAFTA/NAAEC regime, was the focus of the dissertation's look at opportunities presented to the states and provinces. In addition, the discussion of opportunities focused on the CEC's role as a catalyst to subnational governments to address difficult environmental problems.

Expectations and Findings

An examination of federalism in the U.S., Canada and Mexico, presented in Chapter Two, led to an expectation of substantial variation in the manner in which the subnational governments of these three countries are impacted by the regime. This expectation was based on significant variations in federal arrangements among the three countries. Canada is decentralized in the extreme, with the provinces enjoying a great deal of authority and autonomy. Much Canadian policy is made through federal-provincial consultation characteristic of executive federalism; within this context, federal-provincial

relations are in constant flux, based on pragmatic accommodation and compromise. This contrasts highly with Mexico, which–despite recent profound political changes and efforts at decentralization–still lies at the centralized end of the federation spectrum. The United States can be categorized somewhere between these two countries in terms of centralization, with the states enjoying relatively high degrees of power and autonomy, as well as substantial political clout at the federal level through the intergovernmental lobby. Federalism in the U.S. is highly dynamic, subject to ongoing interpretation and change through cooperative intergovernmental processes and judicial review.

A look at environmental policy jurisdiction within each country revealed additional variations. In the U.S., where authority over the environment is concurrent, we find a great deal of overlapping jurisdiction. The federal government is historically dominant in setting standards and passing environmental legislation, but the states have been fundamentally involved in implementation of federal laws. In addition, the states have taken substantial initiative in passing their own environmental measures as part of their mandate to protect public health and welfare. In Canada, while both levels of government have some environmental responsibilities, most of the authority lies with the provinces. Here again we find jurisdictional overlap; in Canada, this has apparently caused some problems of duplication and gaps in environmental protection. True to the model of executive federalism, a great deal of environmental policy is made and managed through federal-provincial agreements and the Canadian Council of Ministers of the Environment. In Mexico, environmental policy is traditionally centralized. This is changing under *concurrencia* and the Federal Ecology Law, which has specifically delegated some areas

of environmental responsibility to the state and local governments. Despite these and other decentralizing efforts, environmental regulation remains under predominantly federal control as a result of jurisdictional ambiguities, limits to state and local administrative capacities and delays in subnational implementation of environmental policies.

Finally, there are variations in terms of subnational involvement in international relations. In the United States, despite a clear constitutional assignment of authority in foreign affairs to the federal government, the states play a significant role. Through the intergovernmental lobby, they can have substantial influence on federal foreign policy decisions. In addition, some states have become directly involved in international relations, primarily through export promotion and transboundary activities. As interdependence continues to blur the lines between domestic and foreign policy, with the latter encroaching on policy areas traditionally under state jurisdiction, the states have increasingly impacted foreign affairs in the normal course of conducting state business and enacting measures for public health and welfare–measures which can legally be preempted by the federal government, but at an unacceptable political cost.

In Canada, the provinces are in a relatively strong position with respect to international relations. The Canadian constitution is vague on where authority over foreign affairs lies, and judicial interpretations of the treaty implementing power have mandated that the federal government cannot unilaterally bind the provinces to international treaties that involve matters under provincial jurisdiction. This leaves Canada in an increasingly difficult position under international law, which holds federal

governments accountable for the actions of their subnational units regardless of internal constitutional restrictions. Even more than the U.S. states, Canadian provinces have become directly involved in international relations through export promotion and transboundary initiatives. In addition, the provinces have a voice in foreign policy decisions at the federal level through federal-provincial conferences.

The situation in Mexico is reflective of the historic centralization of Mexican federalism. Lacking the constitutional advantages of the Canadian provinces, and the political clout of the provinces and the U.S. states, the states of Mexico do not have a noticeable impact on foreign policy. Limitations in financial and administrative capacities have prevented them from engaging in the export promotion activities of their northern counterparts. The only exception to this pattern is a relatively high degree of transboundary activity among the northern Mexican states.

Based on these observations, I expected to find the states and provinces of the U.S. and Canada significantly less constrained by the NAFTA/NAAEC environmental regime than the Mexican states. In particular, I anticipated that the U.S. states would use intergovernmental processes and their substantial political clout to overcome the constraints presented by the regime. In addition, I expected to find the Canadian provinces relying on mechanisms of executive federalism, as well as their constitutional authority in environmental policy and foreign affairs, to overcome these constraints. I predicted that the Mexican states, lacking all of these advantages and in a much weaker position than their northern counterparts, would have no choice but to accept the constraints of the regime. As for the opportunities presented by the regime, I expected to

find the Mexican states benefitting most. Considering their historical lack of a forum, and their great need for assistance with capacity-building, the Mexican states clearly have the most to gain from the enabling aspects of the regime.

With a few exceptions, these expectations were not met by my findings. As will be discussed below, they turned out to be based on assumptions that, for the most part, do not apply to the context of the NAFTA/NAAEC regime. I will look in turn at my findings with respect to Chapter Eleven of NAFTA, the Article 14/15 submissions process, and the potentially enabling aspects of the CEC, and discuss how these findings lined up with my expectations.

