



Making It Work **Kyoto, Trade and Politics**

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A Report Prepared
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Executive Summary

How will trade agreements and federalism constrain Canadian policy makers if they implement the Kyoto Protocol? This question is the focus of *Trade Agreements, Federalism and the Politics of Implementing the Kyoto Protocol*, published by the Parkland Institute.

Its conclusions likely will not sit well with partisans on all sides of the Kyoto debate:

- Drastic domestic emissions cuts are not the only route to implementing Kyoto;
- Strict environmental regulations may boost corporate competitiveness;
- The World Trade Organization is not necessarily an environmental straitjacket;
- NAFTA is a real threat to implementing Kyoto - it must be clarified and renegotiated;
- Canada needs a national electricity policy and "big" hydro and public investment should play important roles therein;
- Constitutional challenges to national action, as threatened by Alberta, may threaten provincial powers;
- The mistakes of the National Energy Program conflict of the 1980s must be avoided - federal and provincial governments finally must start to show genuine leadership on the Kyoto file.

The paper begins by describing the Protocol and detailing the significant concessions Canada won during the last two rounds of Protocol negotiations. These concessions, on subjects such as carbon sinks and international emissions trading, dramatically reduce the size of the cuts in domestic greenhouse gas emissions Canada must make in order to meet its Kyoto target. For example, under Kyoto's carbon sinks provisions Canada can meet twenty per cent of its annual emissions reduction target by afforestation and reforestation - growing trees. These concessions, when combined with the American refusal to ratify Kyoto, should enable Canada to meet its Kyoto commitments at a fraction of the costs cited by the Protocol's most strident critics and without making the Draconian cuts in actual GHG emissions these critics wring their hands about. It is simply not true to tell the public, as too much reporting on Kyoto has done, that the only Kyoto compliance policy option open to Canada is domestic emissions reductions.

The second section of the study argues that carefully crafted environmental regulations actually may actually improve, not destroy, the competitiveness of Canadian industry. This argument, of course, is at variance with the public's understanding of Kyoto's impact, poisoned too often by self-interested rhetoric from various quarters.

The third section outlines a range of policies that a handful of organizations - the International Energy Agency, the David Suzuki Foundation, the World Wildlife Fund, the Pembina Institute for Appropriate Development, and the Canadian Centre for Policy Alternatives - have recommended to help Canada meet its Kyoto commitment. These policies include, but are not limited to: subsidies for renewable energy, increased automobile fuel efficiency standards, a national emissions trading system, and a transition strategy for workers whose jobs will be jeopardized if Canada implements Kyoto.

But, does our membership in the World Trade Organization (WTO) and our obligations under the North American Free Trade Agreement (NAFTA) effectively brake any effort to implement these policies? If many CEO's are likely to close their eyes to the study's arguments about competitiveness, some environmentalists likely will blanch at the paper's suggestion that the WTO is not necessarily an environmental straitjacket. The WTO will not necessarily prevent Canada from implementing many of the policies identified in this report. While the study recommends that the current Doha round of trade negotiations should strive to improve the WTO's environmental sensitivity, the WTO's environmental record is not as bleak as some Green rhetoric would have the public believe.

NAFTA is more problematic, despite its containing of some promising environmental protection provisions. NAFTA's energy provisions figure prominently here. The national treatment provisions outlined in Article 606.1 (a) may frustrate efforts to insure that more of Canada's electricity comes from renewable energy sources (defined as solar, wind, and small scale hydro power). Other elements of NAFTA's energy chapter - its ban on export taxes and its guarantee of proportional access to Canadian energy supplies for the United States - prevent Canadian governments from introducing other measures that could assist a GHG emissions reduction plan. Finally, we do not have sufficient experience with NAFTA to know whether legitimate environmental regulations will fall victim to the investment chapter's expropriation and compensation article. The investment chapter must be clarified or changed to insure that NAFTA

cannot be used to challenge environmental regulations that are not disguised trade protectionism.

The report also highlights two notably absent policy options - “big” hydro and a national electricity policy. Their absence from the Kyoto debate is unwarranted. Hydroelectricity should be valued for its potential to replace electricity currently generated by coal-fired plants; a national electricity policy is needed to move cheaper hydropower to Canadian markets. Significant public investment and dramatic changes to the National Energy Board (or the creation of a Canadian Electricity Board) will be needed to breathe life into this option.

Finally, Canadian federalism complicates whatever national plan of action will be proposed. Provincial responsibility for developing, conserving, and managing natural resources has figured prominently in today’s angry debates over ratifying and implementing Kyoto. Alberta, emboldened by its jurisdiction over natural resources, has threatened to go to court if the federal government’s plan does not give pride of place to provincial resource powers. This threat is ill advised; it is akin to constitutional brinkmanship. Past judicial rulings on powers over treaties and the environment make it very possible that a constitutional gambit may reduce provincial powers.

Constitutional showdowns and bitter federal-provincial conflicts likely await us unless federal and provincial leaders show some genuine leadership on the Kyoto file. This leadership is not found in the federal government: Ottawa’s failure to involve the provinces in developing a national plan for reducing greenhouse gas emissions borders on the irresponsible. Nor is it found in the sleight of hand that passes for global warming policy in Alberta. Reduced “emissions intensity” does not equal reduced emissions. The study ends by urging federal and provincial governments to recognize the legitimacy of their opponents’ interests and to search for a compromise. Governments must sit down around the conference table and craft policies and institutions that take all of the challenges of reducing greenhouse gases seriously. The approach was absent during another political crisis alluded to in today’s Kyoto rhetoric - the one centring on the National Energy Program. Canadians cannot afford to see that mistake repeated today.

“Climate change is biopolitical terrorism. . . . the major industrialized countries must devise workable international efforts to reduce the build-up of greenhouse gases, in cohort with the industries that cause the problem.”

- Lancet, November 2001

“It’s the goofiest, most devastating thing that was ever conceived and has ever been contemplated by a Canadian government in the history of this country . . . other than the NEP.”

- Premier Ralph Klein, September 2002

The climate change debate, as may befit the subject of global warming, has plenty of hot air. Some partisans from either side of the debate have been guilty of relying on inflammatory rhetoric, rather than reason, to try to acquire political support. This author does not aspire to join them. I hope instead to shed some light on an issue that has remained in the shadows during most of the Canadian version of the climate change debate - the extent to which the policy positions of governments may be constrained by trade agreements and our federal system of government. Sovereignty - the ability of nation-states to manage their affairs without internal or external interference - is increasingly shared and challenged in contemporary world politics. In the Canadian case, it is shared not just between Canada’s national government and other national governments but also between the federal and provincial governments. The International Energy Agency’s recent examination of Canadian energy policies implicitly made this

point when it noted that “the federal system of government and integration of the North American economy” were two of the major influences on Canadian energy policy and, by extrapolation, on efforts to grapple with global warming.² In respect to climate change, Canadian sovereignty may be effectively shared through four institutional arrangements and they are the focus of this paper. Those institutions are: the Kyoto Protocol to the United Nations Framework Convention on Climate Change, the World Trade Organization (WTO), the North American Free Trade Agreement (NAFTA), and Canadian federalism.

This analysis has a handful of goals. First, it reviews the evolution of the Kyoto Protocol and suggests that decisions made at the Bonn and Marrakech conferences of 2001 ease whatever hardships Canadians may have to

2 International Energy Agency, *Energy Policies of IEA Countries: Canada 2000 Review*, (Paris: Organization for Economic Co-operation and Development and International Energy Agency, 2000), 38.

endure after ratifying the Protocol. The second section of the paper examines the possibility that concern for the competitiveness of Canadian firms offers a compelling rationale for the refusal of federal and provincial governments to take meaningful action to reduce greenhouse gas emissions in Canada. The third section of the paper introduces a wide variety of policy options that could be implemented in pursuit of the greenhouse gas emissions reductions Canada agreed to when it signed Kyoto in 1997. The fourth section considers the extent to which these sorts of policy options are likely to run afoul of Canada's commitments under the multilateral trading system supervised by the WTO. A similar analysis of the NAFTA's impact on Kyoto implementation policies is offered in the fifth section. The sixth section examines this issue in the context of Canadian federalism.

From the outset, this paper makes two crucial assumptions. First, the scientific work of the Intergovernmental Panel on Climate Change makes it very clear that global warming is real, has been accelerated by the industrialization of the developed countries, and is likely to become far more severe in the twenty-first century. Second, the actions taken to this point in time by Canadian governments to reduce greenhouse gas emissions have been laughable and pathetic. Anyone who doubts the value of these assumptions is welcome to consult the public record.

From Rio to Marrakech: The Evolution and Dilution of the Kyoto Protocol

The catalyst that pushed the world towards negotiating the Kyoto Protocol - concerns about global warming - first came to the widespread attention of the public during the United Nations Earth Summit held in Rio de Janeiro in June 1992.³ This summit was unprecedented in terms of its size (172 governments and more than 2,300 representatives of non-governmental organizations traveled to Rio), the breadth of its concerns, and its outcomes. Two legally binding conventions, the United Nations Framework Convention on Climate Change and the United Nations Convention on Biological Diversity, plus three other major agreements were produced by this summit.⁴

The Climate Change Convention was informed largely by the work of the Intergovernmental Panel on Climate Change (IPCC). Created in 1988 the IPCC draws its members from literally every corner of the scientific community - climatology, oceanography, biology, economics, paleo-

3 Climate change was arguably first regarded as a serious problem in 1979, the year the World Meteorological Organization held the First World Climate Change Conference. For a discussion of the scientific community's mobilization on the issue see James P. Bruce, "Intergovernmental Panel on Climate Change and the Role of Science in Policy," and Gordon McBean, Andrew Weaver, and Nigel Roulet, "The Science of Climate Change: What Do We Know?," in ISUMA: Canadian Journal of Policy Research, Vol. 2, no. 4 (Winter 2001), 11-25.

4 These three agreements were Agenda 21, the Rio Declaration on Environment and Development, and the Statement of Forest Principles. Agenda 21 was a sweeping sustainable development program; the Rio Declaration defined the rights and responsibilities of states in respect to the environment and development; and the statement on forest principles outlined sustainable forest management principles.

ecology, glaciology, health sciences, and sociology. Its first assessment report, released in 1990, provided an important foundation for the Climate Change Convention's stipulation that the developed countries should reduce their greenhouse gas (GHG) emissions to 1990 levels by the year 2000.⁵

During the preparation of the IPCC's Second Assessment Report a "great majority" of the IPCC's climate scientists believed that greenhouse gas emissions were changing the earth's climate.⁶ This perspective animated the deliberations of the parties to the climate convention during 1995 and 1996. By the end of the first Conference of the Parties (COP), held in Berlin in 1995, more than 120 countries had ratified the Convention. This conference produced the "Berlin Mandate." Drawing on the IPCC's work the parties concluded that the GHG reduction limits agreed to in the Climate Convention (reduce greenhouse gas emissions to 1990 levels by 2000) were inadequate. They would not further the objectives of the Convention. The mandate called upon the parties to negotiate a protocol to the Convention that would set emission reduction levels for Annex I parties (the OECD countries, Russia, and the former socialist countries of Eastern Europe). Between the COP 1 meeting in Berlin and the COP 3 meeting in Kyoto hard, but largely unproductive, bargaining took place among the parties to the convention. The United States was on one side of this debate. It insisted, contrary to the emerging scientific consensus, that stabilizing greenhouse gas emissions at 1990 levels would be effective; the European Union stood on the other side of the debate and demanded that, by 2010, the

5 United Nations, United Nations Framework Convention on Climate Change, Article 4.2(a)(b).

6 Bruce, "Intergovernmental Panel on Climate Change," 14.

emissions of the three major greenhouse gases (carbon dioxide, methane, and nitrous oxide) in Annex I countries be cut to fifteen percent below their 1990 levels. The United States also proposed to impose some limits on GHG emissions on developing countries, a position contrary to the Climate Convention's commitment that the industrialized countries take the lead in making reductions since the emissions accompanying their economic growth were largely responsible for changing the earth's climate. Both sides compromised at COP 3. The Kyoto Protocol, the product of this compromise, called for industrialized countries to reduce GHG emissions by an average of 5.2 percent from their 1990 levels by 2008-2012.⁷

The devil, according to an old German saying, is in the details.⁸ This must ring true for many environmentalists who watched Kyoto's many unresolved details hammered out at subsequent Conferences, most notably COP 6 in Bonn and COP 7 in Marrakech. The decisions made there concerning carbon sinks and the so-called "flexibility mechanisms," combined with the American withdrawal from the Protocol, have had two significant impacts on the Protocol. This combination effectively diluted Kyoto's effectiveness as a measure that will reduce greenhouse gas emissions significantly and dramatically tempered the possibility the Protocol will harm the Canadian economy seriously.

7 Although no reductions in greenhouse gas emissions were imposed on developing countries Article 10 of the Protocol calls on all signatories to the Protocol to strive to mitigate climate change.

8 "The devil is in the details" The Concise Oxford Dictionary of Proverbs. Ed. John Simpson and Jennifer Speake. Oxford University Press, 1998. Oxford Reference Online. Oxford University Press. 9 September 2002. <http://www.oxfordreference.com/views/ENTRY.html/?subview=Main&entry=t90.000481>

Consider first the carbon sinks issue. Article 1.8 of the UN Climate Change Convention defines a sink as “any process, activity, or mechanism that removes a greenhouse gas, an aerosol or a precursor of a greenhouse gas from the atmosphere.” Since plants and trees absorb carbon dioxide when they grow they act as carbon sinks. Nations may therefore manage their lands so as to enhance their performance as sinks. Article 3.3 of the Kyoto Protocol consequently states that afforestation (planting trees where none existed previously) and reforestation are activities that developed countries may employ in order to meet some of their GHG reduction commitments. Article 3.4 of the Protocol raises the prospect that other land use and forestry activities may be used as emission reduction credits, effectively reducing the severity of the genuinely domestic emission reductions needed to reach Kyoto’s targets. The size of these carbon sink credits were the subject of intense, acrimonious negotiations during the Bonn conference of July 2001. The European Union did not want to see carbon sinks play a major role in the GHG emissions reduction campaign. Sinks, in the eyes of the EU, were loopholes. They enabled countries to avoid making cuts to their domestic production of greenhouse gases. But, to the so-called Umbrella Group of countries - Canada, Norway, Japan, Australia, New Zealand, Russia, Ukraine, and Iceland - sinks were legitimate tools to reduce atmospheric levels of carbon dioxide.

Heading into the Bonn session of COP 6, the support of the Umbrella Group had become crucial to the prospects of getting the level of international support needed to bring the Protocol into effect. Kyoto acquires legal force once two thresholds are crossed. First, at least fifty-five countries must ratify Kyoto (as

of September 5, 2002 ninety-three countries had ratified the Protocol). Second, the list of ratifying countries must include enough developed (Annex I) countries to account for at least fifty-five percent of the world’s carbon dioxide emissions in 1990. In that year, the United States share of these emissions was 36.1 percent, the European Union share was 24.2 percent, the Russian Federation share was 17.4 percent, and Japan’s share was 8.5 percent.⁹ Given the American share of global CO₂ emissions in 1990, when President Bush announced in March 2001 that he would not ask the Senate to ratify Kyoto he effectively increased the bargaining leverage of the larger GHG emitters within the Umbrella Group - especially Japan, Russia, Canada, and Australia - at the Bonn and Marrakech conferences.¹⁰

If the Russian Federation followed the United States’ lead and left the ratification path it would be impossible to cross the second threshold. Kyoto would die. Canada, Japan, and the Russian Federation used this situation to win very generous carbon sinks concessions. The total annual forest sinks credit available to Canada is 13.6 megatons of carbon, twenty per cent of Canada’s annual reduction target of 65.5 megatons during the first commitment period (2008-2012). Instead of actually reducing emissions by this amount, Canada could apply these credits against its GHG reduction commitment. Japan received a forest management credit of thirteen megatons per year and Russia claimed a 17.63 megatons credit.¹¹ Russia’s thirst for sinks

⁹ “Setting the record straight,” available at <http://unfccc.int/press/dossiers/factsheet.html>

¹⁰ The significance of Canada (with 3.3 percent of global CO₂ emissions in 1990) and Australia (with 2.1 percent of 1990 CO₂ emissions) rested with the fact that ratification by either country when combined with ratification by Japan and Russia would secure the necessary fifty-five percent of CO₂ emissions required to bring the Protocol into effect.

concessions was not satisfied by these concessions. The Russians claimed that their forests soaked up nearly twice the amount of carbon recognized in the Bonn concession; if Russia did not receive an annual carbon credit of thirty-three megatons it would join the United States on the sidelines, effectively scuttling the Protocol.¹²

Kyoto's flexibility mechanisms refer to three market-based mechanisms - Joint Implementation, the Clean Development Mechanism, and International Emissions Trading - that, like sinks, enable industrialized countries to meet their Kyoto commitments without making emissions reductions at home. The Joint Implementation provisions are found in Article 6 of the Protocol and describe a situation where an industrialized nation listed in Annex I may claim credits towards its emissions reduction target by financing an emissions reduction project in another Annex I country. The market sensitivity of this mechanism rests in the possibility that it may be less costly to cut GHG emissions in Eastern European countries struggling to make the transition to market economies than in OECD countries. Prior to Kyoto the concept was proposed, in more or less restrictive terms, by Australia, Costa Rica, the European Union, New Zealand, Norway, Russia, Switzerland, the United States, and Uzbekistan.¹³ The European Union wanted Joint Implementation to be "supplemental to domestic policies and measures;" others

wanted to stipulate a maximum percentage of GHG reduction commitments that could be realized through this mechanism;¹⁴ the United States, the European Union, and Australia all wanted to insure that corporations would be able to participate in Joint Implementation projects. Absolute ceilings were not specified in the Protocol. Instead, Article 6.1(d) incorporates a version of the European Union proposal: "The acquisition of emission reduction units shall be supplemental to domestic actions for the purposes of meeting commitments under Article 3." No actions were taken at Bonn or Marrakech that placed additional restrictions on the use of this mechanism by industrialized countries.

