

FEDERALISM AND TRANSNATIONAL LAW: THE CASE OF CITES IMPLEMENTATION IN CANADA

PART I: LEGITIMACY IN CANADIAN FEDERALISM

1.0 Introduction

Two trends in governance have marked the last 20 years: greater global interdependence and greater autonomy to minority groups in large states. The international legal regime reflects this trend in its increasing reliance on internationally established institutional regimes. Similarly, the legal regimes of individual states have become increasingly decentralized in response to calls for increased autonomy for minorities within states. This raises interesting questions where federal states commit to international obligations and then attempt to implement the obligations domestically.

This purpose of this paper is to examine how multilateral environmental agreements (MEAs) are legitimately implemented in the Canadian federation. The purpose will be fulfilled first by examining the role legitimacy plays in implementation of MEAs in the Canadian federation. Second, the paper will examine how the general theory of legitimate implementation of MEAs manifested itself in the Canadian federation when Canada attempted to implement the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES).

In Part I of the paper I will explain the understanding of legitimacy in the international legal regime and in the context of federal governance, specifically in the Canadian federation. An important tool in understanding legitimate policy implementation in the context of Canadian federalism is transnational legal theory. Transnational legal theory examines how international law gains domestic acceptance through the interaction between institutional and non-institutional actors. Through such interaction, the normative values of international law are “internalized” within the domestic population and international norms are accepted as legitimate.¹ Harold Koh

¹ H. H. Koh, “Transnational Legal Process” (1996), 75 *Neb. Law Rev.* 181 at 183-184.

maintains that this requires various state and non-state actors to work together to “internalize” international norms domestically. Internalization requires deep grounding within political, economic and cultural systems.² This grounding depends, I will argue, on the democratic legitimacy of the process.

The notion of legitimacy as consent, however, becomes problematic when considering federal governance. Federal governance emphasizes the relations between institutionalized political authorities at the federal and provincial levels. Legitimacy of policy implementation is therefore understood differently in a federal governance context. Legitimacy, which is primarily based on consent of the governed, cannot be achieved in a federal state without an appeal to “community”. When a given community senses that an implementation procedure is imposed on it, the members of that community will not accept it or “internalize” it. Consequently, the first part of the paper will show that, in a federal state, legitimacy cannot be based on institutional action that affects a particular community represented by a constituent unit in a federation. At a minimum, subjects of a federal state will view implementation as illegitimate without the consent of, or, at a minimum, consultation with, particularly affected political communities. The level of consultation, meaning seeking opinions, alternative policy suggestions and comments from the affected communities, will vary depending on whether a given policy affects something a community associates deeply with its identity.

Transnational legal theory, and its concomitant institutional interaction, is particularly suited to an effective examination of international policy implementation in the Canadian federation. The first part of the paper will demonstrate that implementation of international law in Canada is dependant on federal-provincial governmental cooperation and is therefore best described as an institutional process. Institutionalism tells us that a community’s perception of legitimacy is governed by the formal contracts and laws as well as the “rules in use”. Therefore legitimate policy implementation in Canada is judged by reference to the formal law of the constitution coupled with the “rules in use” as developed by years of federal-provincial diplomacy.

Part II of the paper will focus on the domestic implementation of CITES through the philosophical framework outlined in Part I. The approach taken in Part II of the paper will be two-fold. First, I will examine the specific obligations the convention places on the Canadian state. Next, I will examine the legislative response of the federal government.

While implementing the treaty, it became clear existing legislation met Canada's bare obligations, the domestic legislation did not reflect the underlying broader norms of the convention. As a result the federal government embarked on creating a new legislative regime in response to the evolving understanding of a member state's obligations under CITES. The domestic implementation of both of these treaties involved extensive provincial consultation and stakeholder negotiation.

2.0 Legitimacy and Transnational Legal Process

2.1 Introduction: The Role of Consent in International Law

The focus of this section of the paper is the role of legitimacy in successful domestic implementation of international law. Legitimate authority is authority that is justified and accepted by the subjects of the authority. Thus, a government is said to be legitimate where there are good arguments for a political order's claim to be recognized as right and just; a legitimate order deserves recognition.³ Legitimate political orders are based on consent and not widespread coercion. As a result, consent is given where a regime or policy is perceived as legitimate. The degree of consent required may vary. For example, if citizens or a community perceive that a particular policy will affect them specifically, greater consent, or consensus among stakeholders, may be required. Likewise, the measure of legitimate policy-making will become more onerous. Ultimately, legitimation is a process by which a legislator is authorized to

² O.R. Young, "Rights, Rules and resources in World Affairs", in O.R. Young (ed) *Governance in World Affairs*, (Ithaca: Cornell University Press, 1999) 1 at 15.

³ J. Habermas, *Communication and the Evolution of Society*, (T. McCarthy trans.), (Boston: Beacon Press, 1979) at 178.

promulgate a law as norm.⁴ Where a norm is internalized within society, the corresponding law will have legitimacy without the requirement of broad-based consensus building.

Likewise, transnational legal process views voluntary consent as integral to domestic implementation of international law. Domestic implementation of international law is two-staged. The “horizontal” level is dominated by institutional interaction in which sovereign states negotiate legal regimes. Institutionalism is therefore a useful tool in examining the legitimacy of horizontal implementation of international law. Institutionalism emphasises the importance of compliance with both formal legal implementation as well as consistency with “rules in use” that have been developed over a long period of institutional interaction.

The “vertical” level refers to domestic implementation of international norms. At this stage, the consent of the governed becomes important. Citizens of states do not negotiate the implementation of the domestic regime directly. Nevertheless, consent of the governed is an important component to successful domestic implementation of international law. As a result, internalization of international norms can only be accomplished through substantively legitimate implementation tools. This process requires extensive consultation with “civil society” in order to gain widespread domestic compliance with international norms on the basis of a “logic of appropriateness” rather than a “logic of consequences”. The implication is that citizens will comply with international law domestically out of a sense of the normative quality of the rules rather than a fear of repercussions for non-compliance.

1.0 Institutionalism and Implementation of Multilateral Environmental Accords

International law-making relies on the voluntary acceptance of agreements by sovereign states and, ultimately, the subjects of the sovereign states. Negotiated regimes are products of an explicit bargaining process in which a number of actors who possess significant, though not necessarily equal, bargaining strength reach agreement on the constitutive provisions of an

⁴ J. F. Lyotard, *The Postmodern Condition: A Report on Knowledge*, (Minneapolis: University of Minnesota Press, 1984) at 8.

institutional arrangement.⁵ After these agreements are made, it is up to the parties to implement the terms. Oran Young distinguishes between these two processes as horizontal and vertical interplay. Vertical interplay turns on distinctions among levels of social organization; for example, the interaction between governments and their subjects. On the other hand, horizontal interplay emphasizes the importance of differentiating between or among institutions operating at the same level.⁶ An example of this is state to state negotiation. Professor Koh equally recognizes this two-step process explaining that international norms are continually questioned and interpreted based on dialogue, first at the institutional, or horizontal, level, and eventually at the domestic, or vertical, level. Koh states:⁷

Yet such arguments, when made, do not settle the question of international legality. Instead, they stimulate another round of transnational legal interaction, in which the integrity of the revised norm can be challenged and tested by other nations and nongovernmental actions. The transnational legal process of institutional dialogue begins again, starting with a debate over whether to amend or reinterpret the norm in light of the new circumstances.

Usually, successful implementation of international law depends on domestic acceptance. Accordingly, transnational legal scholars attempt to reconcile the general aim of international governance with the specific instrument choices of domestic governance. Principally, this is done by approaching the transnational legal process as an integrated one involving international and domestic actors and institutions.