Constraints: Chapter Eleven findings

As mentioned above, Chapter Eleven carries significant potential to constrain subnational governments by allowing private investors to challenge their environmental laws and regulations, with the ultimate threat of severe financial sanctions. I looked at three cases in which subnational environmental policies have been challenged under Chapter Eleven: the Metalclad case, in which a U.S.-based company challenged the actions of a Mexican state and municipality; the Methanex case, in which a Canadian corporation is disputing a California ban on MTBE; and the case of Sun Belt Water, involving a U.S. corporation's challenge to a provincial ban on bulk water exports.

The most striking finding of my look at Chapter Eleven is the universality of its impacts on the subnational governments involved. First, in all three cases the federal governments are assumed to be accountable for the actions of the subnational units. This is, as mentioned previously, consistent with international law and Article 105 of NAFTA;

but these cases bring home the reality that investors and tribunals will hold the federal governments accountable. Thus, it makes no difference where constitutional divisions of authority lie, what the traditional intergovernmental relationships have been, or how centralized or decentralized a federal system is: these considerations become irrelevant under Chapter Eleven. In all cases, federal governments–faced with the prospect of large financial penalties–are universally motivated to pressure their subnational governments into compliance.

Second, in Chapter Eleven disputes, governments are subject to an international tribunal's interpretation of constitutional divisions of authority. This was seen most notably in the Metalclad case, in which the Tribunal declared that the state and local governments had exceeded their constitutional authority. The British Columbia Supreme Court, which heard Mexico's appeal, pointedly refused to take the Tribunal to task for assuming its own competence to rule on domestic matters of environmental jurisdiction. The Sun Belt Water case, in which there is some uncertainty over the extent of provincial authority to ban the export of natural resources, may also invite such a ruling if it ever proceeds to arbitration. It is striking that the most decentralized federation in North America may well be as vulnerable to an international interpretation of constitutional law as the most centralized system. If this trend is allowed to continue, it would be a major development in federalism, altering long-standing traditions in which constitutional divisions of authority have been determined domestically through political processes, judicial review, and deliberate constitutional amendment.

Third, in all three cases, state and provincial officials have been shut out of proceedings in which the fate of their policies are being decided, leaving them dependent on federal officials for their own defense. It is notable that this is as true for California as for the other subnational governments: despite repeated and rather strongly worded requests by California legislators to be kept informed in the Methanex case, such information has not been forthcoming by the USTR. As discussed in Chapter Four, activism led by the California legislature with respect to the federal free trade agenda may be creating political pressure to have the Methanex case dismissed. If successful, this would be consistent with my expectation that U.S. states will use political clout to overcome the constraints of the regime. However, this has not happened yet. If it does, such an outcome would be the result of indirect, behind-the-scenes involvement by California officials. The point here is that, under the rules of arbitration, none of the subnational officials in any of these cases are allowed to be directly involved in the proceedings.

Fourth, in all three cases the subnational governments face potentially severe financial consequences. The states and provinces of the three NAFTA countries are all dependent, to varying degrees, on federal funds, and it would not be unreasonable to expect that payment of an arbitral award would be passed on, at least to some extent, to the state or province involved. It is unknown whether this happened in the case of the $16 million award paid in the Metalclad case, but the high fiscal dependence of Mexican state and local governments on the federal government certainly leaves them vulnerable in such circumstances. In case of an award in the Methanex case, the federal government has the

constitutional authority to compel California to either repeal the MTBE ban or pay the corporation; failing that, it can simply withhold federal funds. In the case of Sun Belt Water, there is some uncertainty as to the federal government's authority to compel payment by the province of British Columbia, with speculation that Canadian courts would be hesitant to allow such measures if they intrude too deeply on provincial authority. Again, however, the federal government can withhold funds to recoup its losses. In both the Methanex and Sun Belt cases, where the amount being demanded is around $1 billion and above, the financial consequences would be devastating to subnational budgets.

Finally with respect to Chapter Eleven, in all three cases these constraints add up to the potential for regulatory chill. Faced with federal pressure to comply with Chapter Eleven, the prospect of having their environmental authorities delineated by international tribunals, the inability to participate in their own defense of environmental measures in arbitration, and the threat of severe financial sanctions, subnational governments are likely to hesitate before enacting environmental policies. As mentioned in Chapter Four, this would be an especially significant consequence for the states and provinces of the U.S. and Canada, which have enjoyed substantial authority in the environmental policy realm and have developed impressive bodies of environmental protection measures.

Thus, with respect to Chapter Eleven, my expectations were not borne out. Expecting variation, I found commonality. Regardless of constitutional authority, political power, and relative levels of decentralization, these cases reveal the subnational governments of the U.S., Canada and Mexico to be more or less equally constrained by the provisions of Chapter Eleven.

Constraints: Article 14/15 findings

The potential constraint presented by the Article 14/15 submissions process is essentially one of accountability: to the extent that subnational governments are held accountable for effective environmental enforcement under Articles 14 and 15, this mechanism represents a constraint on those governments, applying pressure to take actions they might not otherwise take. The enforcing aspect of the process is found in publication of a factual record, which is intended to shame governments into improving their environmental enforcement practices. Thus far, out of 36 citizen submissions filed under Articles 14 and 15, ten have involved subnational governments. I examined these ten cases, which fell into two categories: those directly involving nonenforcement of subnational environmental laws, and those in which subnational governments were involved to some extent in nonenforcement of federal laws.