Similar stories may be told about the Clean Development Mechanism and International Emissions Trading. The Clean Development Mechanism enables industrialized countries to meet an unspecified amount of their domestic reduction obligations by financing emission reduction projects in developing countries.¹⁵ The profile of emissions trading was raised when the United States announced its support for this concept at COP 2 in 1996. At Kyoto, emissions trading threatened to become an issue that, in the words of the Chairman of the group of countries trying to fulfill the Berlin Mandate, "could blow up the whole protocol."¹⁶ Economists predict that emissions trading will reduce the costs of GHG

11 These credits were in addition to a general 8.2 megatons credit potentially available to all Parties who managed forests to retain carbon. This general credit was increased to a maximum of nine megatons at Marrakech.

12 Gilles Trequesser, "Haggling Over Fine Print of Climate Change Treaty," Reuters, 9 November 2001.

13 Joanna Depledge, "Tracing the Origins of the Kyoto Protocol: An Article-by-Article Textual History," (FCCC/TP/2000/2), 25 November 2000, 62.

14 Switzerland proposed a fifty percent ceiling; Costa Rica wanted to set the ceiling at twenty-five percent. See Depledge, "Tracing the Origins," 62.

15 Two limitations are attached to the use of the Clean Development Mechanism. Investment in CDM projects may not replace existing overseas development assistance. A second limitation concerns the establishment of forest management sinks in developing countries. A Party cannot use these projects to claim more than one percent of its 1990 level of emissions.

16 Depledge, "Tracing the Origins," 85.

emissions abatement by between fifty and seventy-five percent.¹⁷ It would allow nations that have more than met their Kyoto emission reduction targets to sell GHG credits to countries whose present level of GHG emissions are greater than their Kyoto targets. Russia and Ukraine are two countries that could be sellers of emission credits. Their Kyoto emissions targets are their 1990 emissions levels. But, as a result of the severe economic crises that hit these countries as they attempted the transition to market systems, their economies - and their GHG emissions - shrank dramatically during the 1990s. Between 1990 and 2000 Russia's emissions dropped by thirty percent while emissions in Ukraine fell by more than forty percent.¹⁸ Consequently, today a considerable gap or GHG emissions surplus exists between their current emissions levels and their 1990 benchmarks. Unlike a country like Canada, these nations have a right under Kyoto to increase their domestic GHG emissions in order to reach their Kyoto target. If emissions trading is allowed these countries may sell their GHG emissions surpluses to countries that, like Canada, have higher emissions levels than Kyoto allows. Much of the opposition to emissions trading came from developing countries and environmental organizations, constituencies objecting to the notion that wealthy countries should be allowed to buy their way out of making genuine domestic cuts in GHG emissions. The Chairman and Executive Secretary of the ad hoc group of countries tackling the Berlin Mandate may

have saved the Protocol from stillbirth when they proposed that Kyoto would embrace the principle of emissions trading but would leave it to future Conferences of the Parties to define "relevant principles, modalities, rules and guidelines." This definitional work was completed at the Bonn and Marrakech meetings in 2001. These conferences placed few restrictions on the ability of countries and their "legal entities" - corporations and other private actors - to buy and sell emission reduction credits. Consider, for example, the following statement in the Marrakech Accords regarding the principles, nature, and scope of the flexibility mechanisms:

*Affirming that the use of the mechanisms shall be supplemental to domestic action and that domestic action shall thus constitute a significant element of the effort made by each Party included in Annex I to meet its quantified emission limitation and reduction commitments under Article 3, paragraph 1.*¹⁹

Domestic action to cut emissions is required to be "a significant element" of GHG emissions efforts. Use of the flexibility mechanisms "shall be supplemental to domestic action." Such imprecise language gives great latitude to the Annex I parties to rely heavily upon these measures, and not domestic cuts, to reach Kyoto's targets.²⁰

The withdrawal of the United States from Kyoto makes the emissions trading option more appealing to all OECD countries. The American refusal to join the rest of the developed world and accept Kyoto eliminated what would have been the most significant

¹⁷ William D. Nordhaus, "Global Warming Economics," *Science*, Vol. 294, 9 November 2001, 1283.

¹⁸ Carnegie Endowment for International Peace, "Russia, Energy, and Global Climate Change: Senior Scientist William Chandler speaks on Russian and global climate change," 7 February 2002. <http://www.ceip.org/files/events/events.asp?EventID=459>

¹⁹ United Nations, Report of the Conference of the Parties on its Seventh Session, Held at Marrakesh from 29 October to 10 November 2001 - Addendum - Part Two: Actions Taken by the Conference of the Parties, Volume II, (FCCC/CP/2001/13/Add.2), 21 January 2002, 2.

source of demand for the emission credits that countries like Russia and Ukraine will sell in a CO₂ emissions market. Consequently, unless Russia, Ukraine, and East European countries with GHG emission surpluses form an effective emission credit cartel, analysts predict that the costs of these carbon credits will fall precipitously in the emissions market. William Nordhaus, Sterling professor of economics at Yale, estimates that the withdrawal of the United States will depress the price of carbon credits in 2010 from around fifty-five dollars (U.S.) per ton to around fifteen dollars per ton.²¹ Others see even steeper reductions. William Chandler, senior staff scientist at Pacific Northwest Laboratories in Washington D.C., concludes that the supply of credits available from the former socialist economies will be so large relative to the demand from the OECD that the price of carbon credits in 2010 will be less than three dollars per ton.²²

20 After the successful completion of the Bonn conference one analyst of the conference outcomes noted: "The latest version of the Kyoto Protocol does not foresee any concrete caps on the share of emissions reductions a country can meet through the purchase of permits from other industrialized countries. ..." See Christoph Böhringer, "Climate Politics from Kyoto to Bonn: From Little to Nothing?," *The Energy Journal*, Vol. 23, no. 2 (2002), 52. A similar sentiment may be found in a report on the Marrakech conference prepared by the Sustainable Energy Industry Association of Australia. In respect to supplementarity the Association noted: "It was decided at COP 7 that Parties 'shall' report on supplementarity but that reporting failures would not trigger loss of mechanisms eligibility." See <http://www.seia.com.au/Policy/Policy/Kyoto.pdf>

21 Nordhaus, "Global Warming Economics," 1284.

22 Carnegie Endowment for International Peace, "Russia, Energy, and Global Climate Change." A similar conclusion is offered in Böhringer, "Climate Politics from Kyoto to Bonn: From Little to Nothing?" Although I have not seen an estimate from the Russian Federation of what it believes the costs of emission credits will be without American participation in the emissions credit market, the government has implied that revenues from the sale of credits will be much lower since the withdrawal of the United States has "greatly reduced" the size of the emissions market. <http://www.energy.ru/eng/conferences/mechanisms.htm>

Of course the effectiveness of Kyoto as a mechanism to reduce GHG emissions in the first commitment period of 2008 to 2012 suffers from both the withdrawal of the United States and easy recourse to international emissions trading. Nordhaus calculates "that the accord will accomplish relatively little in emissions reductions without U.S. participation - reducing global carbon-dioxide emissions by about 1% relative to no policy in the first period, 2008 to 2012."²³ The assessment of Christoph Böhringer, head of the Department of Environmental and Resource Economics at the Centre for European Economic Research in Mannheim, Germany, is even more pessimistic. "Non-compliance of the U.S.," he writes, "reduces environmental effectiveness of the Kyoto Protocol practically to zero if there are no restrictions to hot air sales from Russia, Ukraine, and Eastern Europe."²⁴ Many, perhaps most, of Kyoto's Canadian critics base at least part of their opposition upon the Protocol's diluted environmental effectiveness. "In fact," wrote author and journalist Peter Foster as he bludgeoned away at those favouring ratification, "if there's one thing Kyoto won't do, it will be to produce any discernible change in the climate."²⁵

If Kyoto won't deliver a substantial reduction in GHG emissions is there any good reason to cross the remaining threshold

23 Nordhaus, "Global Warming Economics," 1283.

24 Böhringer, "Climate Politics from Kyoto to Bonn: From Little to Nothing?," 53.

25 Peter Foster, "Don't rush to ratify Kyoto," *The National Post*, 31 August 2002. Readers of *The Globe and Mail* were shelled repeatedly with this argument in early September 2002. See, for examples, Brian Milner, "Implementing Kyoto would be a costly error," *The Globe and Mail*, 6 September 2002; Jeffrey Rubin, "Why Canada signing Kyoto is an empty gesture," 7 September 2002; William Thorsell, "Accept it: Kyoto won't stop global warming," *The Globe and Mail*, 9 September 2002.

needed to give legal effect to Kyoto? In this respect too many critics of Kyoto ignore completely the long-term value to be derived from Kyoto's establishment of institutions, processes, mechanisms, common knowledge, and rules for addressing climate change. Despite the failure of Kyoto to deliver significant substantive reductions in GHG levels, its agreements on issues such as definitions, procedures, and institutions for measuring carbon emissions, for registering carbon credits, for monitoring, and for compliance offer the building blocks - the potential - to manage GHG emissions more effectively in the future. Critics (other than the leading environmental organizations) seem to forget that the creation of this international agreement to manage the climate only came about after more than a decade of tough, difficult negotiations. An alternative to Kyoto is not likely to appear in any less time or any more easily. This acknowledgment is more likely to be offered by environmental groups. While they recognize that Kyoto won't deliver much in terms of reducing GHG emissions they also see the value of creating an international institution to address the issue. Nordhaus, after concluding that Kyoto "will make little progress in slowing global warming while incurring a substantial cost" endorses this alternative rationale for ratifying Kyoto in his closing remarks:

the major merit of the new accord is that it is the first experiment with market instruments in a truly global environmental agreement. There is little appreciation of the importance of "institutional innovations" of this kind, and even less appreciation for the fact that there are no mechanisms for dealing with economic global public goods like global warming. For this reason, the Kyoto-Bonn Accord may be a useful if

expensive guinea pig. Operating the Kyoto-Bonn mechanism will provide valuable insights on how complicated international environmental programs will work. It is hard to see why the United States should not join with other countries in paying for this knowledge.

Canadian governments would do well to heed this advice also.²⁶

The impact of carbon sink credits, flexibility mechanisms, and the United States' refusal to endorse Kyoto upon Canada's ability to meet its Kyoto obligations and to do so economically has to date been understated. Frankly, these factors should enable Canada to meet its Kyoto commitments at a fraction of the costs cited by the Protocol's most strident critics and without making the Draconian cuts in actual GHG emissions these critics wring their hands about. This perspective is ignored in virtually all of what passes for Kyoto analysis in the mainstream Canadian media, however. For whatever reason, too many media commentaries tell readers that the only Kyoto compliance policy option open to Canada is domestic emission reductions. For example, journalist Mike Byfield writes in The Report: "If the 1997 Kyoto accord becomes a binding treaty, Canada would legally commit itself to reducing its output of carbon dioxide (CO₂) 6% below its 1990 level, or about 20% lower than today's level."²⁷ Or, more recently, Jeffrey Rubin, chief economist and managing director of CIBC World Markets, in a column ironically called "Ahead of the Curve," invites readers to "consider the facts. Reaching the

²⁶ Some recognition of this point may be found in Eric Reguly, "EnCana CEO's urge to kill Kyoto is misguided," The Globe and Mail, 14 September 2002.

²⁷ Mike Byfield, "Face it, Kyoto is pure politics," The Report, 18 March 2002, 33.

mandated emissions target (a 6-per-cent reduction from 1990 greenhouse-gas emission levels by 2012) no longer requires a 20-per-cent cut in emissions, but something closer to double that reduction.”²⁸ Unfortunately for the quality of public understanding, a vital fact is missing from Rubin’s analysis (as well as Byfield’s): the carbon credits Canada may claim through sinks and use of the flexibility mechanisms may substitute for reducing greenhouse gas emissions in Canada. Each megaton of carbon credited to Canada’s Kyoto balance sheet through any of these means is one less megaton of carbon that must be cut from the domestic emissions side of the ledger. Once lax restrictions on the use of flexibility mechanisms and American isolationism are added to this vital fact, Canada may honour its Kyoto commitment while seeing more GHG gases emitted from Canadian sources in 2010 than went into the atmosphere in 1990.²⁹ This probably does not mean that, in 2010, Canada’s GHG emissions will be greater than they are today. But, it does show there are options available to Canadian governments and corporations that may significantly reduce the size of domestic emissions cuts and the costs of compliance. This perspective merits more consideration in the debate over ratifying Kyoto than it has received so far.

Government Inaction and the Competitiveness Fallacy

To this point in time, Canada’s federal and provincial governments have not acted as if they took global warming seriously. In fact, despite President Bush’s refusal to embrace Kyoto, “governments in the U.S. have, in fact, taken far more significant action to reduce GHG emissions than have governments in Canada.”³⁰ Some will argue that this policy pattern, one highlighting niggling results, is justified by competitiveness concerns. According to this school of thought, corporate competitiveness will be crippled if governments forced industry - through regulation and/or taxation - to reduce greenhouse gas emissions. United States President George W. Bush, this position’s most powerful champion, used this logic to stitch together his rejection of the Kyoto Protocol. Implementing Kyoto would cost the American economy dearly: it would cost the economy up to \$400 billion and 4.9 million Americans would lose their jobs.³¹ Canadian opponents to Kyoto have followed Bush’s cue and portray ratifying Kyoto as a prescription for economic disaster. The Canadian Manufacturers & Exporters (CME) paint a bleak picture of life under Kyoto: 450,000 manufacturing jobs would be lost by 2010; Canadians would be forced to drive less (and, alas, in smaller cars); re-insulate their homes; pay up to 100 percent more for electricity and 80 percent more for gasoline; and pay more taxes.³² The Canadian

²⁸ Rubin, “Why Canada signing Kyoto is an empty gesture.”

²⁹ In fact, Böhringer concluded that, with the carbon sinks concessions from Bonn alone, Canada’s Kyoto emissions target went from 94 percent of 1990 levels (a 6 percent decrease) to 107.9 percent (a 7.9 percent increase). See Böhringer “Climate Politics from Kyoto to Bonn: From Little to Nothing?,” 56.

³⁰ Matthew Bramley with Kirsty Hamilton and Leslie-Ann Robertson, *A Comparison of Current Government Action on Climate Change in the U.S. and Canada*, (Pembina Institute for Appropriate Development and World Wildlife Fund, 2002), 1.