Lon Fuller describes, law as “the enterprise of subjecting human conduct to the governance of rules”.⁸ Oran Young uses the term “governance” to capture the two-stage nature of transnational legal process. Successful governance arrangements are designed to resolve social conflicts, promote sustained cooperation and, more generally, alleviate collective-action problems in a world of independent actors. As such, Young points out that at the most general level, governance involves the establishment and operation of social institutions that foster dialogue

⁵ O.R. Young, *supra* note 2 at 12.

⁶ *Id* at 24.

⁷ H.H. Koh, *supra* note 1 at 208.

⁸ L. Fuller, *The Morality of Law*, (New Haven and London: Yale University Press, 1969) at 106.

aimed at achieving consensus. To do this, sets of rules and decision-making procedures serve to define social practices and guide the interactions of those participating in these practices.⁹

Because institutions are significant drivers in causing or confronting environmental change, institutionalism is an important tool in studying the horizontal implementation of environmental accords. Institutionalism refers to the study of institutional interaction. Institutionalism is pragmatic, empirical, and marked by emphasis on “rules in use” in contrast to formal provisions of contracts, constitutions, treaties, and other constitutive documents.¹⁰ More importantly, it focuses on the institutional linkages that bring about successful institutional action. Long-term practices of established “rules in use” lead to an expectation of a continued pattern of interrelation between institutions. If these formal rules or “rules in use” are deviated from, implementation will be seen as illegitimate and unsuccessful. Fuller describes this aptly:¹¹

Our institutions and our formalized interactions with one another are accompanied by certain interlocking expectations that may be called intendments, even though there is seldom occasion to bring these underlying expectations across the threshold of consciousness.

In this way, global governance arrangements attempt to establish norms horizontally across national boundaries.¹² This is principally done through multilateral agreements that use the formal rules of international law as well as the “rules in use” to establish and operate an umbrella institution that interacts with national governments and other international institutions to achieve broad acceptance of the regime at the national institutional level. *CITES* is a good example of a treaty with broad horizontal participation. *CITES* has been ratified by 158 countries.¹³

Oran Young sees institutionalism as an important component in studying international environmental law. Of particular importance to evaluating international environmental law is the examination of institutional interaction. Institutions created to deal with specific environmental

⁹ Young, *supra* note 2 at 4.

¹⁰ *Id* at 4.

¹¹ L. Fuller, *supra* note 8 at 217.

¹² O.R. Young, *supra* note 2 at 15

¹³ CITES Home Page <http://www.cites.org/eng/parties/alphabet.shtml>.

problems or issues frequently become embedded in larger hierarchical structures.¹⁴ Any effort to look at the impact of international environmental agreements will therefore require assessment of the larger institutional structures.¹⁵

Indeed, international environmental regimes can only be properly understood as systems of rights, rules, and relationships designed to bring order into the interactions of sovereign authorities.¹⁶ Thus, the process of international environmental regime formation is one of negotiation as opposed to a spontaneous, a self-generating, or an imposed regime.¹⁷

MEAs follow Young's description of institutional operation. MEAs establish autonomous institutional arrangements that mark a distinct approach to: "institutionalized collaboration between states, being both more informal and more flexible."¹⁸ MEAs function through a hierarchy with the Conference of the Parties (COP) as the supreme body. Typically, the COP will meet on a regular basis to examine the effectiveness of the MEA regime and recommend or adopt changes to its operation. The powers of the COP are explicitly set out in treaty articles.¹⁹ Nevertheless, in practice, states are often guided by past member state interaction in interpreting MEAs.²⁰ In this way, MEAs exhibit the institutional behaviours described by Young. Indeed, the institutional arrangements of MEAs have become increasingly perceived as crucial to their effectiveness.²¹ Only through properly functioning institutions can MEAs adapt to changing circumstances in environmental problems.²² Institutional interaction is therefore the dominant feature of horizontal implementation of international environmental law.

However, this represents only half of the process. Environmental norms must also be implemented in a vertical manner within nation-states. Professor Harold Koh maintains that this

¹⁴ O.R. Young, *Institutional Dimensions of Environmental Change*, (Cambridge, Mass: MIT Press, 2002) at 69.

¹⁵ *Id* at 9.

¹⁶ *Id* at 7.

¹⁷ *Id* at 11.

¹⁸ R.R. Churchill and G. Ulfstein, "Autonomous Institutional Arrangements in Multilateral Environmental Agreements: Little-Noticed Phenomenon in International Law"(2000), 94 *A.J. Int'l L.* 623 at 625.

¹⁹ *Id* at 631.

²⁰ *Id* at 641-643.

²¹ *Id* at 628.

means that various state and non-state actors must work together to “internalize” international norms domestically.²³ In order to achieve this, the norms must be grounded deep within national political, economic and cultural systems if they are to achieve their purposes.²⁴ Central to the success of such grounding is the legitimacy of the vertical process.

2.3 Vertical Implementation of Multilateral Environmental Accords

The integrated approach of institutionalism is concerned with institutional linkages at the domestic and international levels. By examining the linkages, the “rules in use” that are practiced among institutions become apparent. It can then be determined what conditions are required for a given institution (such as a member state government) to adopt an international environmental convention. However, successful implementation of international environmental conventions requires domestic implementation. This vertical process is best understood by transnational legal process which involves state and non-state actors working to successfully “internalize” international environmental norms at the domestic level. Legitimacy at this stage does not depend on whether a rule or decision is substantively correct as much as whether it reflects general support for a given policy.²⁵ Transnational legal process is described by Harold Hongju Koh as:²⁶

...the theory and practice of how public and private actors – nation-states, international organizations, multinational enterprises, non-governmental organizations and private individuals interact in a variety of ways to make, interpret, enforce and ultimately internalize rules of transnational law.

Professor Koh defines the transnational process of making international law as an integrated one focusing on the actions of several state and non-state actors. The process may be identified

²² *Id* at 628.

²³ H. Koh, *supra* note 1 at 183-184.

²⁴ O.R. Young, *supra* note 2 at 15.

²⁵ D. Bodansky, “The Legitimacy of International Governance: A Coming Challenge for International Law?” (1999), 93 *Am. J. Int. Law* 596 at 602.

²⁶ H. Koh, *supra* note 1 at 183-184.

temporally as a four-step progression, which I characterize as²⁷: enactment, interpretation, enforcement and internalization.

The first step sees institutions at the international level adopt international environmental conventions. The second and third steps in the transnational legal process involve nations subject to the international agreement interpreting their obligations under the treaty and enacting laws, regulations, or voluntary programs to induce changes in private party conduct in order to ensure compliance with the treaty obligations. This process is best understood by the institutional analysis described above.

The fourth stage of transnational legal process, internalization, involves private parties in the specific states changing their conduct in response to the national actions. This stage or step is focused on the interaction of state and non-state actors to develop a common understanding of the legal norms represented by the international obligation. When this occurs, national and international non-state (and largely non-institutional) actors will campaign to have domestic governments adhere to the obligations. Further, governments, in which there is a strong internalization of international environmental norms, will pressure the minority to adhere to norms broadly accepted by the domestic population.²⁸

Once institutions have accepted, through ratification, the international norms imposed on them through negotiated regimes formed through legitimate processes using both formal rules and “rules in use”, these institutions must then focus on their subjects’ acceptance of the norms in order to successfully internalize them. Two ways of thinking dominate: the logic of consequences and the logic of appropriateness.²⁹

Those who embrace the logic of consequences assume that the actors are utilitarians who will change their behaviour when it becomes in their best interest to do so. In other words, utilitarian

²⁷ Robert Keohane, and others, have characterized the process as three-fold, interactions, interpretations and internalization (see R. Keohane, “Commentary on Koh” (1998), 35 *Houston Law Review* 699). However, this excludes the horizontal process of international law making and domestic legal implementation.