Of the five in the first category, all were terminated without authorization of a factual record. The Quebec Hog Farms submission was recommended for a factual record by the Secretariat, but the CEC Council rejected the recommendation because of intervening changes in Quebec's regulatory scheme. Thus, in these cases, the expected constraint in the form of shaming the governments involved through the publication of a factual record has not materialized to date. However, this has been the result of the particular circumstances surrounding each submission; we should not interpret these findings to mean that a factual record cannot happen with respect to subnational laws. Indeed, it is almost certainly just a matter of time before such a thing comes to pass.

These cases demonstrate that submissions targeting nonenforcement of state and provincial laws will be filed, and will be given due consideration by the Secretariat.

Meanwhile, the subnational governments involved have been obliged to defend themselves. In two out of the five cases, state and provincial officials have been required to prepare documentation justifying their procedures in response to the submissions. The obligation to defend their practices, in addition to utilizing staff time and other government resources, effectively makes subnational governments answerable to an international body. This can arguably be considered a constraint on subnational governments, compelling them to take actions in their own defense that they would not otherwise take.

Turning to the submissions in which subnational governments were involved in some way in nonenforcement of federal laws, it was striking to note that all five cases involved Canada. Considering the nature of environmental federalism in Canada–in which the provinces bear much of the responsibility for implementation of federal policy–I expected to find the submissions complaining of subnational nonenforcement, effectively holding the provinces accountable for enforcement failures. However, this was not what I found. In each case, the submissions complained of federal failures to enforce environmental laws–specifically, in each case, the federal Fisheries Act. Subnational involvement in these cases was found to lie in the fact that the federal government had abandoned enforcement by deferring to the provinces; and this federal act of abandonment was the subject of the complaints.

In its responses to the submissions, the Canadian federal government has, to varying degrees, addressed the issue of provincial responsibility by pointing the finger at

provincial enforcement practices. Factual records are being developed in three of the five cases, and a fourth is currently being considered by the Secretariat for a factual record recommendation. The factual records under development may yet address the question of subnational responsibility for enforcement of federal laws, potentially holding the provinces accountable for their practices. Indeed, in two cases the Secretariat has explicitly recommended focusing on this issue within the factual record; however, in both instances the Council has limited the scope of the factual records, making it questionable whether the matter of provincial responsibility will be addressed.

Once again, my findings with respect to the Article 14/15 submissions process do not bear out my expectations. First, it has not presented a significant constraint to the subnational governments thus far. Although, in some cases, state and provincial officials have been obliged to defend themselves in their responses, the shaming mechanism of the factual record has not yet been brought to bear. However, as discussed in Chapter Five, this may be a reflection of the fact that the NAFTA/NAAEC regime is relatively young, and the citizen submissions process is a novel innovation that has not yet been fully embraced or developed. As the regime matures, it is likely that we will see more submissions targeting subnational governments and holding them accountable for their enforcement practices.

Second, my expectations as to variation in how the states and provinces of the three NAFTA countries would be impacted by the submissions process turned out to be completely inaccurate. Contrary to my general expectation that the Mexican states would be more constrained by the regime, the states of Mexico are in fact less vulnerable to

submissions than the states and provinces of the U.S. and Canada. Out of ten submissions involving subnational governments, only one concerned Mexico–and even that one included subnational considerations almost incidentally among primarily federal issues, resulting in a situation in which the Mexican subnational was not even obliged to contribute to the response. By contrast, seven of the ten involved Canada, and two concerned the United States.

While this finding did not bear out my general expectations, it is not surprising on closer inspection. My expectations were based on broad assumptions having to do with general levels of decentralization, constitutional authority, and political power. A closer look at the details of federalism in the three countries with respect to environmental policy could have predicted that the Mexican states would actually be less constrained by the Article 14/15 process than the states and provinces of the U.S. and Canada. Obviously, if the Mexican states bear less responsibility for environmental policy than their northern counterparts, they will present less of a target for submissions on environmental enforcement. As for Canada, while executive federalism is–as predicted–evident through the Governmental Committee's handling of Article 14/15 submissions, this has obviously not made the Canadian provinces any less vulnerable to the constraints of the process. This finding highlights the need to look beyond old, generalized notions of power within federal arrangements, and focus on the conditions specific to particular policy areas.

Opportunities: CEC findings

As mentioned above, the opportunities to be found in the NAFTA/NAAEC regime include the CEC's potential to provide a forum, engage in capacity-building, and serve as

a catalyst in addressing difficult environmental problems at the subnational level. To determine whether the CEC provides a forum to the states and provinces, I looked at the committees authorized under Article 18 of the NAAEC, as well as informal venues offered in the course of the organization's activities. Discussion of the capacity-building aspects emphasized the wealth of information the CEC has generated; it also focused on technical assistance through training seminars and workshops, as well as the Commission's involvement in state and provincial transboundary programs. Examination of the CEC's role as a catalyst focused on the cases of Silva Reservoir in Mexico and the San Pedro River, an important wildlife habitat straddling the U.S.-Mexico border.