³¹ United States, Office of the Press Secretary to the President, “President Announces Clear Skies and Global Climate Change Initiatives,” 14 February 2002.

version of the competitiveness argument has been fuelled by the Bush administration's rejection of Kyoto.³³ The American decision, claims CME President and CEO Perrin Beatty, "creates a major competitiveness challenge for Canada and puts us in danger of losing sales and investment to competitors south of the border and to other countries. It is not a situation we can afford."³⁴ The American decision, combined with a Canadian strategy based on taxation and regulation, "would make Canadian industry less competitive, driving badly needed investments to other countries and ultimately shifting emissions out of Canada into countries that do not face strict targets under the Protocol."³⁵ The competitiveness gambit also figures prominently in the Alberta government's negative assessment of Kyoto's economic

impact. With Canada standing as the only North American jurisdiction still considering ratification, Alberta warns that a Canadian decision to ratify Kyoto without the participation of the Americans and the Mexicans "creates a real risk of decreased competitiveness, loss of investment, and loss of trade."³⁶

There is, however, a contrary and more optimistic view of the relationship between competitiveness, efficiency, and the strict environmental regulations Kyoto could demand. It insists the conventional belief in an inevitable conflict between environmental protection and competitiveness is a "false dichotomy."³⁷ On the contrary, there is "no evidence" that resource conservation measures such as energy efficiency standards damage the competitiveness of manufacturers in international markets.³⁸ Furthermore, strict environmental regulations do not necessarily erode a jurisdiction's competitive advantage; such regulations, by stimulating innovation and upgrading, actually may boost competitiveness.³⁹ Entertaining this alternative outlook is eased by recognizing there is little evidence to support the doomsayer's warnings that strict environmental regulations are ill winds compelling businesses to set sail for pollution havens. Corporate investment and relocation studies lend little support to the

32 Canadian Manufacturers & Exporters, "Pain Without Gain: Canada and the Kyoto Protocol," 27 February 2002, 1-2.

33 Of course, not everyone welcomed the Bush position. The Union of Concerned Scientists has commissioned public opinion polls purporting to show that 76 percent of likely American voters support government, not voluntary, action to reduce greenhouse gas emissions. See "U.S. voters want strict greenhouse gas cuts, says survey," Reuters News Service, 10 July 2002. In the U.S. Senate, the Environment and Public Works Committee has approved a measure that would require utilities to reduce their carbon dioxide emissions by 24 percent. Republican Senators vow that the carbon dioxide reductions will kill the bill's prospects of passage. See Eric Pianin, "Senate Panel Backs Bill to Curb Power Plant Pollution," *The Washington Post*, 28 June 2002, A5.

34 Canadian Manufacturers & Exporters, "Beyond Kyoto: A Healthy Environment, A Strong Economy," Speaking Notes for the Hon. Perrin Beatty, President and CEO Canadian Manufacturers & Exporters, 9 May 2002 (Calgary), 7-8.

35 *Ibid.*, 11. The same logic animates the position on Kyoto taken by the Canadian Association of Petroleum Producers (CAPP), the most powerful interest in the Canadian petroleum industry. According to CAPP, none of the Kyoto implementation options introduced by the federal government in its spring 2002 discussion paper "adequately addresses industry competitiveness." See Canadian Association of Petroleum Producers, "Technical Backgrounder: Background to CAPP Input to June 14th Workshop on Federal Climate Change Policy Options," 3.

36 Alberta, "Albertans and Climate Change: An Assessment of the Economic Impacts of the Kyoto Protocol," (February 2002), 4.

37 Michael E. Porter, "America's green strategy," *Scientific American*, Vol. 264, no. 4 (April 1991), 168.

38 Duncan Brack with Michael Grubb and Craig Windram, *International Trade and Climate Change Policies*, (London: Royal Institute for International Affairs/Earthscan Publications, 2000), 54.

39 Porter, "America's green strategy." A more elaborate expression of this argument is found in Michael E. Porter and Claas van der Linde, "Toward a New Conception of the Environment-Competitiveness Relationship," *Journal of Economic Perspectives*, Vol. 9, no. 4 (Fall 1995).

assumption that environmental regulations are important considerations in the minds of investors.⁴⁰ The plausibility that regulation may have this positive effect is furthered strengthened by accepting Porter and van der Linde's point that "the world does not fit the Panglossian belief that firms always make optimal choices"⁴¹ - a thought more may entertain in the wake of the spectacular blunders and scandals committed by firms like Enron and WorldCom.

Finally, for those who need corporate endorsement before recognizing an argument's legitimacy, consider the message delivered by British Petroleum Chief Executive John Browne to Stanford University's Graduate School of Business in the late winter of 2002. In 1997 BP accepted the logic underlying the Kyoto Protocol. Sensing that Kyoto's targets would one day be mandatory, BP sought to reduce its own 1990 level of GHG emissions by ten percent by 2010. Browne's Stanford speech announced that, eight years ahead of schedule, BP had reached that objective. By improving the efficiency of BP's operations, by adopting new technologies, and by better managing the company's use of energy, BP met its goal "at no net economic cost - because the savings from reduced energy inputs and increased efficiency have outweighed all the expenditure involved."⁴² BP's story is a good illustration of

how tackling GHG emissions may actually improve a company's competitive position. The Pew Center on Global Climate Change has found that improving corporate competitiveness has been one motivation for companies to look for ways of reducing their GHG emissions.⁴³

This alternative view on the regulation/competitiveness relationship is less categorical than the conventional wisdom. Whereas the conventional wisdom suggests that all environmental regulations damage competitiveness, the alternative does not suggest that all environmental regulations necessarily improve competitiveness. Porter and van der Linde outline three principles that environmental regulations must follow in order to stimulate innovation. They must let industry, not the regulator, select its preferred approach to innovation; regulations should encourage continuous improvements and should not demand that a particular technology be employed; as much uncertainty as possible should be taken out of the regulatory process.⁴⁴

40 Brack et al., *International Trade and Climate Change Policies*, 9; Pierre Marc Johnson and André Beaulieu, *The Environment and NAFTA: Understanding and Implementing the New Continental Law*, (Washington: Island Press, 1996), 45-46; some of these studies also are cited in Porter and van der Linde, "Toward a New Conception," 109.

41 Porter and van der Linde, "Toward a New Conception," 99.

42 John Browne, "Beyond Petroleum, Business and the Environment in the 21st Century," (speech by John Browne, Group Chief Executive, British Petroleum, hosted by Stanford Graduate School of Business, 11 March 2002), http://www.bp.com/centres/press/stanford/media_resources/speeches/index.asp

43 "Climate Change: Myths and Realities," Remarks of Eileen Claussen, President, Pew Center on Global Climate Change at Emissions Reductions: Main Street to Wall Street - "The Climate in North America," New York, New York, July 17, 2002. http://www.pewclimate.org/media/transcript_swiss-re.cfm

44 Porter and van der Linde, "Toward a New Conception," 110.

A Climate Change Smorgasbord: Policies To Reduce Greenhouse Gas Emissions

Against this background of greenhouse gas policy inactivity many proposals for action by Canadian governments have appeared. This section samples these proposals. It highlights recommendations from the International Energy Agency (IEA), the David Suzuki Foundation and the World Wildlife fund, the Pembina Institute for Appropriate Development (PIAD), and the Canadian Centre for Policy Alternatives.

International Energy Agency

The IEA policy recommendations, although sensitive to the climate change issue, are taken from the Agency's broader review of energy policies in Canada.⁴⁵ Depending upon the policy options ultimately selected and the amount of time allowed for compliance the economic costs of meeting Canada's Kyoto commitment were judged to be "potentially high."⁴⁶ Throughout its review the IEA displayed a clear preference for strengthening market mechanisms. This was certainly true of its recommendations pertaining to GHG emissions. As well, however, the Agency appreciated that the voluntary nature of most efforts sponsored by Canadian governments to improve energy efficiency, in a low energy price environment, "may not be sufficient to meet the present-day challenge of energy conservation and carbon dioxide emissions mitigation."⁴⁷ The Agency felt that, in the presence of low energy prices and strong

economic growth, the transition to a less energy-intensive economy would be unlikely to occur in the absence of economic incentives. Consequently, governments should consider measures such as heavier taxes on less fuel-efficient vehicles as well as other unspecified "selected fiscal incentives" in order to reduce GHG emissions.⁴⁸ The IEA also urged governments to extend additional support to renewable resources other than conventional hydropower. Here, governments should consider the incentives required to make solar, wind, small-scale hydro, and co-generation electricity producers commercially viable.⁴⁹ In this respect, the IEA was silent about the fact that Canada's renewable energy producers historically have received no more than a pittance from Canadian governments, especially when compared with the billions of dollars in subsidies received by Canada's petroleum producers.⁵⁰ Equalizing government support for these sectors would be one way to act on the Agency's concern. Finally, the IEA expressed its concerns about the cutbacks made to the energy research and development budgets of governments. It felt these cutbacks should be reconsidered and ways to increase spending should be pursued.⁵¹

48 Ibid., 69.

49 Ibid., 97.

50 In his 2000 Annual Report the Commissioner of the Environment and Sustainable Development reported that, between 1970 and 1999, direct federal spending on non-renewable energy amounted to \$40.4 billion compared to \$200 million on renewable energy. Energy efficiency received \$3.3 billion in total spending over this period. The Commissioner went on to note that today "the federal income tax treatment given to renewable and non-renewable energy investments is reasonably similar except for certain investments in energy efficiency, oil sands, coal mines and alternative fuels." See Canada, Report of the Commissioner of the Environment and Sustainable Development, 2000, 3-11, 3-20.

51 International Energy Agency, Energy Policies of IEA Countries: Canada 2000 Review, 132.

45 International Energy Agency, Energy Policies of IEA Countries: Canada 2000 Review.

46 Ibid., 9.

47 Ibid., 68.

David Suzuki Foundation/World Wildlife Fund (WWF)

Throughout the history of the climate change debate the David Suzuki Foundation has adopted one of the more aggressive stances on the need for Canada to make substantial reductions to the country's GHG emissions. In an effort to reclaim some of the territory claimed by Kyoto's opponents in the competitiveness debate, the Foundation joined the WWF and commissioned the Tellus Institute to study the issue.⁵²

The Tellus Institute focused its analysis on just seventeen measures from the hundreds proposed by the National Climate Change Process (NCCP), a policy package the Suzuki Foundation and WWF regarded as only "modest." The selected policies aimed to reduce GHG emissions in the building, transportation, waste management, electricity, and industrial sectors. Together, they would fulfill just over fifty percent of Canada's 2012 emission reduction target and deliver economic benefits as well. The building sector options selected included measures to improve the energy efficiency of buildings and their appliances/equipment, to offer favourable tax treatment for investments in energy-efficient equipment, and to offer incentives to increase the energy efficiency of new commercial buildings. Waste management practices should be altered to make use of the methane gas generated by landfills and to adopt "reduce, re-use, recycle, and compost" programs. Tellus considered two electricity sector proposals. They ask governments to develop a national cap and trade system for controlling GHG emissions from the electricity sector and to

insure that, by 2010, five percent of Canadian electricity would be supplied by so-called "clean" renewable sources. For industry, governments should stimulate the co-generation of heat and electricity and reduce methane emissions in the petroleum sector. The transportation proposals examined by Tellus included steadily increasing automobile fuel efficiency standards, speed limit enforcement, car sharing, mandatory ride sharing in firms with more than fifty employees, expanded public transit infrastructure and services, and subsidized inter-city bus services. Of the policies considered, these are likely to be the most controversial since they impact most directly upon the lifestyle encouraged by North America's love affair with the automobile.

Pembina Institute for Appropriate Development

Like the David Suzuki Foundation and the World Wildlife Fund, the Pembina Institute for Appropriate Development has been a prominent voice calling for governments to act on climate change. Since the signing of the Kyoto Protocol in 1997 Pembina has published a steady stream of GHG reduction policy recommendations. Many echo the recommendations offered by the IEA, the Suzuki Foundation, and the WWF. Here, we detail a very short list of policy options, options Pembina feels could improve the Canadian business community's competitiveness. One of the proposals Pembina endorses is creating a "cap and trade" emissions trading market similar to the sulphur dioxide emissions trading market incorporated by the United States in its Acid Rain Program (this program is found in amendments to the Clean Air Act in 1990).

⁵² Alison Baillie, Stephen Bernow, William Dougherty, and Benjamin Runkle, *The Bottom Line on Kyoto: Economic Benefits of Canadian Action*, (April 2002).

Under the American sulphur dioxide emission reduction program government ordered all American power plants to reduce their emissions of this pollutant in order to meet the annual emission ceiling (the cap) set by the federal government. The power plants were given the option of meeting their prescribed reductions through emissions trading if this mechanism made better business sense to power plant owners. "Under this program," wrote an environmental organization that championed this market-based mechanism, "each power plant can choose between various compliance alternatives, for example, using low-sulfur fuel, investing in energy efficient technologies, chemically removing sulfur from smokestack emissions, or acquiring allowances from other utilities that can make reductions more cost-effectively."⁵³

Pembina also argues that energy and carbon-use taxes also could be incorporated into a competitiveness-enhancing Kyoto implementation strategy. Importantly, this endorsement of environmental taxes does not necessarily demand an increase in the total taxation burden. Rather, Pembina seems to prefer the path taken by a handful of European countries, countries that have introduced new environmental taxes while reducing payroll and/or income taxes.⁵⁴ Britain's climate change levy offers one example of this approach. This levy on the non-residential use of carbon-based energy is estimated to have increased corporate energy

costs by an average of twelve percent.⁵⁵ But, by reducing employers' National Insurance taxes by 0.3 percent the government claims its new environmental tax has produced "no net gain to the public finances."⁵⁶ Finally, Pembina also endorses increased vehicle fuel efficiency standards and so-called "renewable energy portfolio standards" as policies that would lead to lower GHG emissions. Renewable portfolio standards require utilities to insure that a certain amount of their electricity is produced by low-impact renewable sources (the low-impact designation excludes conventional, large-scale hydro power facilities). Twelve American states have passed legislation requiring the production of low-impact renewable energy. No provincial government can make this claim. Perhaps the most significant law is found in Texas and was signed, ironically enough, by President Bush during his previous political incarnation as the Governor of Texas. By 2009, 2000 megawatts of renewable energy, ten times the level of wind resources in place or under construction in Texas in 1999, will have to be provided by the state's electricity providers.⁵⁷

53 Environmental Defense, *From Obstacle to Opportunity: How acid rain emissions trading is delivering cleaner air*, (Environmental Defense, 2000), 5. http://www.environmentaldefense.org/documents/645_SO2.pdf

54 Sylvie Boustie, Marlo Reynolds and Matthew Bramley, *How Ratifying the Kyoto Protocol Will Benefit Canada's Competitiveness*, (Pembina Institute for Appropriate Development, June 2002), 22-23.

55 Road fuel gas also exempted from this tax.

56 United Kingdom, Department of Environment, Food and Rural Affairs, *Climate Change: The U.K. Program (Section 2 "Delivering emission reductions,"* 72. <http://www.defra.gov.uk/environment/climatechange/cm4913/index.htm>

57 "Texas rounds up wind for power," *Environmental News Network*, 30 March 2001.



Canadian Centre for Policy Alternatives (CCPA)

The last set of proposals to be considered here is taken from Marshall's CCPA study, *Making Kyoto Work: A transition strategy for Canadian energy workers*.⁵⁸ The study proposes, in part, a "just transition" for the workers whose jobs in fossil fuel production and its associated industries are unquestionably at risk if Canada ratifies and implements Kyoto. Given the important profile of the Communications, Energy, and Paperworkers Union (CEP) in the energy sector, the need for a just transition has figured prominently in the union's thinking about climate change. The CEP asserts:

*Workers and their communities too often bear the brunt of changes required to protect the environment. This is fundamentally unfair. We need a JUST transition to sustainable development.*⁵⁹

The CEP Just Transition policy document lists a variety of measures that should be sponsored under the umbrella of a Just Transition program. These measures could include any or all of the following: education, retraining, relocation assistance, income protection for displaced workers, and preferential hiring for displaced workers in emerging "green" industries. Marshall, relying on the economic simulation models employed during the National Climate Change Process (NCCP), projects that up to 12,800 energy sector workers could be clients for a Just Transition program.⁶⁰ The cost of such a program is conservatively estimated at \$1.084 billion over ten years.⁶¹

⁵⁸ Dale Marshall, *Making Kyoto Work: A transition strategy for Canadian energy workers*, (Canadian Centre for Policy Alternatives, April 2002).

⁵⁹ Communications, Energy, and Paperworkers Union, "Policy 915," http://www.cep.ca/policies/economy_energy_e.asp

As the foregoing suggests, the debate surrounding how Canada could reach the GHG reduction target set by the Kyoto Protocol stars literally dozens, if not hundreds, of domestic policy proposals. In the next section we begin to look at the severity of the constraints that a variety of political institutions offer policy makers who would like to move Canada closer to fulfilling this country's Kyoto GHG reduction commitments. Three institutional arrangements concern us: Canadian membership in the World Trade Organization (WTO), the North American Free Trade Agreement (NAFTA), and Canadian federalism. The implications of the WTO first occupy our attention.

The WTO and Kyoto: Can They Be Accommodated?

If there is a standard view of the hospitality of a liberal trade regime, as institutionalized in the WTO, to environmental concerns it might be captured in the phrase "sustained resistance."⁶² Writing in 1999, von Moltke argued that the WTO's Committee on Trade and Environment had been a "big disappointment" and that "environment remains part of the window-dressing rather than a significant concern within the trading system."⁶³ For Carl Pope, executive director of the Sierra Club, the WTO is likely to frown upon any environmental

⁶⁰ The modeling scenario selected by Marshall assumes that Canada, but not the United States, implements Kyoto. The projected job losses by energy sub-sector are: coal (1,700), petroleum and natural gas (400), gas utilities (6,600), and petroleum and coal products (1,400). See Marshall, *Making Kyoto Work*, 41.