²⁸ K. Harrison, *Passing the Buck*, (Vancouver: UBC Press, 1996) at 27.

actors will comply with rules and fulfill commitments if, and only if, they are convinced that the present value of compliance exceeds the value of non-compliance.³⁰

Conversely, those who adhere to the logic of appropriateness assume that actors behave in ways that they regard as right or proper and that they will normally accept restrictions that they conceive as legitimate. Governments approaching the problem from this perspective will seek to design arrangements that actors treat as authoritative because their voices were heard in the design process or because they are based on underlying principles that actors regard as fair or just. To the extent that rules are accepted as legitimate or authoritative, those whose actions are governed by the “logic of appropriateness” rather than the “logic of consequences” will comply with the rules without making an effort to calculate whether the benefits of doing so outweigh the costs.³¹ Thus, some international environmental regimes apply mechanisms that will increase the benefits of compliance or raise the costs of non-compliance to member states while others rely on feelings of propriety or development of behaviour. Many political science scholars see legitimacy as the basis for obedience based on the “logic of appropriateness”. For example, Grace Skogstad states:³²

It is the combination of input legitimacy – that is, procedural legitimacy – and output legitimacy – that is, substantive legitimacy – that leads individuals to feel a sense of obligation to obey collectively binding decisions even when they conflict with their own preferences.

By and large, transnational legal scholars have also accepted that successful implementation of international environmental norms requires institutional frameworks that rely on the logic of appropriateness for compliance. Moreover, many environmentalists see logic of appropriateness as the only means of ensuring enduring environmental protection. For example, Carol Rose

²⁹J. March & J.Olsen, “The Institutional Dynamics of International Political Orders” (1998), 52 *International Organization* 943.

³⁰O.R. Young, *supra* note 15 at 38.

³¹*Id* at 39.

³²G. Skogstad, “Who Governs? Who Should Govern?: Political Authority and Legitimacy in Canada in the Twenty-First Century” (2003), 36 *Canadian Journal of Political Science* 955 at 956; see also F. Scharpf, “Interdependence and Democratic Legitimation” in S. Pharr and R. Putnam, *Disaffected Democracies: What’s Troubling the Trilateral Countries?*, (Princeton: Princeton University Press, 2000) as cited by G. Skogstad *supra* note 33 at 956.

advocates a changing of norms to see the environment as a “gift” which can be protected best by voluntary self-restraint.³³

This was a concept articulated by Immanuel Kant in *The Conflict of the Faculties* in which he writes:³⁴

The profit which will accrue to the human race as it works its way forward will not be an ever-increasing quantity of morality in its attitudes. Instead, the legality of its attitudes will produce an increasing number of actions governed by duty, whatever the particular motive behind these actions may be...Violence will gradually become less on the part of those in power, and obedience towards the laws will increase...and this will ultimately extend to the external relations between the various peoples, until a cosmopolitan society is created.

Given this, it is not unreasonable to assert that legal regimes accepted on the basis of a logic of appropriateness are seen as more legitimate than those that rely on a logic of consequences.

2.4 Legitimacy as Consent

According to William Connolly³⁵, Max Weber’s definition of legitimacy provides the starting point for any contemporary discussion of legitimacy. Weber concludes there are three alternative claims to legitimacy: traditional, charismatic, and legal.³⁶ Legitimacy may reside in an appeal to tradition or the established belief in the sanctity of long-established traditions and the legitimacy of those exercising authority under them. Legitimacy may equally be founded on charisma. This is the devotion to the exceptional sanctity, heroism or exemplary character of an individual person and the “normative patterns of order revealed or ordained by him”³⁷. Finally, a claim might appeal to rational procedures or a belief in the legality of enacted rules and the right of

³³ C. M. Rose, “Given-ness and Gift” (1994), 24 *Environmental Law* 1 at 17.

³⁴ I. Kant, *The Conflict of the Faculties*, excerpted in *Kant’s Political Writings*, ed. H. Reiss (Cambridge: Cambridge University Press, 1970) as cited in P. Riley, *Will and Political Legitimacy*, (Cambridge, MA: Harvard University Press, 1982) at 132.

³⁵ W. Connolly, “Legitimacy and Modernity” in *Legitimacy and the State* (W. Connolly ed.) (Oxford: Basil Blackwell, 1984) at 8.

³⁶ M. Weber, “Legitimacy, Politics and the State” in Connolly, *Id* at 34.

³⁷ M. Weber, *Economy and Society*, vol. 1 (Berkeley: University of California Press, 1978) at 215 as cited in Connolly, *supra* note 36.

those elevated to authority under such rules to issue commands. In a liberal democracy, legitimacy of governmental action is judged primarily on these latter terms. At a minimum, legitimacy entails government action that is consistent with the rule of law. The rule of law entails subjection of subjects to known legal rules and executive accountability to the legal authority.³⁸ However, even among committed legal positivists, a normative evaluation of a legal regime goes beyond mere legislation.³⁹ Legitimacy in the broader sense must demonstrate some form of consent to the authority. Indeed, Daniel Bodansky states that all modern theories of legitimacy attempt to base governmental authority on the consent of the governed.⁴⁰ Central to this normative evaluation of law as consent is both a rights evaluation and a contractualist one.

Rights theory is based on the belief that certain natural rights exist which are inviolable.⁴¹ The theory is premised on the age-old belief that an immoral law is no law at all.⁴² In the modern sense, according to Hohfeld's widely accepted definition, a right is a legal claim that can be asserted against others, including, where relevant, the prevailing governmental power.⁴³ Rights holders may act as they choose within the scope of the right, regardless of the practical result. Further, many liberal democratic states today have a written Bill of Rights which set out certain inviolable rights that cannot be infringed by government action. Thus, even if laws are passed in accordance with the "Diceyan"⁴⁴ conception of the rule of law, they cannot be valid if they breach fundamental rights outlined in a written Bill of Rights.

³⁸ *Re: Manitoba Language Rights*, [1985] 1 S.C.R. 721 at 730.

³⁹ Murphy and Coleman, *Philosophy of Law*, (Boulder: Westview, 1990) at 69.

⁴⁰ D. Bodansky, *supra* note 26 at 597.

⁴¹ see for example, Locke, *The Second Treatise of Government*, (T. P. Peardon ed.), (New York: Macmillan, 1952) at 79.

⁴² see for example, St. Thomas Aquinas, *Summa Theologica [First Part of the Second Part] The Essence of Law*, as reproduced in D. Bigongiari, *The Political Ideas of St. Thomas Aquinas*, (New York: Hafner Press, 1953) at 7.

⁴³ J. Singer, "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld" (1982), *Wisc. Law Rev.* 975 at 986.

⁴⁴ A.V. Dicey, *Introduction to the Study of Law of the Constitution*, (London: MacMillan, 1975) at 187-199 (the Diceyan conception of the rule of law was that relied on and summarized by the Supreme Court of Canada in its definition of the "rule of law", in *Manitoba Language Rights*, *supra* note 39).

Contractual theory has its roots in Thomas Hobbes⁴⁵ and Jean Jacques Rousseau⁴⁶. Locke expressed it as:⁴⁷

Men being, as has been said, by nature all free, equal, and independent, no one can be put out of this estate and subjected to the political power of another without his consent. The only way whereby any one divests himself of his natural liberty and puts on the bonds of civil society is by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties and a greater security against any that are not of it.