I found that the Article 18 committees do not provide a forum in the sense anticipated by regime theory. Both the U.S. and Canada have formed such committees, but they are limited in scope to matters relating to the NAAEC and the CEC. Other intergovernmental venues, such as the CCME for the Canadian provinces and the National Conference of State Legislatures (NCSL) and the Environmental Council of the States for the U.S. states, provide the forums where subnational officials exchange information, build coalitions, and discuss high-priority environmental issues. As for Mexico, no such committee has materialized.

Similarly, no forum is found in the informal venues developed through the CEC's work program. Few such venues exist, and they are heavily weighted with federal officials with minimal participation by subnational representatives.

With respect to capacity-building, we find a situation of unfulfilled potential. The CEC's greatest promise for capacity-building lies in the large amount of information it has

produced, much of which could be quite helpful to subnational governments in pursuing environmental policy goals. However, with a few exceptions, this great wealth of data has not been accessed by state and provincial officials. This is due to the Commission's lack of resources to promote and distribute the materials, combined with a perception on the part of subnational officials–at least in the U.S. and Canada–that such information is irrelevant to their specific environmental agendas.

As for other aspects of capacity-building, the CEC has been mostly absent from the transboundary initiatives of the states and provinces. The opportunity to become involved with transboundary environmental impact assessment (TEIA) initiatives, which have shifted to the subnational level, would appear to provide an ideal opening for the Commission to provide such assistance; however, limitations in organizational resources and political support have thus far prevented this. Only through the provision of training seminars and workshops has the CEC offered any noticeable capacity-building opportunities to the subnational governments; these, however, comprise only a small portion of the organization's activities.

The potential for the CEC to serve as a catalyst to state and provincial governments in addressing difficult environmental problems is clearly illustrated by the organization's involvement in the Silva Reservoir case. Acting within its reporting mandate under Article 13 of the NAAEC, the CEC generated valuable information on the causes of the bird die-off and played an instrumental role in helping state and local officials in Mexico to deal with pollution at the reservoir. In the case of the San Pedro, where the Commission faced local opposition to "outside" interference, its role as a catalyst was

more indirect. The actions of the CEC helped to spur developments in Mexican civil society, as seen in the creation of the grassroots ARASA group, which may lead to state and/or local action in Mexico to address overpumping of the San Pedro's underlying aquifer. Furthermore, the Commission's involvement has resulted in local efforts at binational coordination, which is widely regarded as the best hope to solve the problem of the San Pedro.

Turning back to my expectations with respect to variation in opportunities provided by the regime, my findings are mixed. I expected that, among all the subnational governments of North America, the states of Mexico would benefit most from such opportunities. This has turned out to be only partially true.

Among the three NAFTA countries, Mexico is the only one that has not formed a committee under Article 18. As mentioned in Chapter Six, this is not surprising in a centralized federation where the states have traditionally lacked a voice. On the other hand, it is that very lack of a voice that leaves the Mexican states most in need of the kind of forum that an Article 18 committee could provide. To date, however, they have not benefitted from this potentially enabling aspect of the regime. Like the subnationals of the U.S. and Canada, they have also not participated in the few informal venues provided by the CEC.

Similarly, the Mexican states have for the most part not benefitted from the capacity-building aspects of the CEC. In particular, the states–like those of the U.S., and the Canadian provinces–have not accessed the large volumes of useful information that the Commission has produced. While the subnational governments of the U.S. and Canada

appear to be aware of CEC reports and materials, and have rejected them as irrelevant, this is not the apparent reason behind the Mexican states' failure to access this information. As mentioned above, the CEC has encountered difficulties in promoting and distributing their materials. The Mexican states do not appear to be aware of the wealth of information that is available to them through the CEC (Pineda 2003). Considering that these governments lack the resources to generate data that are available to their northern counterparts, it seems likely that they would find the Commission's reports and materials quite valuable as they attempt to build their capacities in environmental regulation. However, to date they have not benefitted from this key part of the CEC's mission.

On the other hand, my expectations are borne out to some extent when we consider the CEC's role as a catalyst. In particular, the Mexican state of Guanajuato benefitted greatly from the opportunities provided by the Commission's involvement in the Silva Reservoir case. To date, no other state or province in North America has been such a direct beneficiary of the CEC's participation in recognizing a problem, generating information, arriving at a diagnosis, and developing solutions. To be sure, it would be premature to generalize from this one instance that the Mexican states will always stand to benefit most from the CEC's role as a catalyst. However, the Silva Reservoir case is widely touted as one of the Commission's great successes, and the organization is likely to seek opportunities to duplicate the experience. Considering the fact that the Mexican states lag far behind the U.S. states and the Canadian provinces in terms of capacity and resources to solve difficult environmental problems, it is not unreasonable to assume that future such CEC endeavors will be in Mexico, where they are most badly needed.

Despite the fact that expectations with respect to opportunities were not, for the most part, borne out by my findings, I stand by my original predictions. As discussed in Chapter Six, the CEC is a very young organization that is consciously seeking to avoid duplication and find its niche. We may yet see the potential of the CEC embraced by the subnational governments as interdependence and trade integration deepen, and as the organization matures and continues working to establish its relevance. As this process unfolds, the states of Mexico still stand to benefit most from the opportunities offered by the regime; especially within the context of decentralization of Mexican environmental policy, the states will need the benefits that the CEC has to offer.