⁶¹ *Ibid.*, 48-49.

⁶² Konrad von Moltke, "Trade and the environment: the linkages and the politics," Paper for the Roundtable on Trade and the environment, Canberra, 25 August 1999, 2.

subsidies. Its doctrines and rules “constitute a trade-driven regime that elevates material consumption and the interests of multinational producers above such values as the ecological heritage of future generations.”⁶⁴ For those who worry that the WTO is crippling state sovereignty, Maude Barlow - arguably Canada’s most passionate and articulate nationalist - paints a frightening picture. She characterizes the General Agreement on Trade in Services (GATS) in the following way:

*Essentially, the GATS is mandated to restrict government actions in regards to services through a set of legally binding constraints backed up by WTO-enforced trade sanctions. Its most fundamental purpose is to constrain all levels of government in their delivery of services and to facilitate access to government contracts by transnational corporations in a multitude of areas, including health care, hospital care, home care, dental care, child care, elder care, education (primary, secondary and postsecondary), museums, libraries, law, social assistance, architecture, energy, water services, environmental protection services, real estate, insurance, tourism, postal services, transportation, publishing, broadcasting and many others.*⁶⁵

Government as the handmaid to transnational corporations, this is Barlow’s picture of life in the WTO’s liberal international trade regime.

⁶³ Ibid., 10, 12. Brack, Grubb, and Windram also conclude that the Committee on Trade and Environment has not been successful in resolving the conflict between trade and environment. See Brack et al., *International Trade and Climate Change Policies*, 20.

⁶⁴ Carl Pope, “Race to the Top: The Biases of the WTO Regime,” *Harvard International Review*, Winter 2002, 66.

As previously alluded to, however, some corporations, including transnationals, are taking actions to reduce their own GHG emissions and want government action on climate change.⁶⁶ A few of these corporations, American corporations that want the United States to reconsider its rejection of Kyoto might be regarded as “WTO optimists.” They foresee the possibility that the WTO may be used to punish those countries and their corporations that do not ratify. DuPont, for example, has suggested that, if the United States remains outside of Kyoto, America’s trading partners might turn to the WTO and demand action against American exports on the grounds that operating outside Kyoto may create unfair competitive advantages over the signatories to the Protocol.⁶⁷

Another suggestion is that Article XX of the GATT could be used to impose trade sanctions, such as import restrictions, against countries that turn their backs on Kyoto and exhibit a cavalier attitude towards the greenhouse gas threat. Article XX allows WTO members to adopt or enforce any measure “necessary to protect human, animal, or plant

⁶⁵ Maude Barlow, “The Free Trade Area of the Americas and the Threat to Social Programs, Environmental Sustainability and Social Justice in Canada and the Americas,” (2001), 7. <http://canadians.inline.net/documents/campaigns-ftaa-threat-barlow.pdf>

⁶⁶ Some companies who recognize the need to take action on global warming have joined the Pew Center’s Business Environmental Leadership Council. Two Canadian firms, TransAlta and Ontario Power Generation, may be counted among the thirty-eight companies participating in the Council in June 2002. See “SC Johnson Joins Effort to Mitigate Climate Change - Pew Center’s Business Environmental Leadership Council Climbs to 38 Members,” Press Release, 24 June 2002. <http://www.pewclimate.org/media/press.cfm>

⁶⁷ Neil Franz, “Kyoto Pressure Will Mount for U.S.,” *Chemical Week*, Vol. 164, issue 14 (April 3, 2002), 36. Some American transnationals such as DuPont are eager to participate in an international emissions trading system, an option requiring American ratification of Kyoto. See Neil Franz and Alex Scott, “Firms at Odds with Bush,” *Chemical Week*, Vol. 163, issue 29 (August 1, 2001), 7

life or health” or any measure “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”⁶⁸ Such actions cannot, however, constitute arbitrary or unjustifiable discrimination against WTO members nor may such actions be disguised trade restrictions. Kass and McCarroll speculate that European nations could use this article of the GATT to ban imports of American products such as sport utility vehicles since such action would be designed to further a legitimate environmental objective - the Climate Change Convention.⁶⁹

The outcomes of two disputes about the trade impact of environmental protection measures handled by the WTO’s dispute settlement process lend plausibility to this scenario. In the United States - Gasoline Standards case and the Shrimp/Turtle case, American air quality regulations and measures to protect the endangered sea turtle, were challenged. In the United States - Gasoline Standards case, Venezuela and Brazil successfully argued that the approach taken by the Environmental Protection Agency (EPA) to set gasoline cleanliness standards discriminated unfairly against imported gasoline. But, in affirming this WTO panel conclusion the WTO Appellate Body adopted a very different logic and made it very clear that it did not question the legitimacy of the United States Clean Air Act. Rather, its quarrel rested with how the Act was implemented. The EPA’s rules for imported gasoline were harsher than those for gasoline produced by refineries in the United States.⁷⁰ As the EPA noted, the WTO decision “fully recognized a country’s

right to adopt appropriate measures to protect public health and the environment.”

Furthermore, the decision identified clean air as an exhaustible natural resource and established that clean air conservation measures were legitimate under the terms of Article XX(g) of the GATT.⁷¹

The dispute in the Shrimp/Turtle case centred on American efforts to force foreign shrimp trawling fleets to modify their trawls as American shrimp boats operating in areas frequented by sea turtles were required to do. The objective of this extraterritorial regulatory initiative was to reduce the significant, incidental mortality of sea turtles caused by trawling for shrimp. Section 609 of this law imposed a ban on shrimp and shrimp product imports from countries that did not follow the fishing gear modifications made by the American fleet.

The American ban was challenged by India, Malaysia, Pakistan, and Thailand. The WTO panel agreed with the complainants and rejected the American claim that this trade restriction could be justified by the exception found in Article XX(g) “relating to the conservation of exhaustible natural resources.” Upon appeal the Appellate Body upheld the panel’s decision but, as in the United States - Gasoline Standards case, used a logic that was much more hospitable to environmental protection and conservation goals. Here, the Appellate Body endorsed the possibility that trade sanctions may be used as legitimate environmental protection measures since it agreed with the United States that the challenged regulation was focused upon

⁶⁸ Article XX, paragraphs (b) and (g).

⁶⁹ Stephen L. Kass and Jean M. McCarroll, “Standing Alone on Climate Change,” *New York Law Journal*, January 4, 2002.

⁷⁰ World Trade Organization, Appellate Body - United States - Standards for Reformulated and Conventional Gasoline - AB-1996-1 - Report of Appellate Body, 29 April 1996.

⁷¹ World Trade Organization, United States - Standards for Reformulated and Conventional Gasoline, Status Report by the United States, 10 January 1997, 3.

realizing a legitimate environmental objective:

*The means are, in principle, reasonably related to the ends. The means and ends relationship between Section 609 and the legitimate policy of conserving an exhaustible, and, in fact endangered species, is observably a close and real one, a relationship that is every bit as substantial as that which we found in United States – Gasoline between the EPA baseline establishment rules and the conservation of clean air in the United States.*⁷²

In principle Section 609 was “an even-handed measure.” It fell squarely within Article XX(g). But, discrimination may arise when even-handed measures are applied unfairly. Arbitrary and unjustifiable discrimination may result from the manner in which a ban is implemented. This was the rationale the Appellate Body used against the American law. The application of Section 609, not its substance, produced unjustifiable and arbitrary discrimination.⁷³

It is important to note that the WTO did not demand that the United States revoke its law on sea turtle conservation; it instead asked the United States to show more flexibility when evaluating the comparability of foreign sea turtle conservation programs and to insure that foreign governments had genuine opportunities to participate in American deliberations concerning the imposition of shrimp/shrimp product import bans. The United States accepted these recommendations and rulings and altered its regulatory regime accordingly. The United States also redoubled its efforts to negotiate a sea turtle protection

agreement with the countries whose fleets fished the Indian Ocean.⁷⁴ These actions did not impress Malaysia. The Malaysians requested that the original WTO panel be reconvened and that it find that the United States, by maintaining its shrimp import ban, had not complied with the findings of the Dispute Settlement Body.⁷⁵ The original panel rejected Malaysia’s appeal. The continuation of the American shrimp import ban was justified because the Americans had revised their regulatory regime and were trying to negotiate a multilateral sea turtle conservation agreement.⁷⁶

How do these WTO trade dispute outcomes speak to the Canadian ratification and implementation of the Kyoto Protocol? First and most generally, these decisions are important for what they may say about an important evolution in the WTO’s perspective towards environmental conservation and protection. While history demands that we be wary of the WTO’s fidelity to environmental conservation, these decisions suggest that WTO dispute settlement bodies have “established the principle that trade rules do not stand in the way of legitimate environmental regulation.”⁷⁷ Or, as Hoberg bluntly puts it, “environmental criticisms are

⁷² World Trade Organization, United States - Import Prohibition of Certain Shrimp and Shrimp Products - Report of the Appellate Body, 12 October 1998, 53.

⁷³ *Ibid.*, 63-76.

⁷⁴ World Trade Organization, United States - Import Prohibition of Certain Shrimp and Shrimp Products - Status Report by the United States, 15 July 1999.

⁷⁵ World Trade Organization, United States - Import Prohibition of Certain Shrimp and Shrimp Products - Recourse by Malaysia to Article 21.5 of the DSU, 13 October 2000.

⁷⁶ This panel decision was upheld by the Appellate Body in October 2001. See World Trade Organization, United States - Import Prohibition of Certain Shrimp and Shrimp Products - Recourse to Article 21.5 of the DSU by Malaysia - AB-2001-4 - Report of the Appellate Body, 22 October 2001.

⁷⁷ Michael M. Weinstein and Steve Charnovitz, “The Greening of the WTO,” *foreign Affairs*, vol. 80, no. 6 (November/December 2001), 147.

exaggerated. Trade agreements leave far more room for domestic environmental measures than is frequently argued.”⁷⁸ None of this should be taken to imply that the rules of the world trading system should not be made more sensitive to environmental concerns - a point we return to in our recommendations.

Second, these disputes may offer an interesting twist to the Canadian debate about the trade consequences associated with the wisdom of ratifying Kyoto. Kyoto’s opponents have controlled this terrain until now. But, the failure of Malaysia’s appeal to both the original shrimp/turtle panel and the Appellate Body signaled the WTO’s willingness to tolerate trade sanctions used in the name of protecting endangered global common property resources. In order for such a ban to stand, a nation’s regulatory measures must be clearly connected to the environmental objective, non-discriminatory, implemented transparently, non-prescriptive in respect to technology-specific standards, and a last resort adopted only after genuine efforts to negotiate multilateral agreements have failed.⁷⁹ To return to Kass and McCarroll’s point, WTO members who balk at ratifying Kyoto may face damaging trade repercussions.

Finally, as just alluded to, these decisions underline the crucial importance of policy design questions. Carefully crafted initiatives may serve two masters: a liberal trade regime and GHG emission reductions. This attention to policy design figures prominently in studies published by the International Institute for Sustainable Development (IISD) and the Royal Institute of International Affairs (RIIA). During the turbulent WTO Ministerial

meetings in Seattle these bodies sponsored a seminar examining the potential for conflict between GHG reduction policies and WTO trade rules. Although the seminar identified “serious potential problems in the interface between the WTO rules and the implementation of the Kyoto Protocol” it concluded that careful policy design made it possible to avoid them.⁸⁰

Government incentives to increase the use of renewable energy would likely be considered subsidies under the WTO’s Agreement on Subsidies and Countervailing Measures (SCM). Since such measures would target a specific sector or industry they would clearly be governed by this Agreement. However, as long as the subsidies were neither export promoting nor demonstrated to harm a foreign competitor they would not violate the SCM. “The key question to bear in mind when designing such programs is,” according to the IISD/RIIA seminar summary, “do the subsidies impair the market share of a competing foreign producer?”⁸¹ Care must be taken to minimize this possibility. The adoption of higher energy efficiency standards - for automobiles, buildings, and appliances - figured prominently in the earlier discussion of possible implementation measures. Here WTO members may set whatever level of environmental protection they desire. If governments want a zero-risk environment, they are entitled to adopt trade restrictions to uphold those standards as long as they can offer sufficient scientific evidence to justify the zero-risk option.⁸² Again, such standards must be non-discriminatory; they must not favour domestic actors and punish foreign companies or they could be challenged under the terms of

⁷⁸ George Hoberg, “Trade, Harmonization, and Domestic Autonomy in Environmental Policy,” *Journal of Comparative Policy: Research and Practice*, Vol. 3, no. 2 (August 2001), 192.

⁷⁹ *Ibid.*, 207.

⁸⁰ Aaron Cosby, “The Kyoto Protocol and the WTO,” seminar note, no date. <http://www.iisd.org/pdf/kyoto.pdf>

⁸¹ *Ibid.*, 4.

the WTO's Technical Barriers to Trade Agreement (TBT). As Brack et al. observe, it's hard to imagine any environmental reason for applying energy efficiency standards in a discriminatory manner.⁸³

In respect to taxes, heavier taxes on less fuel-efficient vehicles, as long as there was no discrimination against foreign-produced vehicles, would be unlikely to spark a WTO dispute.⁸⁴ Carbon taxes would be a more controversial and more problematic option in the context of the WTO. A carbon tax is a tax set according to the amount of carbon used to produce a particular good. It would be particularly damaging to energy intensive industries such as the Canadian oilsands, smelting, and chemical sectors. If the goods subject to a carbon tax are traded

internationally this type of tax arguably could be doubly or triply damaging:

*If foreign goods do not face the same taxes, then a unilateral carbon tax only has the effect of giving away market share of domestic business to their foreign competitors, both at home and abroad. And, in the end, global carbon emissions may be unaffected - only the names of the emitting countries would change.*⁸⁵

Border Tax Adjustments (BTAs) could temper these damaging market share/global carbon emissions consequences of a carbon taxation system.⁸⁶ First, imported energy-intensive goods would be taxed at the border as if they had been produced domestically. Second, energy-intensive goods exported abroad would receive a refund of the carbon taxes they paid. Clearly, these import taxes or export rebates are barriers to trade. Would they be tolerated in the multilateral trading regime supervised by the WTO? A definitive answer cannot be offered. According to one analysis of BTAs and the WTO system, "it would appear that BTAs relating to production processes are only allowable if they are applied to inputs that are physically incorporated."⁸⁷

82 This conclusion is taken from the WTO's handling of the Beef Hormones and Australian Salmon cases. See Hoberg, "Trade, Harmonization, and Domestic Autonomy in Environmental Policy." This position was reiterated in the Appellate Body's report on the dispute between Canada and the European Communities over France's ban against Canadian asbestos imports. The decision upheld the ban since France's decision to halt the spread of asbestos-related health risks was based on scientific evidence demonstrating the carcinogenicity of chrysotile asbestos. The import ban was upheld. See World Trade Organization, European Communities - Measures Affecting Asbestos and Asbestos-Containing Products - Report of the Appellate Body, 12 March 2001.

83 Brack et al., International Trade and Climate Change Policies, 52. It is unclear how the WTO's TBT would regard the propriety of environmental standards and any trade measures taken to support them. In the Asbestos Case the Appellate Body ruled that the French decree banning Canadian asbestos imports was a technical regulation. It also ruled that the decree was justified under the human health protection exception. But, it did not rule on Canada's claim that the decree violated four provisions of Article 2 of the TBT. These provisions stipulated that regulations: should not discriminate between like products (2.1), should be no more trade-restrictive than necessary (2.2), should use international standards if effective and appropriate (2.4), and should be based on product performance requirements and not on design or descriptive characteristics (2.8). Since the original panel did not examine these claims the Appellate Body lacked the factual basis needed to consider the Canadian claim.

84 In the so-called CAFE dispute of 1993-94 European complaints against a "gas-guzzler" tax imposed by the United States on vehicles that got less than 22.5 miles per gallon were dismissed. Since the tax applied to both domestic and imported vehicles it complied with the GATT.

85 Cosbey, "The Kyoto Protocol and the WTO," 4.

86 A Government of New Zealand study concluded: "Border tax adjustment ensures that domestic industries remain internationally competitive." See Jim Sinner, "Addressing Competitiveness Impacts of Climate Change Policies," A report to the Ministry of Economic Development, New Zealand, February 2002, 17. Available at <http://www.med.govt.nz/ers/environment/climate/competitiveness/competitiveness.pdf>

87 Brack et al., International Trade and Climate Change Policies, 87.

Therefore, where the carbon utilized is not physically present in the final product - as would be the case for carbon-based energy that was only consumed or emitted during production - BTAs would seem to run afoul of WTO rules.⁸⁸ It will be up to some future dispute settlement panel to settle the question unless institutional changes are made to the multilateral trading system.