Thus, according to contractual theory, government is a compact freely consented to by the people acting in their own self-interest for self-preservation. John Rawls used consent to a social contract as a legitimizing principle most recently.⁴⁸ For Rawls, consensus around a liberal conception of justice is the only viable basis for a stable union in modern democratic societies, which are characterized by what he calls the “fact of pluralism”. As citizens have, and will continue to have, competing comprehensive moral conceptions that involve different convictions about that which makes life valuable and the moral theories that ground such beliefs, a common consensus must be reached for liberal democracy to remain viable.

Like Max Weber, Rawls saw three possible bases of social union (or basis of consent to authority). First, there could be some universal acceptance of some particular comprehensive moral doctrine. Rawls sees this as unrealistic given the pluralistic nature of the modern liberal democratic state. Second is self-interest. Like Hobbes, Rawls saw a possible basis of legitimacy to be a pragmatic one in which citizens submit to authority and social union on the basis of need. However, Rawls rejects this as too temporary in nature. Once the conditions that brought on the consent shift, the legitimacy of the authority will be questioned. The third basis of consent Rawls recognizes is the overlapping consensus around a political conception of justice. This will be a

⁴⁵ T. Hobbes, *Leviathan*, (London: Penguin Classics, 1968) at 236.

⁴⁶ J.J. Rousseau, *The Social Contract*, (London: Penguin Classics, 1968) at 59.

⁴⁷ J. Locke, *supra* note 42 at 54.

⁴⁸ J. Rawls, “The Idea of an Overlapping Consensus” (1987), 7 *Oxford Journal of Legal Studies* 1at 1.

narrow enough conception of the good to ensure the long-term viability of the legitimacy of authority and is less prone to desertion when it is to one party's advantage.

The notion of legitimacy as consent is important to transnational legal process. Internalization requires that subjects act out of a logic of appropriateness. This cannot be achieved in legal regimes that are imposed rather than consensual. As such, domestic implementation cannot occur in violation of citizens' rights and it must be consistent with the social compact that is the foundation of the domestic regime. However, as will be explained below, these theories of legitimate governance have been criticized as incomplete because they fail to take into account the role of community in citizens' perceptions of legitimacy.⁴⁹

2.5 Transnational Legal Process and the Role of Legitimacy

The role of legitimacy in transnational legal process is different in the two main stages of the transnational legal process. The horizontal stage is mainly concerned with procedural legitimacy. Nevertheless, legitimate implementation procedures at the horizontal level are important to the successful internalization of the legal norms represented by international environmental conventions. At the horizontal stage of transnational legal process, legitimacy depends on adopting conventions that are negotiated in a manner consistent with both the formal rules and the "rules in use" that have evolved over years of institutional interaction.

Thomas M. Franck sees legitimacy as rule by laws. Frank cites four indicators of legitimacy:⁵⁰ determinacy, symbolic validation, coherence, and adherence. Determinacy means the law is defined and public so that everyone may understand his or her obligations. Symbolic validation is a sense that authority is being exercised in accordance with the right process that is institutionally recognized and validated. People who have not acquired authority through the proper rituals cannot be seen as legitimately exercising power. Coherence implies that a rule be applied uniformly in every similar or applicable instance. Adherence implies that all laws be

⁴⁹ *Infra*, p. 19.

⁵⁰ T. Franck, *Fairness in International Law and Institutions*, (Oxford: Oxford University Press, 1995) at 30-46.

made with the proper procedure in accordance with what H.L.A. Hart calls secondary rules of recognition.⁵¹

Although Harold Koh maintains that internalization may occur in both liberal and non-liberal regimes, it is more likely to occur in liberal states.⁵² Moreover, as recognized by Robert Keohane, liberal regimes offer the transparency within the political-institutional environment that is necessary for the interaction, which brings about internalization.⁵³

Legitimate process is necessary for developing a logic of appropriateness. If a regime has a legal system where law is enacted, and power exercised, legitimately (as defined by Franck), the conditions deemed necessary by Keohane to internalize international law will be present. Koh notes that legal compliance in the domestic arena is a function of encouraging internalized normative behaviour.⁵⁴ Similarly, Thomas Franck defines legitimacy in the international domain as a property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.⁵⁵

Finally, Oran Young says the perceived equity of a solution will be entrenched when major parties and interest groups have a sense that their primary concerns have been treated as a critical determinant for successful efforts to create international rules.⁵⁶ Legitimacy, according to Young, depends on the extent to which those addressed by a rule see themselves as obligated by it and on whether that attitude of obligation is conditioned by the quality of the rules and not by the power that created and supports them. Since it is only when international law is implemented domestically that people become obligated to follow it, legitimacy looms large in horizontal

⁵¹ H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961) at 209.

⁵² R. O. Keohane, *supra* note 28 at 710-711; Koh himself admits that “the structural attributes of liberal systems undeniably make them more generally open to some kinds of internalization” H.H. Koh, “Bringing International Law Home” (1998), 35 *Houston Law Review* 623 at 676.

⁵³ R.O. Keohane, *supra* note 28 at 710.

⁵⁴ H.H. Koh, *supra* note 53 at 628.

⁵⁵ T. Franck, *The Power of Legitimacy among Nations*, (New York: Oxford University Press, 1990) at 24, 38.

⁵⁶ O. Young, *International Cooperation: Building Regimes for Natural Resources and the Environment*, (Ithaca: Cornell University Press, 1989) at 368.

implementation but implies a deeper meaning at the vertical stage. Central to legitimacy at the vertical stage of transnational legal process is the impact an international norm has on political communities.

1.0 Community and Legitimacy

At the vertical stage of transnational legal process, legitimacy takes on a greater importance and is integral to successful internalization of international environmental norms. Again, the quality of the rules will be evaluated before subjects will obey a law based on logic of appropriateness. It is at this stage that member states attempt to internalize international environmental norms in such a way that the citizens will comply with the rules without making an effort to calculate whether the benefits of doing so outweigh the costs. An important appeal to legitimacy in vertical implementation of international norms is community. Franck states:⁵⁷

The more plausible a community's perception of a rule's legitimacy, the more persuasive that rule's claim to fairness, the stronger its promotion of compliance, and the firmer its re-enforcement of the sense of community.

Essentially, our community determines who we are; it is the context in which we exist and which gives meaning to our actions.⁵⁸ Michael Sandel states:⁵⁹

...to say that members of society are bound by a sense of community is not simply to say that a great many of them profess communitarian sentiments and pursue communitarian aims, but rather that they conceive their identity-the subject and not just the object of their feelings and aspirations- as defined to some extent by the community of which they are a part. For them, community describes not just what they have as fellow citizens but also what they are, not a relationship they choose (as in voluntary association) but an attachment they discover, not merely an attribute but a constituent of their identity.

Thus, communitarian arguments reject the idea that individuals are an aggregation of identifiable preferences that exist prior to, or apart from, any group. Instead, citizens form preferences with

⁵⁷ T. Franck, *supra* note 51 at 30; see also T. Franck, *supra* note 56 at 38 where Franck notes that legitimacy is an avenue to obligation as well as perceived justness of the regime.

⁵⁸ M. J. Sandel, *Liberalism and the Limits of Justice*, (Cambridge: Cambridge University Press, 1982) at 150, 183.

⁵⁹ *Id* at 150.

reference to that community as well as by traditional modes of political action. Franck demonstrates community's impact on citizens' understanding of legitimacy with this remark:⁶⁰

It is only by reference to a community's evolving standards of what constitutes right process that it is possible to assert meaningfully that a law, or an executive order, or a court's judgment, or a citizen's claim on a compatriot, or a government's claim on a citizen is legitimate.