Summary: expectations and findings

Overall, the findings show a regime that is still developing. In terms of both constraints and opportunities, we are dealing more in the realm of potentialities than in hard conclusions. Two of the three Chapter Eleven cases examined have yet to be resolved, and we have yet to see exactly how the constraints of Chapter Eleven will play out for the subnational governments involved. Similarly, environmental NGOs do not appear to have yet grasped the potential of Articles 14 and 15 for holding states and provinces accountable for nonenforcement of environmental laws, and we are for the most part still waiting to see how the shaming aspect of the citizen submissions process will constrain the subnational governments. As for the opportunities offered by the CEC, as discussed above, such benefits for the states and provinces are still more potential than real. Therefore, my findings are projective in nature. They can be summarized as follows.

I expected to find variation in the impacts of the regime on the subnational

governments, with the states and provinces of the U.S. and Canada less constrained than the Mexican states. This turned out to be untrue. The constraints of Chapter Eleven apply equally in all three instances, from the most decentralized federation to the most centralized. As for the constraints presented by the Article 14/15 process, the subnationals of Canada and the U.S. are actually more vulnerable to citizen submissions than those of Mexico.

I predicted that the U.S. states would use their political clout to overcome the constraints of the regime. Again, this is not true. The state of California has certainly tried to use political pressure to defend itself against the Chapter Eleven Methanex case, but has thus far not been successful. As for the Article 14/15 process, only two submissions have been filed against a U.S. state (again, California with respect to the MTBE ban), and both were dismissed because of the pending Chapter Eleven proceeding. It remains to be seen how the U.S. states will respond to additional submissions; it seems doubtful that they would use political clout to overcome the potential constraint posed by the mechanism, because the process itself does not provide a forum in which political pressure could be brought to bear. Perhaps, if the U.S. subnationals find themselves increasingly targeted by submissions, the GAC will eventually provide such an arena.

I also anticipated that the provinces would rely on the intergovernmental processes of executive federalism, as well as their constitutional authority over environmental policy and foreign affairs, to overcome the constraints of the regime. This was not the case. Neither executive federalism nor constitutional authority has shielded the provinces from the potential constraints of Chapter Eleven. At most, a province that is subject to a

Chapter Eleven dispute may be able to help prepare its defense behind the doors of a federal-provincial conference; however, the province is still shut out of the dispute proceedings themselves. As we saw in the Sun Belt case, with the Accord on bulk water exports, such mechanisms of executive federalism may actually leave the provinces *more* vulnerable to Chapter Eleven challenges under the "national treatment" obligation. Similarly, the Canadian provinces are clearly vulnerable to Article 14/15 submissions. Their constitutional authority over environmental regulation has resulted in a large body of environmental law that can invite scrutiny under the Article 14/15 process. In addition, as we saw in the cases involving the federal Fisheries Act, it appears that the pragmatic accommodation and compromise typical of executive federalism are creating gaps in environmental protection that give rise to complaints. While all of these submissions thus far have targeted federal, rather than provincial, enforcement failures, at some point a factual record may address the core issue of provincial responsibility. The Secretariat seems eager to do so.

I expected to find the Mexican states, in a much weaker position than the U.S. states and the Canadian provinces, more constrained by the regime than their northern counterparts. As discussed above, this was not the case. Chapter Eleven poses equal constraints to the subnationals of all three countries. Furthermore, the Mexican states are actually less vulnerable to Article 14/15 submissions because of the centralization of Mexican environmental policy.

Finally, I predicted that the Mexican states would benefit most from the opportunities provided by the enabling aspects of the regime. As discussed above, this

turned out to be partially true as the CEC's role as a catalyst has been seen most beneficially in Mexico. While none of the subnational governments of North America have yet taken advantage of most of the opportunities offered by the CEC, the Mexican states still stand to benefit most from such opportunities as the regime evolves.

Conclusion

While my findings are somewhat projective, they are by no means premature. Indeed, now is the time to be examining these issues, in light of the imminence and importance of trade liberalization initiatives within international relations. Of these initiatives, the most significant for our purposes is the Free Trade Area of the Americas (FTAA).

The FTAA is a hemispheric free trade agreement that would include every country in North, Central and South America, with the exception of Cuba (Public Citizen 2002). It encompasses 34 nations, seven of which are federations (FTAA website, 12/31/02). If enacted, it would create a free trade zone including over 800 million people throughout the Americas (Kuehl 2002). Observers have noted that early texts of the FTAA are built upon, and closely resemble, the North American Free Trade Agreement (Kuehl 2002; Public Citizen 2002; Wise and Gallagher 2002; Gaines 2003).

First proposed at the Summit of the Americas in Miami in December 1994, negotiations for the FTAA have been ongoing since that time and have intensified since late 1999 (Public Citizen 2002). On November 1, 2002, the trade ministers of the 34 FTAA countries met in Quito, Ecuador "with the intent to review progress in the FTAA negotiations so as to establish guidelines for the next phase of the negotiations..."