National and international emissions trading systems also figure significantly in discussions of how Kyoto's targets may be met. The potential for emissions trading to conflict with the multilateral trading system is, in part, definitional. Will the emission reduction units that Annex I countries will trade be treated as goods or services by the WTO? If these units are treated as goods they may violate the most-favoured-nation principle because WTO members who are not included in Annex I would be discriminated against - they are not included in the international emissions trading regime sketched out in Article 17 of the Kyoto Protocol. But, if these units are regarded as services they would fall under the General Agreement on Trade in Services (GATS), not the GATT. This second scenario would be unlikely to conflict with the WTO if all financial institutions from all WTO members (including countries such as the United States that will not be governed by the Protocol) were allowed to handle the trades of the emission reduction units between Annex I countries.⁸⁹

⁸⁸ Ibid., 85-90. A more optimistic view of the likely fit between BTAs applied to energy consumed or emitted during production is offered in J. Andrew Hoerner, "The Role of Border Tax Adjustments in Environmental Taxation Theory and U. S. Experience," (1998) available at <http://www.SustainableEconomy.org/bta.pdf> Sinner shares this view. See Sinner, "Addressing Competitiveness Impacts of Climate Change Policies," 17-21.

Barring any changes to the world trading system supervised by the WTO, the ultimate conformity between a multilateral environmental agreement (like Kyoto), the sorts of GHG emissions reductions options highlighted here, and the WTO will rest in the hands of WTO dispute settlement bodies. The record to this point in time might offer some optimism. "So far," notes the WTO, "no measure affecting trade taken under an environmental agreement has been challenged in the GATT-WTO system."⁹⁰ Of course, this record neither guarantees that future challenges will not be forthcoming nor that settlement bodies will look favourably on environmental trade measures. However, the measures identified in this paper, if designed in a careful, non-discriminatory manner, are likely to survive any trade challenges brought against them. A scarcity of domestic political will, not the WTO, presents a more serious threat to these GHG emissions reduction options.

One dimension of a coherent Kyoto implementation strategy - workforce adjustment or Just Transition - has been ignored to this point. Does the WTO pose a more or less serious threat to the type of policies governments would include in a comprehensive, Just Transition program? Referring once again to the position on workplace adjustment articulated by the

⁸⁹ At an OECD/IEA workshop on emissions trading under Kyoto Jacob Werksman suggested that "emissions allowances are government permits or licences to emit, and would not, themselves, qualify as either products or services under the WTO (but the services associated with trading of AAUs may be a "service" within the meaning of the WTO)." Any rules pertaining to the transfers, acquisitions, or trading of those allowances would not violate, therefore, WTO prohibitions on trade bans. See Organization for Economic Co-operation and Development and International Energy Agency, "Joint Implementation and International Emissions Trading Under the Kyoto Protocol: Workshop Report," 19 November 1999. Available at <http://www.oecd.org/pdf/M00006000/M00006931.pdf>

Communications, Energy and Paperworkers Union (CEP), a Just Transition could include any or all of the following: education, retraining, relocation assistance, income protection for displaced workers, and preferential hiring for displaced workers in emerging “green” industries.

On the one hand, many of these measures are consistent with the “active” labour market programs countries increasingly have adopted in their efforts to restructure their domestic economies and cope with the disruption accompanying global economic changes. This is especially true in respect to education and training programs.

On the other hand, some fear that, although globalization may demand active labour market policies, trade agreements like the NAFTA, GATT, and GATS shackle governments. They sap the sovereignty of nation states. By robbing states of their sovereignty, contemporary trade agreements severely restrict their freedom of action. According to worse case scenarios of economic integration, distinctive - and generous - social programs either will vanish or become impossible to introduce. Social policies will converge. And, of crucial importance to working people, this convergence will not be benign. Social programs, taking their cue from the mantra of economic competitiveness, will be niggardly. Trade agreements will be used to attach social policies as subsidies that should either be eliminated or compensated for. This logic invites us to consider whether or not the types of measures resting at the heart of a Just Transition program would be vulnerable in this environment.

The provisions of the GATS seem to offer protection to the type of policy initiatives suggested by the CEP’s Just Transition policy. Both the preamble to the Agreement and Article XIX state that liberalization shall grant “due respect for national policy objectives.”⁹¹ As Canada approached a new round of GATS negotiations, the federal government identified the following as one of its objectives:

*To preserve the ability of Canada and Canadians to maintain or establish regulations, subsidies, administrative practices or other measures in sectors such as health, public education, and social services.*⁹²

Again, if this position is maintained and future negotiations do not dilute the “respect for national policy objectives” it would appear that a Just Transition program would not be threatened by the GATS.

⁹⁰ World Trade Organization, “The Doha Declaration explained,” Available at http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm

⁹¹ World Trade Organization, General Agreement on Trade in Services, accessed at http://www.wto.org/english/tratop_e/serv_e/gatsintr_e.htm

⁹² World Trade Organization, “Communication from Canada - Canadian Initial GATS Sectoral/Modal/Horizontal Negotiating Proposals,” (S/CSS/W/46), 14 March 2001.

The NAFTA and Kyoto

Let us now turn and consider the extent to which the Kyoto implementation policies identified above are likely to survive any potential challenges under the NAFTA. In respect to a Just Transition program, Annex II of the NAFTA reserved for Canada “the right to adopt or maintain any measure” pertaining to a variety of social services “established or maintained for a public purpose.” The following services are covered by this declaration: income security or insurance, social security or insurance, social welfare, public education, public training, health and child care. As long as Canada does not relinquish this right, the NAFTA likely will tolerate the range of social policies needed to realize a Just Transition.

These brief looks at the substance of a Just Transition program in the context of Canada’s GATS/NAFTA commitments and positions offer an important reminder. It would be a mistake to assume, by definition, that economic integration and trade agreements lead to an unhealthy, or lowest common denominator, social policy convergence between countries such as Canada and the United States. Policy analyst Keith Banting’s comments are instructive:

*Although international pressures on the state have clearly grown, narrowing the autonomy of national states in a palpable way, it is important to avoid determinist interpretations. Each nation must adjust to powerful pressures emanating from the global economy, but the global economy does not dictate the way in which each country responds. Policy is also shaped by domestic politics. . . .*⁹³

When policy convergence, harmful or otherwise, occurs between countries we must

realize that domestic political pressures, as well as or instead of, trade agreements may be responsible. Conceivably, domestic political forces and considerations may bear the lion’s share of the responsibility. For example, in the 1990s Canadian unemployment insurance policy became more like American unemployment policy. But, the domestic obsession with deficit reductions - not the demands of the NAFTA - led to Canadian UI benefit reductions. And, on a more positive note the federal government retained the fishermen’s benefit in the changes made to UI in 1991 because of another domestic political pressure - regional economic disparities. The retention of the fishermen’s benefit, a longstanding irritant in Canada-U.S. trade relations, may also signal that regionally differentiated treatment, if warranted, could be incorporated into a Just Transition program. If sufficient domestic political support could be mustered, a version of Just Transition offering more generous transition provisions for workers in one region of the country (such as workers in Alberta’s oilsands) than in other regions would seem quite feasible.

From Just Transition we now turn to consider NAFTA’s hospitality to the range of energy policy options outlined earlier. Given the cross-pollination between the WTO and NAFTA many of the conclusions offered in the previous examination of the WTO’s hospitality to implementing Kyoto may be extended to this look at the relationship between Kyoto and NAFTA. However, we also must remember that NAFTA tries to create a more liberal economic environment for

⁹³ Keith Banting, “The Social Policy Divide,” in Keith Banting, George Hoberg, and Richard Simeon (ed.), *Degrees of Freedom: Canada and the United States in a Changing World*, (Toronto: McGill-Queen’s University Press, 1997), 309.

Canada, Mexico, and the United States than is available to these countries through the WTO.⁹⁴ To the extent that trade liberalization threatens a country's ability to regulate on behalf of the environment, NAFTA may pose a larger threat than the WTO to Kyoto implementation policies.

Several chapters of NAFTA merit close attention in trying to gauge the constraints this trade agreement may place on efforts to implement Kyoto. They are: Chapter Nine (standards-related measures), Chapter Eleven (investment), and Chapter Six (energy and basic petrochemicals).

The standards-related measures chapter is analogous to the WTO's Technical Barriers to Trade (TBT) Agreement. Earlier we noted that it is unclear how the type of environmental standards Canada could adopt to implement Kyoto would fare in the context of the TBT Agreement. There is no case law on the agreement to use as a signpost on this issue.⁹⁵ Under NAFTA most of the environmental regulations with implications for trade between Canada, Mexico, and the United States will fall under Chapter Nine, a fortunate circumstance given the chapter's "unprecedented permissiveness to most environmental standards-related measures."⁹⁶ This chapter gives these countries the right to adopt any standards-related measure relating to environmental safety or protection and to set their environmental protection levels

wherever they feel appropriate.⁹⁷ Moreover, unlike the TBT Agreement or NAFTA's chapter on agriculture, sanitary, and phyto-sanitary measures (Chapter Seven), Chapter Nine does not require countries to use risk assessments to defend their chosen standards and levels of environmental protection. Countries may conduct risk assessments to support a legitimate objective such as environmental protection - they are not required to do so.⁹⁸ The more permissive environment created in Chapter Nine leads Johnson and Beaulieu to conclude that, as long as standards-related measures respect NAFTA's national treatment provisions, do not raise unnecessary obstacles to trade, and are related to environmental protection, they are likely to survive trade challenges. Stricter emission standards, heavier taxes on less fuel efficient vehicles, or tougher energy efficiency standards would all seem likely to pass these tests.

As friendly as Chapter Nine might be to environmental regulations generally and to Kyoto implementation measures specifically, some fear these gains will become ephemeral because of NAFTA's Chapter Eleven - the investment chapter. Since NAFTA took effect Chapter Eleven has been the most contentious section of NAFTA for those who support strong environmental protection measures. Mann makes this point emphatically: "Chapter 11 can undermine efforts to enact new laws and regulations in the public interest, in particular to protect the environment and human health."⁹⁹ It arguably plays this corrosive role by sending a regulatory chill

⁹⁴ Maureen Appel Molot, "NAFTA Chapter 11: An Evolving Regime," 4, a paper presented at the NAFTA Chapter 11 Conference, 18 January 2002, Carleton University, available at <http://www.carleton.ca/ctpl/chapter11/>

⁹⁵ Gary Horlick, Christiane Schuchhardt, and Howard Mann, *NAFTA Provisions and the Electricity Sector*, (Montréal: Commission for Environmental Cooperation of North America, 2002), 18.

⁹⁶ Johnson and Beaulieu, *The Environment and NAFTA*, 87, 94.

⁹⁷ North American Free Trade Agreement, Article 904.1, 904.2

⁹⁸ North American Free Trade Agreement, Article 907.1. The language of Article 2.2 of the Agreement on Technical Barriers to Trade is more categorical in respect to risk assessments. It reads, in part: "In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products."

through governments. The generous treatment of foreign investors and their investments outlined in this Chapter are thought to intimidate governments, making regulators afraid of introducing environmental measures because corporations are likely to challenge their regulations successfully.¹⁰⁰ For environmental regulations, the greatest threat rests with several “substantive” articles found in Section A of the Chapter as well as in the investor-state dispute settlement process outlined in Section B. We first consider NAFTA’s investor-state dispute settlement process.

A path-breaking feature of NAFTA, one that strengthens foreign investors vis-à-vis governments, concerns “standing” - the issue of who is permitted to initiate NAFTA’s dispute settlement process. In the GATT only governments have the right to launch a case before the WTO’s dispute settlement bodies. NAFTA extends this right to foreign citizens and corporations.¹⁰¹ Imagine the opportunities this creates for an American company, for example, an American energy company, with investments in Canada. This company could kick-start the dispute settlement process if it felt sufficiently damaged by federal or provincial measures. A Canadian government could find itself embroiled in a dispute if it treated this foreign

investor differently from Canadian investors (Article 1102: National Treatment) or differently than required by international law (Article 1105: Minimum Standard of Treatment) or forced the foreign investor to meet certain performance requirements such as transferring technology (Article 1106: Performance Requirements). Our imaginary energy company, after first attempting to settle its claim through consultation or negotiation, then may unilaterally initiate a binding arbitration process against the Canadian government.¹⁰²

When it comes to environmental protection, some of the substantive investment provisions in Section A are more threatening than others. Regulations genuinely aimed at environmental protection would seem to have no sound reason to discriminate based on the nationality of investors.¹⁰³ Consequently, the Chapter Eleven articles prohibiting discrimination between domestic and foreign investors (Articles 1102, 1103, and 1104) are not particularly worrisome. More serious concerns have been raised though in respect to two other articles in Section A: Article 1105 (Minimum Standard of Treatment) and Article 1110 (Expropriation and Compensation). Article 1105 requires NAFTA parties to treat the investments of foreign investors “in accordance with international law, including fair and equitable treatment

⁹⁹ Howard Mann, *Private Rights, Public Problems: A guide to NAFTA’s controversial chapter on investor rights*, (Winnipeg: International Institute for Sustainable Development, 2001), 1.

¹⁰⁰ *Ibid.*, 33-34. For an argument refuting the emergence of regulatory chill see Michael M. Hart and William A. Dymond, “NAFTA Chapter 11: Precedents, Principles, and Prospects,” a paper presented at the NAFTA Chapter 11 Conference, 18 January 2002, Carleton University, <http://www.carleton.ca/ctpl/chapter11/>

¹⁰¹ Article 1139 defines an investor as “a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment.”

¹⁰² Christopher Wilkie, “The Origins of NAFTA Investment Provisions: Economic and Policy Considerations,” a paper presented at the NAFTA Chapter 11 Conference, 18 January 2002, Carleton University, <http://www.carleton.ca/ctpl/chapter11/>

¹⁰³ This may be seen in respect to Chapter 11’s performance requirements provisions. Article 1106.2 modifies the prohibition against setting performance requirements in order to allow any “measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements.” But, any such measure must apply to domestic, as well as, foreign investments.

and full protection and security.” The concern environmentalists raised was that NAFTA tribunals would broadly interpret the phrase “international law.” Since the sources of international law are many, environmental measures would violate Article 1105 if tribunals were persuaded that the measures violated an international treaty, custom, judicial decision, or other article of NAFTA the tribunals felt should be covered by the minimum international standards umbrella.¹⁰⁴ Canada, Mexico, and the United States shared this concern about the wide meaning tribunals might ascribe to international law. In July 2001 they acted through the Free Trade Commission and “clarified” what international law meant for the purposes of Chapter Eleven. International law was only customary international law; fairness, equity, protection, and security should be considered only in the context of due process; a breach of another NAFTA article or another international treaty did not establish that a breach of Article 1105 had taken place.¹⁰⁵ Whether or not this clarification was an interpretation or an amendment to Chapter Eleven, the IISD feels that it has repaired the

¹⁰⁴ The sources of international law are outlined in Article 38.1 of the Statute of the International Court. They are: “a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.” Article 59 reads: “The decision of the Court has no binding force except between the parties and in respect of that particular case.” See <http://www.un.org/Overview/Statute/contents.html>

¹⁰⁵ Canada, Department of Foreign Affairs and International Trade, “Pettigrew welcomes NAFTA Commission’s Initiatives to Clarify Chapter 11 Provisions,” news release, 1 August 2001, http://webapps.dfait-maeci.gc.ca/minpub/Publication.asp?FileSpec=/Min_Pub_Docs/104441.htm&bPrint=True&Language=E

key problem in Article 1105.¹⁰⁶

The most serious remaining environmental concerns centre on Chapter Eleven’s expropriation and compensation article (Article 1110). The ambiguous language of Article 1110, like that of Article 1105, fuels concerns about regulatory chill.¹⁰⁷ NAFTA negotiators, unable to agree on precise definitions for concepts like “indirect expropriation” and “tantamount to nationalization or expropriation,” left it to NAFTA tribunals to decide what, if anything, distinguishes one concept from the next. The concern is that the adjective “tantamount” opens the door for tribunals to find that environmental regulations, by affecting the profitability of business, should be seen as the equivalents of the confiscatory taxes international law usually associates with indirect expropriation.¹⁰⁸ To this point in time, tribunal decisions have approached the questions conservatively; they have viewed “tantamount” as equivalent to indirect expropriation and have found it unlikely that regulatory acts constitute expropriation.¹⁰⁹ But, precedent does not bind NAFTA tribunals. They do not have to follow rulings made by their predecessors. Concerns linger

¹⁰⁶ International Institute for Sustainable Development, “Note on NAFTA Commission’s July 31, 2001, Initiative to Clarify Chapter 11 Investment Provisions,” http://www.iisd.org/pdf/2001/trade_nafta_aug2001.pdf The tribunal established in *Pope and Talbot Inc. v. Government of Canada* believes that this decision by the Free Trade Commission is actually an amendment to NAFTA. See *In the Matter of an Arbitration Under Chapter Eleven of the North American Free Trade Agreement - Award in Respect of Damages by Arbitral Tribunal*, 31 May 2002, para. 47. http://www.dfait-maeci.gc.ca/tna-nac/damage_award.pdf

¹⁰⁷ Mann, *Private Rights, Public Problems*, 30-33.