When domestic implementation of international law is undertaken, the same institutions whose representatives negotiated an agreement with other states to commit to a certain undertaking become subject to a greater degree of scrutiny. This is because the vertical implementation (and eventual internalization) of international norms involves much more interaction with non-institutional actors. Implementation procedures at this level must be cognizant of the community's values and perceptions in order to successfully internalize the norms. The dichotomy between the expectations at the two stages is captured in Charles Taylor's description of a community's identification with its institutions. Taylor notes:⁶¹

On the one hand, there are structures that have a merely instrumental relation to our lives, even if the service they supply is very important. On the other hand, there are environments characterized by practices that are the primary sites in which we define important values and hence possible poles of identity. We may speak of institutions that serve versus institutions that identify. All are institutions in our society, but the respective ways they fit into our lives are very different.

As institutions become part of individuals' lives, they come to give the community meaning. Thus, at the vertical stage, institutional structures have different components, which help in specifying the interests that motivate action: norms, identity, knowledge, and culture.⁶² Nevertheless, institutions (and the communities they represent) can be reshaped through changes

⁶⁰ T. Franck, *supra* note 51 at 26.

⁶¹ C. Taylor, *Reconciling the Solitudes*, (Montreal: McGill-Queen's University Press, 1993) at 123.

⁶² J. Brunnée & S. Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000), 39 *Colum. J. Trans. L.* 19 at 29.

in the constructed identities of the actors.⁶³ Skogstad takes note of the malleable nature of legitimacy stating:⁶⁴

While legitimation standards differ across societies and over time, output legitimacy generally captures the belief that decisions and policy outcomes promote the common welfare of the political community through effective problem-solving and distributive justice.

In consenting to international norms, a government binds itself. However, implementation of international law, in particular environmental law, has significant implications for, and imposes obligations on, non-state actors and requires their consent in order to be successful. Thus, an important component of legitimacy is consent. Consent implies action consistent with the rights of citizens and action consistent with the social contract. Also important in legitimacy is action consistent with community values. In order to successfully implement international law domestically, a given community must accept it as just and right. Only then will non-institutional actors voluntarily change their behaviours based on a logic of appropriateness. Legitimate procedures allow norms to emerge.⁶⁵

...from the interaction of participants (subjects), and an increasingly fixed pattern of expectations about appropriate behaviour.

Internalization of norms occurs when citizens adopt the norms at a deep level. Where this occurs, subjects will obey laws out of a “logic of appropriateness” rather than a “logic of consequences”. The difference is explained well by Skogstad.⁶⁶

...it is helpful to recognize that legitimacy has both an input and output component. Political authority enjoys input legitimacy when individuals believe that those who make legally enforceable decisions have a right to do so. In democracies, input legitimacy is sourced in procedures that allow citizen preferences to enter into the political process. Political authority enjoys output legitimacy when the outputs of governing – public policies and other decisions – meet social standards of acceptability and appropriateness.

⁶³ *Id* at 30.

⁶⁴ G. Skogstad, *supra* note 33 at 956.

⁶⁵ *Id* at 24.

⁶⁶ G. Skogstad, *supra* note 33 at 956.

Thus, implementation of MEAs cannot occur without legitimate implementation procedures. Since legitimacy is based on consent, implementation of international legal norms cannot be seen as being imposed on a particular community. In particular, those communities represented by the constituent governmental institutions within the nation-state in a federation must consent to the domestic implementation of international legal norms. Consent is obtained domestically through both a rights-based and a compact theory of legitimate governance. The following chapter will show that these theories are readily applicable to federalism as sub-units' consent is obtained through procedures that are consistent both with the rights of sub-units and procedures that respect the historical compact of the federal regime.

3.0 Legitimacy in the Canadian Federal State

3.1 Normative Federalism

In the struggle for an equilibrium between individual and communal rights, there are no guarantees for success, at least in the short term. Ultimately, therefore, as consent of the governed remains the basic principle, the disappointed or disillusioned citizen must have the right to voluntarily seek his or her community elsewhere.⁶⁷

In a federal state, a large portion of the population identifies itself with the communities within the sub-units of the federation. Moreover, the citizen is free to “seek his or her community elsewhere”. As a result, community and community identification with institutions is particularly relevant in a federal state. Consequently, domestic implementation of MEAs in federal states must be done in a manner that is consistent with federal normative values. Although I will not attempt to elucidate a complete theory of federalism through a normative lens, I will attempt to demonstrate one of the primary means by which citizens in a federal state (in particular, Canada) evaluate the legitimacy of government action. This will generally parallel transnational legal process. The use of international models to understand policy-making in the federal context is

⁶⁷ P.W. Hutchins, "The Aboriginal Right to self-government and the Canadian Constitution: The Ghost in the Machine" (1995), 29 *U.B.C. L. Rev.* 251 at 298.

not uncommon.⁶⁸ When applying international models of governance within federal states, the term multilevel governance is used.⁶⁹ Like transnational legal process, the focus of multilevel governance is on the relationship between established institutions. Determinations are made between these institutions about what level should undertake policy implementation based on what resources are available at each level, and the ability of the governments to carry out policy in an efficient manner.⁷⁰

Because of the interaction between the institutions, the institutionalism theory used to explain patterns of behaviour among international states becomes useful. The federal government must implement international environmental agreements in a manner that is consistent with the formal federal contract as well as the “rules in use” that underlie the political relations between federal sub-units and the national government. However, this institutional interaction must also be consistent with Canadians’ understanding of the federal values of the Canadian polity. The essence of the characterization of the international legal system as “horizontal” is that there is no legislative or executive hierarchy within the system.⁷¹ As a result:⁷²

Norms typically emerge from the interaction between participants (subjects), and an increasingly fixed pattern of expectations about appropriate behaviour.

However, an important feature of multilevel governance is that often a federal government can impose its will on the constituent units whereas the international dimension of global governance is purely consensual. Nevertheless, this “horizontal” view of federalism is a useful tool in understanding the ultimate vertical implementation of environmental norms in a federation and the concomitant internalization of those norms.

⁶⁸ See for example, J. O. Saunders, “Sharing Environmental Management: A Legal Perspective”, (Paper presented at the International Conference on Environmental Management: The Sharing of Responsibilities between Levels of Government, Lac Beauport, Quebec, 4-6 December 1992) [unpublished]

⁶⁹ R. O’Brien, “The Nuances of Multilevel and Global Governance”, paper presented at *Globalization, Multilevel Governance and Democracy: Continental, Comparative and Global Perspectives*, (Kingston: Queen’s University, May 3-4, 2002) at 3.

⁷⁰ *Id* at 4.

⁷¹ J. Brunnée & S. Toope, *supra* note 63 at 21.

⁷² *Id* at 21.

An understanding of the normative values of federalism will aid in setting standards with which we can assess, evaluate, justify, defend or attack the structure and operation of the federal system and the implementation of MEAs within it. The first step in this examination is to define the main basis of legitimacy relevant to federalism. Legitimacy has been defined as: authority exercised consistent with right process; power exercised without breaching the natural rights of the governed; and authority based on a social contract. All of these are normative bases for federalism and consent is the thread that runs through them. When speaking of consent in the federal milieu, consent is not conceived of as the consent of the individual governed but rather of the political communities making up the federation.

Legitimate government is consensual. Just as international environmental regimes can only be properly understood as systems of rights, rules, and relationships designed to bring order into the interactions of sovereign authorities,⁷³ federal regimes exhibit many of the same characteristics. To a large degree, federal-provincial environmental regime formation in Canada is, like international regime formation, one of negotiation rather than a spontaneous, a self-generating or an imposed regime.⁷⁴ In the context of Canadian environmental policy, to a larger degree than in many federations, environmental regime formation is largely a consensual process. The history of Canadian federalism and the “rules in use” that have developed over years of federal-provincial diplomacy require the implementation of negotiated regimes in order to effectively implement policy, especially environmental policy.