(Ministerial Declaration of Quito 2002). The ministers instructed the FTAA negotiators to complete the next stage of negotiations with the exchange and discussion of trade liberalization offers among countries by July 15, 2003 (Ministerial Declaration of Quito 2002). A revised draft of the agreement is to be completed by the Fall of 2003 (Ministerial Declaration of Quito 2002). According to a fact sheet on FTAA by Public Citizen (2002), "negotiators hope to have a final text ready for signatures of heads of state by 2004, with country-by-country ratification in 2004-2005, with implementation the following year."

The FTAA has generated a great deal of concern and outright opposition among NGOs throughout the hemisphere (Bell 2002). More significantly for our purposes, representatives of the U.S. states have weighed in with expressions of concern. For example, in response to a request for comments on the FTAA, posted in the Federal Register in July 2002, the NCSL sent a letter to U.S. Trade Representative Robert Zoellick. It noted that state and local governments support trade agreements because of the jobs and economic growth that they create; however, it stated that the language in such agreements must be consistent with "American values and constitutional principles." (NCSL 2002a, 2002b) California State Senator Sheila Kuehl, who serves as Chair of the state Senate Select Committee on International Trade Policy and State Legislation, also responded to the request for comments with a letter to Zoellick expressing "deep concern about international trade agreements and their potential implications for state and municipal lawmaking authority." (Kuehl 2002)

Not surprisingly, given experience to date under Chapter Eleven, such input has focused on the FTAA's investment provisions, which are closely modeled on those of NAFTA (Kuehl 2002; Gaines 2003; Public Citizen 2002). The NCSL's letter to Zoellick bluntly stated that state and local governments believe that NAFTA's investment chapter is a threat to U.S. federalism, "and that no provision remotely similar to it should be included in future agreements, including the FTAA." (NCSL 2002a, 2002b) Kuehl's comments also suggested excluding the investor-to-state dispute mechanism from such agreements (Kuehl 2002).

Failing the exclusion of NAFTA-type investment rules from the FTAA, both Kuehl and the NCSL stated a position that American federalism should be protected by carving out state governments from the scope of such agreements, with neither the decisions of international arbitral panels nor the agreements themselves binding on the states (Kuehl 2002; NCSL 2002a, 2002b, 2002c). Comments have also suggested preserving the police powers of governments by exempting environmental and other regulatory measures from the investment rules (Kuehl 2002; *Inside U.S. Trade* 9/13/02). In addition, Kuehl and the NCSL have argued for transparency in investment dispute proceedings, including the allowance of *amicus* briefs by state governments; inclusion of state attorneys on any team defending a state law; and effective consultation between the states and the federal government on such disputes (Kuehl 2002; NCSL 2002c). The NCSL has also taken a policy position on the payment of awards:

> In the event of an unfavorable judgment, states must be protected from financial liability. If the federal government agrees, in an international trade or investment agreement, to allow foreign firms to collect money damages for "harm" caused by a

state law, then the federal government must fulfill its promise to pay those damages itself, rather than shift the cost to states. (NCSL 2002c)

Kuehl (2002) complained in her September letter to Zoellick that, despite the issues raised, the draft investment language of the FTAA "would provide the same broad powers to investors throughout the hemisphere" as those in NAFTA. Other observers have noted as well that, despite concerns expressed by a variety of interests, the FTAA draft that emerged from the meeting in Quito still closely resembles NAFTA (Collier 2002).

Thousands of protesters took to the streets opposing the FTAA in response to the meeting in Quito (Collier 2002). As mentioned in Chapter Four, some free-trade proponents have expressed the fear that groups opposed to free trade "will try to co-opt the states and injure state support for trade liberalization and trade agreements." (Schaefer 2000, 6) It is still too early to predict whether such opposition to the FTAA will in fact solidify among subnational governments. It should be noted that the intergovernmental lobby in the U.S. appears to be divided on the issue: while, as noted above, the NCSL and a vocal state legislator have expressed strong policy statements opposing the inclusion of NAFTA's investment rules in the FTAA, the National Governors' Association (NGA) has been virtually silent. The NGA's policy position on international trade policy states simply that the governors support the FTAA and hope for ongoing consultations with the USTR regarding conflicts between trade agreements and state laws; no mention is made of the proposed investment rules (NGA 2001).

Interestingly, there appears to be no discussion of expanding the NAAEC or the

CEC to include the FTAA countries. In particular, the environmental NGOs that were instrumental in the creation of the NAAEC and the Commission have not apparently brought up the notion of a similar side agreement to the FTAA. To be sure, these NGOs are closely monitoring the hemispheric agreement, and devote considerable attention to it on their websites. However, a random look at these websites reveals that, rather than pushing for a side agreement to the FTAA, they are opposing it altogether (NWF website, 12/31/02; Sierra Club website, 12/31/02; Public Citizen website, 12/31/02). This position may change as the situation with FTAA evolves: if it appears that the trade agreement is likely to become reality despite their opposition, environmental NGOs will likely insist again upon a side agreement as their best hope to mitigate its effects.