¹⁰⁸ This understanding of indirect expropriation is taken from J. Anthony VanDuzer, “NAFTA Chapter 11 to Date: The Progress of a Work in Progress,” 32, a paper presented at the NAFTA Chapter 11 Conference, 18 January 2002, Carleton University, <http://www.carleton.ca/ctpl/chapter11/>

that more expansive, and threatening, interpretations of the link between regulations and expropriation may be waiting just around the corner.

The case of *Methanex Corp. v. United States of America*, the only case to date where Chapter Eleven has been used to attack an environmental regulation, may provide the crucial test of whether or not environmental regulations will be regarded as expropriation under Chapter Eleven. At issue in *Methanex* are California regulations designed to promote environmental and human health. *Methanex* argues that the Executive Orders calling for the removal of the gasoline additive MTBE from gasoline by January 1, 2004 are tantamount to expropriation of its business.¹¹⁰ The company produces methanol, an ingredient of MTBE. *Methanex* argues that the MTBE ban expropriates some of the company's investments in the United States and is claiming damages from this regulatory initiative of \$1 billion.¹¹¹

In August the *Methanex* tribunal delivered a ruling "powerful enough to decimate *Methanex's* case."¹¹² The United States had urged the tribunal to interpret Article 1101(1) narrowly and to find that the relationship between the California regulations and *Methanex* was so indirect that the company

did not have a valid claim to bring before a NAFTA tribunal. The indirectness of the connection between the regulations and *Methanex* was said to rest in the fact that the regulations targeted MTBE. They did not target methanol, methanol producers, or *Methanex*. Because measures of general application like environmental and health regulations will affect a "vast range" of actors the United States argued that "relating to" - the disputed phrase from Article 1101(1) - "requires a legally significant connection between the disputed measure and the investor."¹¹³ It was not enough for a company merely to be affected by a measure. The tribunal agreed; "(a) threshold which could be surmounted by an indeterminate class of investors making a claim alleging loss is no threshold at all"¹¹⁴ Since California's regulations "do not relate to methanol or *Methanex*" the tribunal ruled it did not have the jurisdiction needed to hear the original claim. The case will die this November unless *Methanex* submits a fresh pleading and convinces the tribunal that the Governor of California intended to harm *Methanex* with these regulations.

This decision, while it may destroy *Methanex's* challenge to these regulations, is unhelpful for those who do not want to see Chapter Eleven used to challenge legitimate environmental regulations. "Indeed," as the IISD's Howard Mann concludes, "it 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."¹¹⁵ Legitimate environmental

¹⁰⁹ *Ibid.*, 32-33.

¹¹⁰ The first 1999 Executive Order from Governor Davis called for the removal of MTBE from California's gasoline supplies by the end of 2002. In March 2002 Governor Davis announced signed a second Executive Order postponing the MTBE ban until January 1, 2004. See "MTBE," <http://www.methanex.com/investorcentre/MTBE.htm>

¹¹¹ United States Department of State, "*Methanex Corp. v. United States of America*," <http://www.state.gov/s/l/c5818.htm>

¹¹² Howard Mann, "Review of the Decision on Jurisdiction of the *Methanex* Tribunal, August 5, 2002," 2, (Winnipeg: International Institute for Sustainable Development, 2002), http://www.iisd.org/pdf/2002/trade_methanex_analysis.pdf

¹¹³ 1st Partial Award (August 7, 2002), paragraph 130, <http://www.state.gov/documents/organization/12613.pdf>

¹¹⁴ *Ibid.*, paragraph 137.

¹¹⁵ Mann, "Review of the Decision on Jurisdiction," 6.

regulations that are not camouflaged efforts at protectionism need stronger protections from Chapter Eleven challenges.

Chapter Six, NAFTA's energy chapter, also demands consideration here. Earlier we noted that renewable energy portfolio standards could be incorporated into a GHG emissions reduction strategy. Governments would require a certain percentage of the electricity produced by utilities to come from renewable energy sources such as solar, wind, and small-scale hydro, sources that do not leave a heavy footprint on the environment. Questions have been raised about whether these standards violate the national treatment provisions outlined in Article 606.1 (a). American renewable portfolio standards legislation, in the jargon of the WTO, is a non-product related processes and production methods measure.¹¹⁶ A trade-related problem raised by renewable portfolio standards is that they discriminate against "like products" (in this case electricity) based on the process and production methods used to generate the electricity (for example, renewable versus large-scale hydropower). The legislative definition of renewable energy found in a state like New Jersey "suggests clearly that large scale hydropower producers such as Hydro Quebec or Ontario Power Generation would be excluded from the supply of renewable electricity"¹¹⁷ Disadvantaging foreign products in this way "has consistently been interpreted as a violation of the national

treatment requirement"¹¹⁸ Although the Council for Environmental Cooperation heard this argument developed in respect to American renewable portfolio standards legislation, the same logic would apply to Canadian versions of this type of legislation. They could run afoul of Article 606.

Other sections of Chapter Six impose more certain constraints on the freedom of policy makers. Article 604's export tax provisions, for example, prevent the national government from funding GHG emissions reduction initiatives through an export tax on energy. Under NAFTA export taxes only may be levied if they also are imposed "on any such good when destined for domestic consumption."¹¹⁹ The same policy making restriction, "do unto Americans only what you are prepared first to do unto Canadians," applies to the possibility of reducing Canadian GHG emissions by export restrictions, reducing the volume of oil and natural gas sold in the American market. Here, Canadian policymakers shackled themselves through the "proportional access requirement" found in Article 605. Under the terms of this article Canada can only reduce its exports to the United States if it reduces the energy available for domestic consumption by the same percentage. Production cutbacks, in other words, must be shared equally between American and Canadian consumers of Canadian energy. If, for example, the United States continues to consume approximately sixty percent of all the natural gas produced in Canada and the federal government decided to cut natural gas production as a way of meeting part of its Kyoto obligation then the United States would be entitled to receive sixty percent of this reduced production volume.¹²⁰

¹¹⁶ A non-product-related processes and production methods measure "exists where the manufacturing of the product has a negative impact on the environment, but the product itself does not carry any potential environmental damage (for example, through the release of pollutants into the air or water." Gary Horlick, Christiane Schuchardt, and Howard Mann, "NAFTA Provisions and the Electricity Sector," (Montréal: Commission for Environmental Cooperation of North America, 2002), 8.

¹¹⁷ *Ibid.*, 11.

¹¹⁸ *Ibid.*, 11.

¹¹⁹ North American Free Trade Agreement, Article 604(b).

“The higher our exports relative to consumption,” concluded Pratt, “the greater the Americans’ proportional access.”¹²¹ In the current environment - with Canada, but not the United States, seemingly ready to ratify Kyoto - this proportional access situation could deteriorate further.¹²² If Canada reduces domestic GHG emissions and the pace of oil and gas exports to the United States remains steady or accelerates, the American claim on Canadian energy production will grow apace. Pratt’s conclusion that if Canada wants to regain its energy sovereignty Chapter Six must be “drastically changed or abandoned as unworkable” will be strengthened if this scenario unfolds.¹²³

NAFTA, Electricity Infrastructure and the National Energy Board

It’s important to note that more than NAFTA’s legal framework led to this loss of Canadian sovereignty and control over our petroleum resources. An extensive north-south pipeline network pre-dated the Canada-United States Free Trade Agreement. Its existence and subsequent expansion in the Free Trade era established the infrastructure needed to feed the growing American appetite for Canadian petroleum. Without this infrastructure the pace of the oil and gas flow to the United States would have been, at the very least, slower.

This point about infrastructure is important in the context of controlling our exports of other types of energy such as electricity. NAFTA’s energy chapter and its proportional access requirements govern electricity, as they do natural gas. But, for the time being, Canadian electricity exports are stable. Last year seven percent of the electricity generated in Canada was exported to the United States, little changed from the eight percent shipped south in 1997.¹²⁴ But, we should not be sanguine about this situation lasting for much longer. There are many signs that interest in and an appetite for Canadian electricity exports is growing. Examples include: NAFTA’s Commission for Environmental Cooperation has made the North American electricity market a priority issue for study; Canada’s National Energy Board received more applications for new international power lines in 2001 (three) than it had received during the previous five years; provinces are seriously considering joining regional transmission organizations (RTOs)

¹²¹ Ibid., 20.

¹²² In 1986 Canada produced 2.9 trillion cubic feet (tcf) of natural gas and twenty-five percent of this production was exported to the United States; in 2000, production had doubled to 5.9 tcf and sixty percent of this volume was headed to the American market.

¹²³ Pratt, *Energy: Free Trade and the Price We Paid*, 39.

¹²⁴ National Energy Board, 2001 Annual Report to Parliament, Appendices, (Canada 2001), 5.

formed in the United States by the Federal Energy Regulatory Commission (FERC) - participation in RTOs will encourage more north-south trade and greater integration of Canada-United States electricity markets;¹²⁵ Alberta has established principles for electricity exports;¹²⁶ Manitoba Hydro pitched hydroelectricity as the “cleaner Canadian export” at a federally-sponsored United Nations Climate Change workshop on less GHG emitting energy.¹²⁷

If Canadians do not want to see their electricity resources follow the same path taken by oil and gas steps must be taken to restrict the construction of the additional infrastructure needed to expand exports to the United States - international transmission lines. This will require amendments to federal legislation outlining the National Energy Board’s regulatory responsibilities for the international electricity trade. Currently, the NEB plays an overly passive role in respect to carrying out these responsibilities. Under amendments made to the National Energy Board Act in 1990 electricity export permits and permits for the construction and operation of international power lines customarily are issued without holding any public hearings. Between June 2001 and August 2002 none of the twenty-six electricity export permit applications considered by the NEB was examined in a public hearing. The

Board summarily rejects requests to hold public hearings on export applications. Here, the experience of Alberta’s Environmental Resource Centre is typical. It requested a public hearing into Consumers Energy Company’s export permit application because the public had not had sufficient opportunity to voice its support or opposition to this proposal. The Board replied that first, the National Energy Board Act required it to issue permits without public hearings. It went on to suggest, perhaps as only a bureaucracy would have the nerve to do, that since Consumers had published a Notice of Application and Directions in the Canada Gazette Part I (a publication regularly consulted by dozens, if not hundreds, of citizens) Canadians had had an adequate opportunity to raise any thoughts they might have about the application with the Board.¹²⁸ It is just as disconcerting to read that the Board does not believe it has the authority under Section 119.03 of the Act needed to deny export applications. The Environmental Resource Centre asked the Board to reject Consumers’ application. When the NEB rejected this request and approved the export permit, it wrote that it “may only delay the issuance of the permit and recommend to the Minister that the application for the exportation of electricity be designated as a license application; it may not deny the application.”¹²⁹

The Board would seem to be just as impotent when it comes to international power line applications. Manitoba Hydro’s September 2001 application (approved in

¹²⁵ National Energy Board, 2001 Annual Report to Parliament, 21; National Energy Board, Canadian Electricity Trends and Issues: an Energy Market Assessment May 2001, (Canada 2001), 59.

¹²⁶ Alberta, “Energy Minister Announces Electricity Export Principles,” (news release), 29 May 2002.

¹²⁷ Ed Wojczynski, “Hydropower: A Cleaner Canadian Export,” a presentation to the UNFCCC workshop on Cleaner or Less Greenhouse Gas-Emitting Energy: Exchange of Information and Views, Whistler, British Columbia, 7-8 May 2002. <http://unfccc.int/sessions/workshop/070502/wojczyns.pdf>

¹²⁸ National Energy Board, “24 May 2002 Consumers Energy Company (Consumers Energy) Application for Electricity Export Permits Pursuant to Section 119.03 of the National Energy Board Act,” (A0F7C1 - Permit), 7. <https://www.neb-one.gc.ca/ll-eng/livelink.exe?func=ll&objId=238314&objAction=browse>

¹²⁹ *Ibid.*, 4.

March 2002) to construct and operate an international power line into North Dakota was never aired at a public hearing.¹³⁰ Furthermore, the language of Section 58.11 of the National Energy Board Act outlining the Board's responsibilities for issuing international power line construction and operation permits is virtually identical to that of Section 119.03. The Board also then would not appear to have the authority needed to deny applications for these permits.

Changes must be made to the National Energy Board if Canadians want an agency with the wherewithal needed to insure that we steer the future of our electricity resources onto a different path than the one we placed petroleum on. The legislative provisions restricting public hearings and limiting the Board's authority regarding the disposition of export and international power line applications must be changed. As well, the National Energy Board Act should be amended to stipulate that international power line applications shall only be considered when it can be demonstrated that any resulting additions to the export infrastructure will not result in electricity exports surging to higher than nine percent of Canadian production, the highest export percentage reached in the Free Trade era. Given the recent incursions of American companies into Canada's electricity marketing business it is possible, perhaps likely, that this latter restriction would be challenged under the investment chapter of NAFTA. But, this type

of infrastructure-oriented measure might survive if non-discrimination guides both the implementation of the measure and any electricity export applications made to the Board. These sorts of changes, challenged though they might be, must be made if Canadians want greater control over future electricity use.

There may be a more powerful reason than reclaiming sovereignty for pursuing these measures in respect to the National Energy Board and electricity exports. They are important because the most significant source of Canadian electricity, hydropower, has the potential to reduce significantly Canada's GHG emissions and therefore to help Canada reach its Kyoto target. When it comes to GHG emissions "(h)ydroelectricity production emits virtually no greenhouse gases."¹³¹ It emits sixty times less GHG than coal-fired power plants and eighteen times less than the most efficient natural gas plants.¹³² The amounts of carbon emissions and coal-fired electricity that could be eliminated by this type of policy initiative are significant. Coal-fired electricity supplies eighteen percent of Canada's electricity supply and the development of new hydroelectricity sites in Canada could displace anywhere from 270 to 740 million tons of carbon per year.¹³³ Expanding Canadian hydroelectricity production would be "an important contributor to a least-cost solution to reducing GHG emissions in Canada."¹³⁴ Yet, this GHG

¹³⁰ An important upcoming test of the NEB's resolve on the public hearings question will be the application from Ontario's Hydro One Distribution Services to lay an underwater power line across Lake Erie to the United States. As of September 25, 2002 one hundred and twelve citizens and environmental non-governmental organizations had registered with the NEB their comments or objections about the scope of the environmental assessment needed for this application.

¹³¹ National Energy Board, *Canadian Electricity Trends and Issues*, 31.

¹³² Canadian Hydropower Association, "Quick Facts," http://www.canhydropower.org/hydro_e/pdf/Quick_Facts_2202.pdf; Canadian Hydropower Association, "Submission to National Stakeholder Workshops 2002 on Climate Change," 20 June 2002, 2. http://www.nccp.ca/NCCP/national_stakeholders/pdf/Cdn%20Hydropower%20Assoc.pdf

¹³³ Wojczynski, "Hydropower: A Cleaner Canadian Export."

reduction potential is barely recognized in the federal government's 2002 Climate Change discussion paper, a paper that "contains no significant measure that would help accelerate the development of Canada's hydropower potential."¹³⁵ Why?

Part of the explanation for this failure to give hydropower more serious consideration may rest in the capital costs of large-scale hydroelectric plants relative to natural gas-fired generating facilities. Building natural gas-fired generating facilities is much less expensive than building dams. Yet, this advantage of natural gas-generated electricity must be placed in the context of the recent North American experiences with natural gas prices. Continental market forces determine gas prices. As we saw in the winter of 2000-2001, when natural gas storage levels are low and demand is high the cost of electricity produced from natural gas may skyrocket. Water prices, on the other hand, are not set in continental or international markets. Since water is much cheaper than natural gas the marginal costs of producing hydroelectricity are relatively low.¹³⁶

The hydropower option also may suffer from the likelihood that it would require government intervention, a heresy to the market faith still gripping most Canadian policy makers. This hesitation appeared, for example, in the Electricity Issues Table established as part of the National Climate Change Process. The Table generally supported the suggestion to improve the

country's inter-provincial electricity transmission infrastructure. New transmission lines could allow supplies of low-GHG emitting electricity, like hydropower (as well as other renewable sources like wind and solar), to move across provinces and displace the electricity produced by fossil fuels. They could therefore lower the costs of complying with the Kyoto emissions reduction regimen. Additional inter-provincial transmission capacity would also increase the reliability and security of the electricity system. But, measures to stimulate the construction of this infrastructure such as loan guarantees, subsidies, or government ownership "run counter to some jurisdictions' approaches."¹³⁷

A third obstacle to hydropower, probably more powerful than the previous two, rests in hydro-electricity's checkered history. Near my home in southeastern British Columbia, hydro dams left heavy boot marks on landscapes and people's lives. Flooded valleys and displaced persons, they constitute the darker legacy of the dams built under the terms of the Columbia River Treaty. Those impacts pale in comparison, however, to those suffered by the aboriginal peoples and terrain of the James Bay region in northern Québec. Yet, there are signs that "Big Hydro" has learned from those histories and now seeks partnerships with aboriginal peoples and less-environmentally damaging hydro facilities.¹³⁸ Recently concluded agreements between the Cree, Inuit, and Government of Québec may help to rehabilitate the image of Big Hydro. Through these agreements the Cree and Inuit will accommodate themselves to additional hydro

¹³⁴ National Climate Change Process, Electricity Industry Issues Table, "Options Paper," 3 November 1999, 53.