Legitimacy in a federal system is concomitantly based on rights, contract, and process. Again, the central theme in these bases of legitimacy is consent. In order for the polities in a federation to consent to union, the union must have some justification. Richard Simeon lists the justifications for federal governance as: effectiveness, community, and democracy.⁷⁵ The perspective of effectiveness justifies an action by a constituent or national level of government where it will enhance the capacity of government institutions to generate effective policy and

⁷³ Much like international environmental legal regime as described by O. Young, *supra* note 2 at 7.

⁷⁴ *Id* at 11.

⁷⁵ R. E. Simeon, *supra* note 79.

respond to citizen needs. The federal principle of community justifies the exercise of authority from the level of government that best represents the community affected. Moreover, it will appeal to the image of the ideal or preferred community that that constituency represents. Finally, the democracy justification is used to attempt to legitimize federal or provincial actions by demonstrating that the exercise of power by that level of government promotes democracy. A national government will appeal to majority support in the nation-state as a whole to justify its authority. A state or provincial government, on the other hand, will try to demonstrate that its legitimacy to oppose national authority is based on the fact that a majority within its borders is opposed to the imposition of federal authority and maintain that action by the national government is an illegitimate use of federal power because it will be a manifestation of the tyranny of the majority that federalism is intended to prevent.⁷⁶

The justification I will be focusing on is community, which is particularly relevant to the Canadian federal system,⁷⁷ and is central to successful implementation of international law domestically. The legitimacy of federal action is therefore assessed by its ability to successfully maintain a balance between the provincial and national communities. Thomas Franck, while recognizing the social contract theories of philosophers such as Rawls, makes a similar claim:⁷⁸

While most literature about the social contract addresses the formation of a community by persons, contractarian theory is also readily applicable to, and influential in, the evolution of a community of states.

A federal system is one of dual sovereignty. Both the federal and regional governments are sovereign in particular spheres of governance and independent of one another.⁷⁹ Each government has a constitutional right to legislate in its particular sphere. Therefore, a normative

⁷⁶ See for example A. Hamilton, J. Jay, J. Madison, *The Federalist Papers, Federalist No. 10*, (New York: New American Library, 1961) esp. Federalist Paper No. 39.

⁷⁷ Simeon, *supra* note 79 at 135-136.

⁷⁸ T. Franck, *supra* note 56 at 26-27.

⁷⁹ K.C. Wheare, *Federal government*, (4th ed.), (Oxford: Oxford University Press, 1963) at 14.

understanding of federalism can be partially explained through a rights analysis. Lynn Baker and Ernst Young define the rights as:⁸⁰

A state's freedom from federal interference, like an individual's freedom from governmental restrictions on expression or private choices, is an essentially *negative* freedom. Just as Isaiah Berlin defined "negative freedom" for individuals as "the area in which a man can act unobstructed by others,"⁸¹ so too federalism seeks to create a space within which a local political community can make choices about how to govern itself without interference from the national government. And just as negative freedoms do not prescribe what the individual shall do within this protected sphere of liberty, so too federalism does not dictate that the state government make any particular substantive choice within the range of options permitted it.

However, one cannot make a direct comparison between the rights of individuals and legitimate governmental action, discussed above, and the rights of federal sub-units. The rights held by federal sub-units have no independent value; their worth derives entirely from their utility in enhancing the freedom and welfare of individuals.⁸² The question is:⁸³

...whether individual freedom can best be protected solely by assigning particular rights to individuals -- such as free speech or privacy -- or through a structure of institutional checks and balances, or through some combination of the two.

This is a common reason for adopting a federal system. Political philosophers from Aristotle to Montesquieu insisted that political units had to stay relatively small, because only a small polity could possess sufficient social and moral commonality to be self-governing.⁸⁴ Although James Madison argued that a large national government could more effectively control the tendency toward faction in popular governments,⁸⁵ he also insisted that the jurisdiction of the central government be limited with the states and localities retaining control over matters within their

⁸⁰ L. Baker & E. Young, "Federalism and the Double Standard of Judicial Review"(2001), 51 *Duke L.J.* 75 at 135-136.

⁸¹ I. Berlin, *Four Essays on Liberty* 122 (1969) as cited in L. Baker & E. Young, *id* at 135.

⁸² L. Baker & E. Young, *supra* note 88 at 136.

⁸³ *Id* at 136.

⁸⁴ W. M. McClay "The Soul of Man Under Federalism" (1996), 64 *First Things* 21 at 23. Of course the idea that legitimate or relevant political communities have to be small enough that the citizens feel a sense of ownership to them is one of the chief rationales for federalism and the one focused on in this paper.

⁸⁵ A. Hamilton, J. Jay and J. Madison, *supra* note 84 at 77.

traditional authority.⁸⁶ Madison assumed that a large and diverse nation could not offer the same sense of moral community as a small and relatively homogeneous republic.⁸⁷ Thus, at its core, the federal system can be understood as the integration of political communities that share a common population.

In Canada, the federal dynamic is marked by the interaction not between individuals but between what have been called political communities. Political communities have aspects of affective communities, which consist of mutual attachments through personal contact and day-to-day relationships.⁸⁸ Further, they are also dialogic communities, which emphasize the instrumental role of public debate and un-coerced persuasion in arriving at collective decision-making (i.e. legitimate decision making).⁸⁹

The political community, in the traditional sense of the term, has no geographic centre.⁹⁰ Rather, it is a community of common interests and/or identities. More importantly, identification or membership in a political community is freely given, unlike membership in a nation-state. The form of the political community is therefore constantly in flux. It continually changes as new projects or joint actions are undertaken.⁹¹

The presence of political communities within the nation-state is particularly relevant with respect to ethnic minorities within the broader dominant culture. However, the values may also be based on traditional ways of life or economic structure that create differences among otherwise homogenous federal states. Thomas Franck asserts that allegiance to political communities may be based not on ethnic, language or religious divisions but on an:⁹²

Ineluctable conflict between two principles which had been conceived not *in integrum* but in very limited, specific historic contexts.

⁸⁶ *Id* at 291.

⁸⁷ *Id* at 290.

⁸⁸ E.L. Rubin & M. Feeley, "Federalism: Some Notes on a National Neurosis" (1991), 41 *U.C.L.A. Law Review* 903 at 936.

⁸⁹ J. Habbermas, *supra* note 3 at 273-337.

⁹⁰ D. Schechter, *Sovereign States or Political Communities?*, (Manchester: Manchester University Press, 2000) at 112.

⁹¹ *Id* at 112.

⁹² T. Franck, *supra* note 51 at 153.

For example, the American Civil War was largely fought to bring the southern states back into the union. The Confederacy saw secession as the only means to preserve its traditional plantation economy in the face of a federal government seemingly dedicated to destroying its economic base – cotton production supported by slave labour. Although a great number of southerners had no direct interest in it, this economic system was so integral to the south that it essentially defined the region. As one historian notes:⁹³

What we are dealing with here is a culture complex. Despite the fact that cotton growing and slaveholding directly involved only a minority, it was nevertheless true that standards, conditions, and patterns of society were set by the basic staple.

Similarly, the imposition of the federal National Energy Policy⁹⁴ in Canada by the federal government was seen as an attack on the traditional resource economy of Alberta and thereby viewed as illegitimate despite its constitutional validity.⁹⁵ Just as cotton was to the American south, the oil and gas industry in Alberta is seen as a defining feature of the society. The Canadian sociologist John F. Conway sees the Canadian west as a whole as a region defined by a resource economy marked by:⁹⁶

...structural economic inequality, built into the very fabric of the national economy, combines with the inevitable insecurity that haunts resource-based economies, to sustain an ongoing sense of injustice in the West. Western disaffection, and its continuing expression in increasingly regional politics, is the defensive reaction of the people of the West who have fought repeatedly for structural changes, only to be defeated each time.