As we face the expansion of trade liberalization through initiatives like the FTAA, what implications can we draw from this initial look at the impacts of such measures on subnational governments within federations? The following remarks are meant, by way of conclusion, to draw attention to some of the issues that must be kept in mind as the new international context unfolds.

First and foremost, my findings bring into question the relevance of federalism within the new international landscape. By entering into agreements such as NAFTA, federal governments are forming new relationships among themselves that do not take federalism into account. It is nothing new that international agreements are dominated by federal governments as the primary actors. However, the agreements themselves are new in content, encroaching on policy areas that fall within subnational jurisdiction. Despite this striking evolution in international relations, the subnational governments that stand to

be impacted are left out of the considerations and vulnerable to the consequences of international agreements. We have seen this particularly in the situation in which the states and provinces find themselves under Chapter Eleven. Federalism, then, in terms of traditional constitutional authority and political power, appears to be losing relevance within the new international context.

My impression of the declining relevance of federalism goes beyond Chapter Eleven. It may be significant that environmental NGOs have, for the most part, not thought to target the states and provinces for Article 14/15 submissions, despite the fact that the subnational governments of the U.S. and Canada have so much authority over environmental regulation. This is simply not where the NGOs are looking. In addition, my look at the opportunities provided by the CEC revealed a general lack of accounting for federalism. Even though the U.S. states and the Canadian provinces are clearly major players in domestic environmental policy, and environmental decentralization in Mexico is underway, the CEC has not made any systematic effort or undertaken any significant initiatives to work with the subnational governments or form relationships with them.

Second, this look at the NAFTA/NAAEC regime reveals that, within the new international context, the devil is in the details. As my findings with respect to the constraints posed by the Article 14/15 process reveal, it is necessary to look beyond traditional measures of federalism such as constitutional authority, centralization, political processes and so on. Within the new international context, we must look deeper at the subtleties of federal arrangements as expressed in particular policy areas, and ask how the

details of international agreements will impact subnational governments in light of those subtleties.

As mentioned at the beginning of Chapter One, federalism has a long history, and is a major consideration by scholars when comparing political systems. Countries are categorized by whether or not they are federal. Furthermore, the establishment of federal divisions of power is a deliberate act by the founders of nations, and the maintenance of federal relations is a preoccupation of the policy-makers who come after them. Despite the changes we are witnessing in international relations, federalism remains important.

In light of this, and of the findings presented herein, now is the time to begin re-asserting the relevance of federalism within international affairs. Subnational governments, and those representing their interests, must insist on being considered within international agreements such as the FTAA. Some subnational representatives in the United States, as discussed above, appear to be on the right track by arguing to have their laws exempted from certain aspects of the agreements. Thus far, they have been ignored, and it will be interesting to watch how they respond as the hemispheric agreement comes closer to reality. They may well be faced with a difficult choice of either accepting a subordinate position within the agreement, or opposing the FTAA and the economic development it promises. As for the subnational governments of the other six federations among the FTAA countries, they should begin now to assert their own interests and relevance in the FTAA negotiations.

An environmental side agreement expanding the NAAEC and the CEC to cover all of the FTAA countries would be problematic. As it is, within the dense thicket of

jurisdictions presented by the three North American countries, the CEC is still struggling to find its own niche after nearly a decade in existence. Placing an additional 33 countries, with widely divergent political systems, levels of development and environmental protection, in its purview is likely to create at least temporary chaos. If such a side agreement does materialize, the CEC will have to undergo radical reorganization and streamlining of its mission in order to remain effective. As it makes these changes, the organization must take into account the fact that seven of the countries involved are federations, with variations in environmental policy jurisdiction. This could involve designating staff specifically to work with subnational governments, distributing information, building capacity, and forming relationships with them.

In conclusion, recall from Chapter One that a "federation," as defined, deals directly with citizens and is elected by citizens; features a supreme written constitution which is not unilaterally amendable, outlining the terms by which power is divided or shared; and exhibits constitutionally fixed territorial divisions of power. In an essay on federalism and globalization, Keating (1999, 21) mused that, in the complexity of the new international relations, "the federal division of power, in which a territorial government exercises determinate competences over a specific area and is answerable to a territorial constituency, can easily get lost." This look at the impacts of the NAFTA/NAAEC environmental regime on the states and provinces of North America has shown that such considerations are not idle concerns. As the new international landscape takes shape, the issues raised herein must be kept foremost in mind if federalism is to remain relevant, and if the integrity of federal arrangements is to be preserved.

APPENDIX

List of Publications and Documents[1]
Commission for Environmental Cooperation
(In reverse chronological order of publication)

A Retrospective Review of FERC's Environmental Impact Statement on Open Transmission Access. June 2002.

A Review: *Environmental Challenges and Opportunities of the North American Electricity Market* symposium. June 2002.

Assessing Barriers and Opportunities for Renewable Energy in North America. June 2002.

Design and Legal Consideration for North American Emissions Trading. June 2002.

Environmental Challenges and Opportunities of the Evolving North American Electricity Market. June 2002.

Estimating Future Air Pollution from New Electric Power Generation. June 2002.

European Electricity Generating Facilities: An Overview of European Regulatory Requirements and Standardization Efforts. June 2002.

Government comments on *Environmental Challenges and Opportunities of the Evolving North American Electricity Market.* June 2002.