¹³⁵ Hydro Québec, "Hydro-Québec Brief, Submitted for the federal consultation on Canada's contribution to addressing climate change," 27 June 2002, 3. http://www.nccp.ca/NCCP/national_stakeholders/pdf/submissions/june2702_HQ_e.pdf

¹³⁶ National Energy Board, Canadian Electricity Trends and Issues, 3.

¹³⁷ Electricity Industry Issues Table, "Options Paper," 41.

¹³⁸ The scuttling of Hydro Québec's Great Whale Project in the 1990s at the hands of a coalition Cree/environmentalist coalition underlined the importance of aboriginal consent to the prospects of future projects.

projects on the Eastmain and Rupert rivers in exchange for billions of dollars and increased control over economic and community development.¹³⁹ From a strictly environmental perspective, hydropower producers ask whether the global challenge of reducing GHG emissions in order to protect species might not justify local habitat losses. Hydro Québec bluntly argues that environmental assessments of future hydro projects must be willing to tolerate local habitat losses if these losses are made in aid of the global GHG emissions reduction campaign:

those responsible for applying the regulations must have the necessary tools to properly weigh the need to safeguard a fish habitat against the need to address climate change by clearly favouring renewable energy. What is the point in protecting a brook trout habitat by rejecting a hydropower project, when global warming poses a much more serious threat to all trout and salmon habitats, both in Canada and around the world? Government authorities and decision-makers must establish a balance between short-term, local impacts and planetary issues like climate change and be able to choose the option that is least damaging for the environment. Regulations, policies and guidelines must therefore be modified to give more importance to the

*fight against global pollution as part of each ministry's responsibilities.*¹⁴⁰

Corporate self-interest aside, the point is worth considering, especially in light of the apparent need to decrease global carbon emissions by at least fifty percent in order to stabilize the concentrations of greenhouse gases in the atmosphere.¹⁴¹ Given a problem of this magnitude, local prejudices and historical wrongs seem insufficient grounds for dismissing hydropower's potential to make a major contribution to reducing Canada's greenhouse gas emissions.

¹³⁹ For details on these agreements see Kevin Dougherty, "Aboriginals now can 'move ahead': Erasmus," *The Montreal Gazette*, 8 February 2002, A11; Michel Hebert, "Cree-Quebec deal draws opposition," *The Montreal Gazette*, 8 February 2002, A11; Kevin Dougherty, "Quebec Inuit approve \$475M hydro deal," *The Ottawa Citizen*, 18 May 2002, A7. Manitoba Hydro also seems to appreciate the importance of aboriginal involvement to future hydro development in Manitoba. See Manitoba Hydro, "Climate Change and the Kyoto Protocol," presented at the National Stakeholders Workshop on Climate Change, 19 June 2002, 3-4.

¹⁴⁰ Hydro Québec, "Hydro-Québec Brief, Submitted for the federal consultation on Canada's contribution to addressing climate change," 27 June 2002, 4.

¹⁴¹ Dale Marshall of the Canadian Centre for Policy Alternatives attributes this estimate to the Intergovernmental Panel on Climate Change. See Canadian Centre for Policy Alternatives, "No Reason Not To: CCPA's response to the federal discussion paper on Kyoto ratification," presented at the National Stakeholders Workshop on Climate Change, 20 June 2002, 1.

Federalism and Kyoto: the Risks of Constitutional Gambits, the Need for a Federal-Provincial Partnership

The reluctance to push hydropower forward as a major player in the GHG emissions reduction campaign also may be attributed to the last institution considered here - Canadian federalism. Due to the federal-provincial division of powers provincial governments have been assigned the primary responsibility for developing hydroelectricity projects in Canada. The key components of these projects - dams, generating facilities, and transmission systems - are defined as “local works and undertakings” according to s. 92 (10) of the Constitution Act, 1867.¹⁴² Federal constitutional authority, as noted earlier in our discussion of the National Energy Board, is generally restricted to the inter-provincial transmission and international export of electricity.¹⁴³

This constitutional division of responsibility, combined with a lack of provincial enthusiasm for cooperative ventures, has meant that hydroelectricity development has been driven by provincial, rather than national, priorities. The experience of the Diefenbaker government in the early 1960s is instructive here. For Diefenbaker, the development of a national electricity grid was valued for its nation-building potential. Like

Canada’s national transportation and communication networks, a national electricity system could help to “bind the country together.”¹⁴⁴ Diefenbaker’s dream, despite its technical and economic feasibility, was not shared by enough Premiers for it to become a reality. Apart from briefly flirting with the idea of a national electricity grid during the so-called “energy crisis” of the early 1970s, provincial governments have shown little interest in developing a national electricity network. Instead, electricity projects have been evaluated primarily according to their potential impact on provincial jobs and investment. While this focus is understandable such parochialism has been damaging. Take, for example, the fate of efforts in the late 1970s and early 1980s to develop a regional electricity grid connecting the four western provinces. Such a grid would have delivered significant economic and environmental benefits. The net benefit of a western grid was pegged at \$150 million; the development of the Limestone hydro project on Manitoba’s Nelson River would have done less damage to the environment than building planned coal-fired generating plants in Alberta and Saskatchewan. But, concerns in the capitals of Alberta and Saskatchewan that they would lose employment and investment to Manitoba helped to scuttle the project.¹⁴⁵ Whether or not the time now is right to return to consider the development of regional or national electricity grids is an issue we return to later in this section.

¹⁴² Peter W. Hogg, *Constitutional Law of Canada*, 2d edition, (Toronto: Carswell, 1985), 596. Originally called the British North America Act, 1867 the name of Canada’s original constitutional document was changed to the Constitution Act, 1867 when the Constitution was patriated and amended in 1982.

¹⁴³ Since dams also affect the navigability or waterways they also are subject to federal jurisdiction in respect to the navigation and shipping provisions of s. 91 (10) of the Constitution Act, 1867.

¹⁴⁴ Prime Minister Diefenbaker made these remarks at the 1962 Federal-Provincial Conference on Long-Distance Transmission. See Karl Froschauer, *White Gold: Hydroelectric Power in Canada*, (Vancouver: University of British Columbia Press, 1999), 32.

¹⁴⁵ *Ibid.*, 43-44.

Federalism's centrality to the politics of Kyoto is secured by much more than its relevance to understanding the development of electricity. Much of the fireworks exploding today around Kyoto rises out of judicial interpretation of where the powers to make and implement treaties reside. The power to make treaties belongs exclusively to the federal government. Until the latter half of the Great Depression the power to implement treaties was also judged to rest with the federal government. In the Radio Reference case (1932), Canada's highest court of appeal found that the power to implement treaties rested exclusively with the federal government, even if the subject matter of the treaty rested in an area of provincial jurisdiction. In other words, the Radio Reference case opened the door for the national government to legislate in areas of provincial jurisdiction if the legislation was required in order to fulfill a treaty commitment.

This interpretation of the federal-provincial division of the treaty powers, one that assigned treaty making as well as implementation to the national Parliament, did not last long. In the Labour Conventions case (1937) the Judicial Committee of the Privy Council stripped Ottawa of the unqualified treaty implementing powers it had extended to federal authorities in the Radio Reference. Ottawa could make, but could not implement, treaties for subjects assigned to the provinces by the Constitution Act, 1867. Treaties that, for example, dealt with subjects exclusively assigned to the provinces by s. 92 only could be implemented if the provinces saw fit to pass the necessary legislation. "(T)he Dominion cannot," wrote Lord Atkin, "merely by making promises to foreign countries, clothe itself with legislative authority inconsistent with the constitution which gave it birth."¹⁴⁶ This second interpretation severely

limited the treaty making authority of the federal government, effectively limiting federal implementation powers to subjects assigned exclusively to the national Parliament by s. 91 of the Constitution Act, 1867.

As long as the Labour Conventions judgment stands provincial ownership of and extended legislative authority over natural resources are two of the features of the federal division of powers that rob Ottawa of the jurisdiction needed to implement the Kyoto Protocol on its own. "(F)or the implementation of Kyoto," Prime Minister Chretien said, "we need the collaboration of the provinces. We don't have all the jurisdiction to do it."¹⁴⁷ Provincial legislative authority over resources was strengthened through the 1982 addition of s.92A "Non-Renewable Natural Resources, Forestry Resources and Electrical Energy" to the Constitution Act, 1867.¹⁴⁸ By establishing the exclusive provincial legislative right over the "development, conservation and management" of non-renewable natural resources, forestry resources, and electricity sites, s. 92A may offer an important constitutional resource to a petroleum producing province like Alberta in its battle against Kyoto.¹⁴⁹

¹⁴⁶ Peter H. Russell, Rainer Knopff, and Ted Morton, *Federalism and the Charter: Leading Constitutional Decisions*, (Ottawa: Carleton University Press, 1989), 110. This volume also offers helpful synopses of the Radio Reference and Labour Conventions cases at pp. 93-96 and 104-110.

¹⁴⁷ Steven Chase, "Provinces have Kyoto role, PM says," *The Globe and Mail*, 24 April 2002, A4.

¹⁴⁸ William D. Moull, "The Legal Effect of the Resource Amendment - What's New in Section 92A," in J. Peter Meekison, Roy J. Romanow, and William D. Moull, *Origins and Meaning of Section 92A: The 1982 Constitutional Amendment on Resources*, (Montréal: Institute for Research on Public Policy, 1985). Provincial ownership of resources, conferred by s. 109 of the Constitution Act, 1867, was unaffected by the amendments of 1982.

The jurisdictional limitations identified by the Prime Minister also could spring from the view the courts have taken of the constitutional authority over the environment. Jurisdiction is shared between Ottawa and the provinces.¹⁵⁰ Nowhere in the Canadian Constitution will you find the heading “environment.” But, several of the heads of power assigned to the national and provincial levels of governments allow each level to legislate in ways that affect environmental quality.¹⁵¹ Provincial authority over natural resources and property and civil rights may be the most significant bases for establishing provincial jurisdiction over the environment; the basis for federal legislative action rests under headings such as the criminal law power, fisheries, and the peace, order, and good government power. In *Friends of the Oldman River Society v. Canada (Minister of Transport)* (1992) the Supreme Court generally concluded “that the Constitution

should be so interpreted as to afford both levels of government ample means to protect the environment while maintaining the general structure of the Constitution.”¹⁵²

Taken singly or together, these features of Canadian federalism play a very important role in shaping the political debates we have witnessed throughout most of 2002 on the subjects of ratifying and implementing Kyoto. They figure prominently in the open letter sent by Alberta’s Premier Klein to Prime Minister Chretien in early September 2002:

*Alberta recognizes your government’s constitutional rights to negotiate and sign international treaties. At the same time, the Government of Canada does not have the constitutional authority to implement international treaties in areas of provincial jurisdiction. Alberta hopes that your government recognizes its obligations to ensure those treaties serve the best interests of Canadians, and the constitutional rights of provinces to manage their natural resources.*¹⁵³

They also figure prominently in the comparisons made between Kyoto and the National Energy Program of 1980 (NEP) and in the mandate of the Kyoto External Advisory

¹⁴⁹ However, Moull argues that s. 92 A “does not seem to take from Parliament any jurisdiction that it had before....” Ibid., 53. The Supreme Court of Canada confirmed this interpretation of s. 92A’s impact in *Westcoast Energy Inc. v. Canada (National Energy Board)* [1998] 1 S.C.R. 322. Justices Iacobucci and Major wrote for the majority: “The resource amendment increased provincial power with respect to the raising of revenues from resources and to regulating the development and production of resources without diminishing Parliament’s pre-existing powers.”

¹⁵⁰ For examinations of the constitutional background of environmental policy in Canada see Marcia Valiante, “Legal Foundations of Canadian Environmental Policy: Underlining Our Values in a Shifting Landscape,” in Debora L. VanNijnatten and Robert Boardman (ed.), *Canadian Environmental Policy: Context and Cases* (2d edition), (Don Mills: Oxford University Press, 2002); Mark S. Winfield, “Environmental Policy and Federalism,” in Herman Bakvis and Grace Skogstad (ed.), *Canadian Federalism: Performance, Effectiveness, and Legitimacy*, (Don Mills: Oxford University Press, 2002).

¹⁵¹ As outlined in *Friends of the Oldman River Society v. Canada (Minister of Transport)* (1992) the court regards the concept of environmental quality as very diffuse. It possesses economic and social, as well as biophysical, dimensions.

¹⁵² This synopsis of the Court’s ruling in *Friends of the Oldman River Society v. Canada (Minister of Transport)* (1992) is offered in *R. v. Hydro-Québec* (1997) [1997] 3 S.C.R. 213.

¹⁵³ Alberta, “Klein releases open letter to PM on Alberta’s opposition to Kyoto ratification,” (news release) 3 September 2002. <http://www.GOV.AB.CA/can/200209/13052.html> Alberta’s Environment Minister Lorne Taylor has made this argument on numerous occasions. See, for example, Canadian Broadcasting Corporation, “Alberta fumes over PM’s promise to ratify Kyoto,” http://www.cbc.ca/stories/2002/09/02/pm_kyoto020902 Finally, see the comments of former Premier Peter Lougheed in Steven Chase, Richard Mackie, and Patrick Brethour, “Divulge plan on Kyoto, angry Eves tells Ottawa,” *The Globe and Mail*, 2 October 2002, A5.

Committee created by Premier Klein and chaired by former Premier Peter Lougheed. This committee is intended to support Alberta's efforts to stop the implementation of the Protocol.¹⁵⁴ Part of this committee's mandate is to "advise Alberta on the merits of writing its own laws to protect the province from the effects of the accord."¹⁵⁵ Or, as Peter Lougheed put it after the first meeting of this committee: "We are here to advise the government on how to deal with the Kyoto Protocol if it is ratified."¹⁵⁶

These interpretations of federal-provincial powers and responsibilities arguably have emboldened Alberta to the point of constitutional brinkmanship. Some members of the government, Environment Minister Lorne Taylor most notably, appear to relish the prospect of going to court over the implementation of Kyoto. In this respect, the more cautious approach to taking legal action outlined by Lougheed may serve Albertans and Canadians better. For the Chair of the Kyoto External Advisory Committee caution on the legal front is warranted because the federal government, to its obvious discredit, still has not produced a plan for implementing Kyoto.¹⁵⁷

More importantly, caution also is advisable because of the genuine risks a provincial constitutional challenge, based on provincial authority over natural resources, poses to provincial jurisdiction over treaty implementation and the environment. As Peter Hogg has pointed out, the reasoning of the Privy Council in the *Labour Conventions* case, as outlined by Lord Atkin, is quite questionable. For example, Atkin concluded that while s. 132 of the Constitution Act, 1867 clearly gave the federal government the authority to implement Empire treaties in areas of provincial jurisdiction this section did not give the federal government this implementation power in respect to treaties that Canada entered into on its own. He rejected the inference that, after Canada became independent of Britain, the reference to Empire treaties in s. 132 gave the power to implement Canadian treaties to the federal government.¹⁵⁸ The decision in the *Radio Reference* case offered a contrary view - with independence the treaty power was undivided and rested within the federal power to maintain the peace, order, and good government of Canada. Since the Supreme Court became Canada's final court of appeal in 1949 a handful of its decisions have appeared willing to reexamine Lord Atkin's reasoning. In Hogg's words, "it may well be that the peace, order, and good government argument will ultimately prevail."¹⁵⁹ It may be a grave mistake, in other words, for Alberta to believe that the understanding of the treaty power established in the *Labour Conventions* case rests in constitutional bedrock.