Specifically, the citizens of the respective state and provincial governments viewed both of these federal actions as a breach of the self-determination inherent in the federal value of community. Both situations were an affront to what the people thought was the federal principle that allows the government closest to them to make decisions about particular local issues. In these cases,

⁹³ J.G. Randall and D.H. Donald, *The Civil War and Reconstruction*, (Lexington, Mass: D.C. Heath and Co., 1969) at 37.

⁹⁴ Canada, *The National Energy Program*, (Ottawa: Department of Energy, Mines and Resources, 1980)

⁹⁵ J.F. Conway, *The West: The History of a Region in Confederation* (2nd), (Toronto: James Lorimer & Co., 1995) at 209-222.

⁹⁶ *Id* at 321.

the resource economy and the cotton economy were deemed to be essential to the communities and particular to the region. As such, the citizens believed the only legitimate use of power was by the constituent government itself, or at least with their consultation.

Thus, democratic claims to legitimacy in a federal system are often appeals to community values. This legitimacy depends on using mechanisms which are consistent both with federal democratic values, in that they are constitutionally valid and, in a broader sense, are not a manifestation of the tyranny of the majority over a discrete political community. As a final example, I would point to the imposition of the *Charter of Rights* in Canada. Legally, the federal government was in a position to patriate the new *Constitution Act, 1982*⁹⁷ (which included the *Charter of Rights*) absent provincial consent.⁹⁸ The Charter was eventually adopted with the approval of all provinces except Quebec. Indeed, for several years after, all laws passed in Quebec were passed “notwithstanding”⁹⁹ the provisions of the Charter in protest of this federal use of authority.

However, it could not be said the people of Quebec did not accept the principles of the Charter. The Quebec government implemented a *Quebec Charter of Human Rights and Freedoms*¹⁰⁰, which provides the same protections as the federal Charter. Nevertheless, the Charter is deemed illegitimate by Quebecers because it is perceived to have been imposed by the federal government on the people of Quebec in spite of the opposition of the provincial government, an illegitimate use of authority because it is a breach of the federalist goal of protecting political communities.¹⁰¹

Contractual understandings of legitimacy are equally, if not more important than, rights-based conceptions of legitimacy in a federation. The federal framework is recognized as having the

⁹⁷ U.K, 1982, c. 11.

⁹⁸ *Reference Re: Amendment of the Constitution of Canada*, [1981] 1 S.C.R. 753 affirmed the legal principle that the constitution could be amended absent any provincial consent. However, the court noted that *tradition and convention* dictated that substantial provincial consent was necessary to amend.

⁹⁹ S. 33 (the notwithstanding clause) of the Charter allows a province to opt out of the provisions of the Charter for a period up to five years.

¹⁰⁰ R.S.Q. c. C-12.

¹⁰¹ G. Laforest, *Trudeau and the End of a Canadian Dream*, (Montreal: McGill-Queen’s University Press, 1995) at 125-149.

nature of a state system safeguarded by an effective coercive legal apparatus such as the federal Constitution. In this way, it is understood as a contract, generating the members' consensus as the base of the system.¹⁰² The American Senator John C. Calhoun stated:¹⁰³

...the present constitution is the act of States themselves, which is the same thing as the people of the several States, and forms a union of them as sovereign communities...the confederation was a contract between agents-the present Constitution a contract between the principals themselves.

The words of the Supreme Court of Canada make this point particularly clear in the Canadian context:¹⁰⁴

The federal character of the Canadian Constitution was recognized in innumerable judicial pronouncements. We will quote only one, that of Lord Watson in Liquidators of *Maritime Bank v. Receiver-General of New Brunswick*:¹⁰⁵

The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy.

The federal principle cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities.

Similarly, Immanuel Kant in *Perpetual Peace* (1795)¹⁰⁶ envisioned a pact between nations binding each and every one of them to certain rules in order to overcome the defects generated by state sovereignty. According to Kant, nations make war because they find themselves in a state of nature and the transition to political society, which worked for people within individual countries, must be extended to nations.

¹⁰² A. La Pergola, *Residui "Contrattualistici" e Struttura Federale nell' Ordinamento degli Stati Uniti* (Milan: Giuffrè, 1969) at 92) as cited by L. M. Bassani, "Jefferson, Calhoun and State's Rights: the Uneasy Europeanization of American Politics", (1999), 114 *Telos* 132 at 136.

¹⁰³ *The Papers of John C. Calhoun*, (C.N. Wilson ed.), (Columbia: South Carolina University Press, 1979) Vol. XII at 21 as cited by Bassani, *id* at 149.

¹⁰⁴ *Reference Re: Amendment of the Constitution of Canada*, *supra* note 107 at 771.

¹⁰⁵ [1892] A.C. 437 (J.C.P.C.) at 441-2.

¹⁰⁶ I. Kant, *Perpetual Peace*, (Adelaide: University of Adelaide e-tests, 1999);

<http://www.arts.adelaide.edu.au/personal/Dhart?eTexts/Enlightenment/Kant/PerpetualPeace1795.html>

Finally, Wayne Norman uses the contractualist approach as well and recommends, as does Rawls for society generally, that federal principles and institutions be judged as if they were selected by enlightened federal partners interested in developing a stable, mutually beneficial federation in the long-term. Norman's theory, like modern contractual theories applying to unitary states and their citizens, maintains that it is irrelevant in the first instance whether there actually was a contract but when evaluating the institutions we must look at historical pacts, treaties and tradition. History can serve, according to LaSelva:¹⁰⁷

...as a reminder, if not a solution. What it suggests is that the very existence of Canada has depended on the willingness to compromise, the recognition of difference, and the willingness to create a community of belonging that seeks to include all Canadians. Much the same idea is expressed by saying that if Canada is to exist at all, it must exist as a federal and pluralistic nation.

The task, according to Norman, is to sketch the basic normative structure starting from the situation of independent nations negotiating to form a just and stable federation. Applying such a general theory to an actual federation will involve balancing its recommendations with the moral force of historical arguments.¹⁰⁸

Although no agreement exists on what a just federation is, Norman believes that a consensus can be built, at a minimum, on the definition of an *unjust* federation. Norman includes in this: the perception by the citizens of any sub-unit that it is unfairly disadvantaged in the federation or that it is underrepresented in key federal institutions; mutual lack of understanding among citizens and political elites of different regions or provinces of each others' political, economic, or cultural situation; divergent perceptions of the history or prehistory of the federation; mutual distrust concerning the use of federal institutions; resentment by one group, that forms a national minority but is represented by a sub-unit in which the group is a majority, concerning the treatment of its people.¹⁰⁹

¹⁰⁷ S. V. LaSelva, *The Moral Foundations of Canadian Federalism*, (Montreal: McGill-Queen's University Press, 1996) at 195.

¹⁰⁸ W.J. Norman, *supra* note 77 at 85.

¹⁰⁹ *Id* at 96.

The way to avoid the perception of an unjust federation is to base it on the normative quality of trust.¹¹⁰ According to Daniel Weinstock, the central government can encourage trust among the members and representatives of groups assembled within the same society at the national level. Citizens of sub-units must not perceive that the federal government is posing threats to the interests that distinguish them from the nation as a whole. Through the federalist system, groups will generate a common political identity that will, in turn, foster the achievement of social values and goals on a national scale.