Modeling Techniques and Estimating Environmental Outcomes. June 2002.

NAFTA Provisions and the Electricity Sector. June 2002.

Progress: A message from the Executive Director of the Commission for Environmental Cooperation. June 2002.

Taking Stock 1999: Sourcebook. May 2002.

Taking Stock 1999: Summary. May 2002.

North American Environmental Law and Policy Series: North American Boundary and Transboundary Inland Water Management Report. April 2002.

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[1] Source: Commission for Environmental Cooperation, http://www.cec.org/pubs_docs/publications/index

Workshop on Green Goods and Services: Financing Sustainable Production in North America. April 2002.

The Environmental Effects of Free Trade: Papers Presented at the North American Syposium on Assessing the Linkages between Trade and Environment (October 2000). March 2002.

North American Environmental Law and Policy Series, Volume 8: Metales y Derivados Final Factual Record. February 2002.

The North American Mosaic: A State of the Environment Report. January 2002.

Mexico and Emerging Carbon Markets: Investment Opportunities for Small and Medium-size Companies and the Global Climate Agenda. November 2001.

Taking Stock 1998: Sourcebook. July 2001.

Taking Stock 1998: Summary. July 2001.

Special Report on Enforcement Activities (2000). June 2001.

CEC Program Plan for 2001-2003. January 2001.

Bringing the Facts to Light: A Guide to Articles 14 and 15 of the North American Agreement on Environmental Cooperation. December 2000.

North American Environmental Law and Policy Series, Volume 5. September 2000.

North American Environmental Law and Policy Series, Volume 6. September 2000.

Guidance document: Improving Environmental Performance and Compliance. June 2000.

NAWEG: Making a difference for wildlife. June 2000.

Taking Stock: North American Pollutant Releases and Transfers, 1997. May 2000.

North American Environmental Law and Policy Series, Spring 2000 volume. March 2000.

2000-2002 North American Agenda for Action: A Three-Year Program Plan for the Commission for Environmental Cooperation. January 2000.

Framework for Public Participation in Commission for Environmental Cooperation Activities. January 2000.

North American Environmental Law and Policy Series, Winter 1999 volume. December 1999.

North American Important Bird Areas. December 1999.

Supporting Green Markets: Environmental Labeling, Certification and Procurement Schemes in Canada, Mexico and the United States. December 1999.

Measuring Consumer Interest in Mexican Shade-grown Coffee. October 1999.

Indicators of Effective Environmental Enforcement: Proceedings of a North American Dialogue. August 1999.

Taking Stock: North American Pollutant Releases and Transfers, 1996. August 1999.

Ribbon of Life: An Agenda for Preserving Transboundary Migratory Bird Habitat on the Upper San Pedro River. June 1999.

Silva Reservoir: An Example of Regional Environmental Cooperation in North America. June 1999.

Tracing the Paths of Our Shared Environment. June 1999.

The Development of Sustainable Tourism in Natural Areas in North America: Background, Issues and Opportunities. May 1999.

Environment and Trade Series #6: Assessing Environmental Effects of the North American Free Trade Agreement (NAFTA): An Analytic Framework (Phase II) and Issue Studies. March 1999.

North American Agenda for Action: 1999-2001, A Three-Year Program Plan for the Commission for Environmental Cooperation. February 1999.

1998 Annual Report. January 1999.

CEC 1995 Annual Report Annex 1: North American Report on Environmental Enforcement. January 1999.

North American Environmental Law and Policy Series, Winter 1998 volume. December 1998.

Taking Stock: North American Pollutant Releases and Transfers, 1995. October 1998.

North American Environmental Law and Policy Series, Fall 1998 volume. September 1998.

North American Cooperation for the Sound Management of Chemicals. June 1998.

Voluntary Measures to Ensure Environmental Compliance: A Review and Analysis of North American Initiatives. March 1998.

1998 Annual Program and Budget. January 1998.

Ecological Regions of North America: Toward a Common Perspective. November 1997.

Environment and Trade Series #5: NAFTA's Institutions. November 1997.

The Demand for Environmental Education and Training in Mexico. September 1997.
Final Factual Record of the Cruise Ship Pier Project in Cozumel, Quintana Roo. August 1997.

Taking Stock: North American Pollutant Releases and Transfers, 1994. July 1997.

1997 Annual Report. January 1997.

A Shared Vision: Toward Sustainability in North America. January 1997.

Continental Pollutant Pathways: An Agenda for Cooperation to Address Long-Range Transport of Air Pollution in North America. January 1997.

In Brief: Protecting the Marine Environment in North America. January 1997.

Environment and Trade Series #3: Dispute Avoidance. November 1996.

Environment and Trade Series #4: Building a Framework for Assessing NAFTA. November 1996.

Environment and Trade Series #5: Putting the Pieces Together; The Status of Pollutant Release and Transfer Registers in North America. November 1996.

Assessing Latin American Markets for North American Environmental Goods and Services. August 1996.

Environment and Trade Series #1: Potential NAFTA Environmental Effects. August 1996.

Environment and Trade Series #2: NAFTA Effects, A Survey of Recent Attempts to Model the Environmental Effects of Trade. August 1996.

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