¹⁵⁴ Alberta, "Lougheed committee established to support government's Kyoto efforts," (news release) 25 September 2002, <http://www.gov.ab.ca/can/200209/13187.html>

¹⁵⁵ Allison Dunfield, "Canadians kept in dark about Kyoto, opposition says," *The Globe and Mail* (online edition), 1 October 2002. <http://www.globeandmail.com/servlet/ArticleNews/front/RTGAM/20021001/wkyot1001/Front/homeBN/breakingnews>

¹⁵⁶ Canadian Broadcasting Corporation, "News conference held after the first meeting of the Kyoto External Advisory Committee," 1 October 2002. http://cbc.ca/clips/ram-newsworld/live_lougheed021001.ram

¹⁵⁷ *Ibid.*

¹⁵⁸ The Imperial Conference of 1926 proclaimed that the United Kingdom and the Dominions enjoyed equality of status in respect to their domestic, international, and imperial conduct. The Statute of Westminster confirmed this independence in 1931.

¹⁵⁹ Hogg, *Constitutional Law of Canada*, 252.

Pursuing a constitutional gambit is risky for reasons other than those relating to the question marks surrounding the treaty power. This course of action also pays insufficient attention to themes or strands in several Supreme Court decisions that might be used to justify federal action under the peace, order, and good government power or the criminal law power. Two decisions, *R. v. Crown Zellerbach* (1988) and *R. v. Hydro-Québec* (1997) seem particularly relevant here.¹⁶⁰ In *R. v. Crown Zellerbach* the Supreme Court found that federal laws concerning dumping substances into the sea could be applied to tidal waters that were clearly inshore and provincial. The majority of the Court found that the Ocean Dumping Control Act fell under the so-called “national concern” or “national dimensions” doctrine. The doctrine has three criteria. First, it may be used to justify two types of federal behaviour: actions in respect to subjects that neither existed when the Constitution Act, 1867 was passed nor may be clearly identified as local or private matters and actions taken in respect to subjects that, while originally local or provincial in nature, have evolved into ones of national concern. Second, the federal action must be taken in respect to a matter characterized by “singleness, distinctiveness, and indivisibility;” the matter must be clearly distinguished from one of provincial concern; and, the impact of the federal action must be consistent with the Constitution’s federal-provincial distribution of legislative power. Third, a “provincial inability” test must be passed. According to this test, federal action is warranted “when the failure of one province to act would injure the residents of the other (cooperating) provinces.”¹⁶¹

¹⁶⁰ *R. v. Crown Zellerbach Canada Ltd.* [1988] 1 S.C.R. 401; *R. v. Hydro-Québec* (1997) [1997] 3 S.C.R. 213.

¹⁶¹ Hogg, *Constitutional Law of Canada*, 379.

Are greenhouse gas emissions a matter of national concern? Could the federal government design a greenhouse gas regulatory regime affecting provincial natural resource use that could be justified under the national concern doctrine? Since *R. v. Crown Zellerbach* no Supreme Court decision upholding federal authority over environmental protection has relied upon this doctrine. In *Crown Zellerbach* the Supreme Court began its categorization of marine pollution as a matter of national concern by recognizing “its predominantly extra-provincial as well as international character and implications.” Greenhouse gas emissions, especially in light of the work of the Intergovernmental Panel on Climate Change, easily leap this hurdle. If the extra-provincial and international dimensions of greenhouse gas emissions are acknowledged then provincial intransigence over reducing absolute levels of GHG emissions, the option Alberta trumpets and all other provinces silently endorse through their lack of action, then the conditions outlined by the provincial inability test also might be satisfied. The most difficult hurdle for the national concern justification for relying upon the peace, order, and good government power to overcome likely rests in arguing that controlling greenhouse gas emissions is a single, distinctive, and indivisible matter. Greenhouse gas emissions could be viewed, as inflation was by Justice Beetz in the *Anti-Inflation Reference* case (1976) or environmental protection was by Justice La Forest in *Crown Zellerbach*, as too broad or all-pervasive a subject to meet this test. Here, the targets and design of any federal regulatory program may be a crucial consideration. Any federal regulations must focus as narrowly as possible on any or all of the three primary greenhouse gases: carbon dioxide, methane, and nitrous oxide. A narrow

focus is vital to allay the very legitimate concerns that, if broad subjects such as environmental pollution are seen to be exclusively federal under the peace, order, and good government power then the federal-provincial division of powers will be altered radically in favour of the national government.¹⁶² Recourse to the national concern doctrine must be sensitive to rocking the jurisdictional balance as little as possible.¹⁶³

Other than Crown Zellerbach, a Supreme Court decision that should make Alberta wary of pursuing constitutional challenges in that of *R.v. Hydro-Québec* (1997). This case involved a challenge to the federal government's authority under the Canadian Environmental Protection Act to prosecute Hydro-Québec for allegedly dumping polychlorinated biphenyls (PCBs), a toxic substance, into a Québec river. Several aspects of this decision are noteworthy and potentially threatening to any natural resources based challenge Alberta might launch. First, Justice La Forest, writing for the majority in this decision, argued that the stewardship of the environment is a fundamental Canadian value and therefore the criminal law must keep pace with such a fundamental value. His language was forceful:

The protection of the environment, through prohibitions against toxic substances, seems to me to constitute a wholly legitimate public objective in the exercise of the criminal law power. Humanity's interest in

*the environment surely extends beyond its own life and health.*¹⁶⁴

The more narrowly focused federal regime mentioned above would also seem to be more compatible with the majority opinion in *Hydro-Québec* since, unlike the national concern doctrine, the criminal law power only assigns partial rather than full power to government. The criminal law power "seeks by discrete prohibitions to prevent evils falling within a broad purpose, such as, for example, the protection of health."¹⁶⁵ From the perspective of GHG emissions reductions, the decision also is noteworthy for endorsing the World Commission on Environment and Development's (Brundtland Commission) conclusion that setting regulations and standards for matters such as the "energy and resource efficiency of products or processes" should normally be a national responsibility. Local governments should be allowed to surpass but not lower those national benchmarks.¹⁶⁶

It is clear from comparing Justice La Forest's reasons in *Hydro-Québec*, where he was writing for the majority, with the minority opinion he wrote in *Crown Zellerbach*, that he regarded the criminal law power as the best vehicle for enabling Ottawa to perform its environmental stewardship responsibilities. Relying on the criminal law power, rather than the national concern doctrine, allows the federal government to defend legitimate environmental protection measures while preserving the fundamental balance of federal-provincial legislative powers:

¹⁶² As Justice La Forest wrote in the minority opinion in *Crown Zellerbach*: "To allocate environmental pollution exclusively to the federal Parliament would, it seems to me, involve sacrificing the principles of federalism"

¹⁶³ This point is made more elegantly in Katherine E. Swinton, *The Supreme Court and Canadian Federalism: The Laskin-Dickson Years*, (Toronto: Carswell, 1990), 204.

¹⁶⁴ *R. v. Hydro-Québec* (1997), [1997] 3 S.C.R. 300.

¹⁶⁵ *Ibid.*, 297. My emphasis.

¹⁶⁶ *Ibid.*, 296.

In Crown Zellerbach, I expressed concern with the possibility of allocating legislative power respecting environmental pollution exclusively to Parliament. I would be equally concerned with an interpretation of the Constitution that effectively allocated to the provinces, under general powers such as property and civil rights, control over the environment in a manner that prevented Parliament from exercising the leadership role expected of it by the international community and its role in protecting the basic values of Canadians regarding the environment through the instrumentality of the criminal law power.¹⁶⁷

In light of the significant potential risks to provincial jurisdiction that may rest in the constitutional gambit what options might Alberta and other opponents of Kyoto consider? Here, I would plead with them, and also with their federal opponents who I believe are in the stronger jurisdictional position, to recognize the possibility of developing federal-provincial strategies for reducing GHG emissions that would benefit all regions. To date, this recognition, like genuine leadership on the Kyoto file, is nowhere to be seen in the nation's capital. Nor can such recognition and leadership be detected among the provinces that oppose ratifying and implementing the Protocol. Canadians deserve better.

Obviously, this is a tall order but it is one where I believe the Western provinces may be able to take a strong leadership position. Our contemporary history should make Western Canadians particularly sensitive to the need to develop this type of productive federal-provincial partnership. The leading provincial protagonists in the fight against Kyoto, Premier Klein and former Premier Lougheed,

should reflect for a moment on the very history they have been using to drum up public support and to slag those who favour ratifying Kyoto. An important aspect of the conflict over the National Energy Program, one that was ignored during the energy wars of twenty years ago, was the failure of the NEP's architects to recognize that petroleum-driven growth in Western Canada could offer important economic benefits to other regions. Peter Lougheed, and others from an earlier generation of Alberta politicians, were right to criticize Prime Minister Trudeau's call in 1980 for a "made-in-Canada" oil price, a foundation of the NEP. Too many central Canadian eyes were closed to the short and long-term benefits that could have flowed to Ontario and other provinces through the accelerated petroleum resource development a move to world oil prices would have encouraged. The call for a "made-in-Canada" oil price, federal-provincial bickering over shares of economic rent, and federal efforts to steer exploration activities onto "Canada" lands in the north and offshore blinded the policy-makers and the public alike to important linkages between the Alberta and Ontario economies. These linkages meant that strong, petroleum-driven growth in the West could deliver substantial economic benefits to Ontario. Energy mega-projects did not take jobs away from Ontario; they brought jobs to the province.

Today, the very people who rebelled against the Trudeau government's "made-in-Canada" oil price policy now advocate a "made-in-Canada" alternative to Kyoto that is just as short-sighted as Trudeau's vision was in 1980. Like that earlier vision, today's assumes that Canadian governments cannot respond to international forces and work together to develop strategies and policies offering benefits to Canadians across this country. It is truly a sad irony we are forced to witness.

¹⁶⁷ Ibid., 314.

Can the impasse be broken? Those who want to avoid the constitutional showdown and bitter federal-provincial conflicts we may well be headed for might be wise to heed the counsel of Bernard Crick. He champions “normal politics,” a politics where rivals forego “winner take all” strategies and are prepared to compromise and recognize the legitimacy of their opponent’s position. Instead of asking “who is in the right?” Crick urges political actors to try to understand the legitimate concerns that most likely drive their opponents.¹⁶⁸ Policies and institutions must be crafted that address and respond to those legitimate concerns and try to encourage compromise.

One small illustration of this approach flows out of the earlier discussion of hydroelectricity and the National Energy Board. Canada needs a national electricity policy as part of its efforts to reduce our greenhouse gas emissions and this policy should be a priority for federal-provincial negotiation. Given how shriveled the electricity regulation function of the National Energy Board has become, the administration of this policy might be entrusted to a new federal regulatory agency, the Canadian Electricity Board. Either the current NEB or this new institution must recognize the legitimacy of provincial concerns regarding their jurisdiction over the generation and transmission of electricity in Canada. One way of responding to such legitimate concerns would be to revisit the recommendations on regulatory institutions incorporated into the Lougheed government’s 1978 position paper

on constitutional change. There, in recognition of the profound impact that many federal regulatory boards may have on provincial development, Alberta recommended that forty percent of the members of designated federal boards and agencies be appointed by provincial governments. The procedures for these provincial appointments would be decided by the Premiers’ Conference.¹⁶⁹ Institutional changes of this sort respect the legitimacy of the interests that both levels of government would have in this particular policy issue.

These sorts of complementary measures need not come just in the form of institutional change. They also may be found in policies. For example, Alberta’s Environment Minister Lorne Taylor objected to international emissions trading because Canadian funds will go to Russia or Ukraine and will not be used to reduce emissions in Canada. Perhaps he would favour, as earlier Progressive Conservative administrations did, making investments in other provinces. Today, the goal would be to invest in projects that would reduce GHG emissions. An interprovincial transmission grid across Western Canada might be a good “made-in-Canada” GHG emissions reduction candidate for Alberta to invest in.

¹⁶⁸ Bernard Crick, “A Final Footnote to Rally Those Who Grudge the Price,” In *Defence of Politics*, 4th ed., (London: Weidenfeld and Nicolson, 1992). Reprinted in Thomas M.J. Bateman, Manuel Mertin, and David M. Thomas (ed.), *Braving the New World: Readings in Contemporary Politics*, (Scarborough: Nelson Canada, 1995).

¹⁶⁹ Alberta, *Harmony in Diversity: A New Federalism for Canada*, (October 1978), 12.

Conclusion

In this study we have considered the evolution of the Kyoto Protocol, a range of policies that could be taken to implement the Protocol, and the extent to which several key political institutions - the World Trade Organization, the North American Free Trade Agreement, and Canadian federalism - may constrain efforts to implement Kyoto. A few features of the analysis should be underlined here. First, several very significant consequences of the Kyoto Protocol for a Canadian implementation strategy have received insufficient recognition in the debate over ratifying the Protocol. Too little attention has been paid to how carbon sinks credits and the flexibility mechanisms (such as international emissions trading) secured at Bonn and Marrakech have lowered the bar Canada must hurdle in order to meet its Kyoto commitment. They mean that while Canada must make substantial cuts in its domestic GHG emissions these cuts are not nearly as draconian as those who demonize Kyoto would have Canadians believe. The public's understanding of Kyoto's impact also has been poisoned by the failure to acknowledge that the type of environmental regulations Kyoto might require may actually improve, not destroy, the competitiveness of Canadian industry. Despite the best efforts of organizations such as the Pembina Institute this perspective has not received the consideration it deserves.

Second, there is the issue of what the ratification and implementation of Kyoto will accomplish. Here, Kyoto's critics certainly are right to argue that, with the refusal of the United States to ratify the Protocol, the

agreement cannot make much of a contribution to reducing the level of greenhouse gases in the Earth's atmosphere during the 2008-2012 commitment period. Yet, in making this conclusion the critics underestimate the value of Kyoto as an international institution and may overestimate how easy it will be for them to find a more acceptable substitute for this agreement. Securing this international agreement, immediate substantive impact aside, was in itself an important, hard-won, accomplishment. Through the Protocol the world now has rules and mechanisms for addressing the threat posed to future generations by greenhouse gases. Furthermore, the critics of Kyoto seem oblivious to a point that may be inferred from mentioning the importance of sinks and flexibility mechanisms to this agreement - the Kyoto Protocol has traveled a great distance to insure that market mechanisms are welcomed in its structure. Countries such as Canada and the United States that sought these mechanisms should think twice before assuming that, if Kyoto dies, its eventual successor will treat these policy preferences more generously.

Third, just as CEO's will dismiss the earlier arguments about competitiveness, many Greens likely will blanch at the suggestion that the World Trade Organization is not necessarily a straitjacket preventing countries from implementing many of the environmental measures Kyoto could require. Yet, this is the message I feel has to be taken from the decisions made by the WTO's Appellate Body in the Gasoline Standards, Shrimp/Turtle, and Asbestos cases. The

Appellate Body, to its credit, has paid much more than lip service to Article XX's provisions regarding the protection of health/life and resource conservation. This is not to say that the WTO should not strengthen its environmental sensitivity. It should. Rather, it is to point out that the organization's environmental record is not as bleak as some Green rhetoric would have the public believe.

Fourth, NAFTA is more constraining by comparison. Chapter Six's energy provisions regarding export taxes and proportional access prevent Canadian governments from introducing measures that could assist a GHG emissions reduction plan. Questions also remain about whether environmental regulations could fall under the expropriation and compensation article in Chapter Eleven. Legitimate environmental regulations need more certain protection than the language of Chapter Eleven currently affords them.

Fifth, federalism promises to affect at least the pace and perhaps the substance of implementing Kyoto if the federal government ratifies the Protocol. Yet, here I believe the likely terrain for federal-provincial conflict - provincial natural resource powers versus federal treaty/criminal law/residual powers - does not favour the provinces. Provinces have a legitimate interest in the development and management of natural resources but this interest will be better pursued over a conference table than in a courtroom.

Recommendations

1. Strengthen the WTO's acceptance of legitimate environmental measures. Following the sentiment of the RIIA/IISD seminar on the relationship between the Kyoto Protocol and the WTO, establish a Working Group in the Doha round of WTO negotiations that would recommend changes to the WTO that would maximize the organization's contribution to sustainable development.
2. Negotiate the addition of the United Nations Framework Convention on Climate Change and the Kyoto Protocol to NAFTA Article 104 - "Relation to Environmental and Conservation Agreements." This Article stipulates that the trade obligations outlined in the environmental and conservation agreements enumerated in this article take precedence over NAFTA.
3. Negotiate a clarification to Chapter Eleven of NAFTA to insure that legitimate environmental regulations (regulations that are not disguised efforts at protectionism) cannot be challenged.
4. Renegotiate Article 605 of NAFTA given the possibility that implementing Kyoto will increase further the proportional access claim to Canadian oil and gas resources the United States may be able to make in the future.
5. Amend the National Energy Board Act to insist that public hearings be held in regards to all applications to export electricity or to construct international power lines. Give the Board the authority to reject electricity export and international power line applications (subject to appeal to the federal cabinet). Alter the makeup of the National Energy Board to insure that provinces appoint forty per cent of its members. Alternatively, vest these powers and responsibilities in a new Canadian Electricity Board.



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