Samuel LaSelva uses a similar concept of fraternity to describe the normative values of federalism. Political communities unite to allow different ways of life to flourish but also come together to promote the good of all. While fraternity does not demand complete identity of sentiments and interest, it does suppose that peoples with distinctive ways of life can possess goodwill towards each other, participate in common endeavours, develop and sustain common allegiances and common sentiments, and, most importantly, operate political institutions for the welfare of all.¹¹¹

Essentially, the subject of a federal state is what David Held would call the “cosmopolitan” citizen.¹¹² Held posits that the citizen in the modern liberal-democratic state has several allegiances to various communities. Indeed Charles Taylor has commented that Canada can only operate if such cosmopolitanism is respected. Taylor notes:¹¹³

To build a country for everyone, Canada would have to allow for second-level or deep diversity, where a plurality of ways of belonging would also be acknowledged and accepted.

The long-term survival of a federation is therefore dependant on an appeal to the normative qualities of the system and the ability it offers its citizens to belong to several different communities under one government. It cannot be based solely on the utilitarian benefits of union.

¹¹⁰ D. Weinstock, “Toward a Normative Theory of Federalism”, *Forum of Federations Documents* at 1, www.ciff.on.ca.

¹¹¹ S. V. LaSelva, *supra* note 116 at 25-26.

¹¹² D. Held, “The Changing Contours of Political Community”, in B. Holden ed., *Global Democracy: Key Debates* (Routledge: London, 2000). This is a similar concept to Kant’s cosmopolitan citizen, *supra* note 34.

¹¹³ C. Taylor, “Can Canada Survive the Charter” (1992), 30 *Alta. L.R.* 427 at 446.

Accordingly, a sense of obligation based on the appropriateness of international environmental norms, and *a fortiori*, internalization, will only emerge in a federal state where a sense of legitimacy exists in the implementation of the norms in the sub-units. This is particularly the case in some provinces of Canada. There is a national community (those who hold primary allegiance to the Canadian state) and separate provincial communities (those who hold primary allegiance to their province). However, the degree of bifurcation varies from province to province and over time. As Andrew Petter states:¹¹⁴

The underlying rationale for federalism is a belief that while some matters are better decided by the national political community, others should be left to the regional political communities. Implicit in this belief is that, with respect to certain matters, regional governments can better reflect the political attitudes and aspirations of citizens.

Indeed, in Canada, all provinces have significant provincial communities except Ontario.¹¹⁵ However, as the national and provincial political communities have a common population, there is significant overlap in allegiances. Norrie, Simeon and Krasnick note:¹¹⁶

There is overwhelming public-opinion evidence to show that citizens do not view their community identifications in an either/or way; they feel comfortable as Canadians and also as citizens of a province...Canadians are indeed “good federalists”. They share multiple loyalties; they value both Canada and their province, and they do not see a conflict or contradiction in holding these identities simultaneously.

It is my assertion that the cosmopolitan citizen has always existed in federal states with allegiances to the federal or constituent government fluctuating based on his or her understanding of the value of federalism generally and the specific federal values of his or her broader nation-state. Accordingly, government action in a federal state will only be legitimate if it successfully appeals to two notions. First, citizens must accept government authority on the basis of

¹¹⁴ A. Petter, “Federalism and the Myth of Federal Spending Power” (1989), 68 *Canadian Bar Review* 448 at 464.

¹¹⁵ See R. Gibbins, “Regional Politics”, in *Politics: Canada*, (Toronto: McGraw Hill Ryerson, 1987) at 196 where the author notes that surveys reveal that for Canada as a whole, 74% choose Canada as their first loyalty and 26% their province. Ontario was at the low end with only 5% identifying with their province and Newfoundland had the highest provincial identification at 58%.

¹¹⁶ K. Norrie, R. Simeon and M. Krasnick, *Federalism and Economic Union in Canada*, (Toronto: University of Toronto Press, 1986) at 26 and 162.

traditional Weberian notions of legal legitimacy. In other words, authority must be consistent with *pro forma* rules as well as “rules in use” as determined by previous institutional interaction. Second, authority must be legitimate in that it does not contradict the federal values held by the political communities and fostered by federalism. These values are shaped by the historical background to the federation, the constitutional texts, the legal interpretation of the constitutional texts and the rules in use formed from dialogue between political communities in the federation.

Therefore, at a minimum, legitimacy of governmental action in a federal system must always be shown to be consistent, or at least not inconsistent, with the federal contract. The contract is based on the mutual consent of the constituent units to legislative or executive action by the federal government. This consent will be determined primarily by a contractual interpretation of the historic reading of the federal constitution coloured by both the formal constitutional rules as well as “rules in use”. Moreover, the political communities within the federal system must not have a sense that action is being imposed on them illegitimately, in that it is without their consent. Where this occurs, the constituent political communities’ trust in the federation will be undermined and the long-term viability of the federation compromised. As LaSelva notes: “No constitutional system can endure an endless questioning of its legitimacy”.¹¹⁷

The goal of horizontal transnational implementation of international environmental law in Canada is to encourage vertical implementation and, ultimately, internalization of norms established by international conventions. These norms will not be accepted at the deep level deemed necessary by transnational legal process theorists unless Canadian citizens perceive the methods as legitimate. An important component of legitimate governance in Canada is the shared understanding that federal action cannot be unreasonably imposed on a discrete provincial political community absent consultation with the community. The level of consultation will be greater if a policy touches upon something that the provincial political community sees as central to its community identity.

¹¹⁷ S.V. LaSelva, *supra* note 116 at 195.

1.0 Canadian Federalism

The Canadian nation presupposes federalism. In *Reference re Secession of Quebec*, the court stated:¹¹⁸

This underlying principle of federalism, then, has exercised a role of considerable importance in the interpretation of the written provisions of our Constitution. In the *Patriation Reference*, *supra*, at pp. 905-9, we confirmed that the principle of federalism runs through the political and legal systems of Canada. Indeed, Martland and Ritchie JJ., dissenting in the *Patriation Reference*, at p. 821, considered federalism to be "the dominant principle of Canadian constitutional law". With the enactment of the Charter, that proposition may have less force than it once did, but there can be little doubt that the principle of federalism remains a central organizational theme of our Constitution. Less obviously, perhaps, but certainly of equal importance, federalism is a political and legal response to underlying social and political realities.

The principle of federalism recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction. The federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity.

Canadian federalism is based on a: "complex form of fraternity that can promote a just society characterized by a humanistic liberalism and a democratic dialogue."¹¹⁹ The democratic dialogue can be seen in the historical compact, the constitutional text and its legal interpretation as well as the patterns of interaction between the provinces. The law of the Constitution is made up of the statutes and common law relating to the interpretation of the *Constitution Act, 1867*¹²⁰. The law of the Constitution is also shaped by the historical rationale for federalism and the subsequent legal interpretation of the constitutional texts. Indeed, as W.R. Lederman writes:¹²¹

¹¹⁸ [1998] 2 S.C.R. 217 at para 57.

¹¹⁹ S.V. LaSelva, *supra* note 116 at xiii.

¹²⁰ *Supra*, note 106.

¹²¹ W.R. Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975), 53 Can. Bar. Rev. 597 at 600

It is a mistake to think that the task of interpretation is grammatical and syntactical only, treating the constitution document in isolation from the economic, social and cultural facts of life of the society to which the constitutional document relates, both historically and currently.

The federal foundation of Canada is based on the notion of political community and its contractual visions of legitimacy rather than the rights based, and resulting individualist, focus of other federations such as the United States. Georges Etienne Cartier, one of the fathers of confederation, envisioned a new kind of nationality in which different ways of life flourished, but whose peoples had come together to promote the good of all and were united by a “political nationality”.¹²²

In his book, *Federal-Provincial Diplomacy*,¹²³ Richard Simeon notes that a central characteristic of modern federal systems is the co-existence of governments, which are at the same time interdependent and autonomous. Interdependence implies that many fields cut across formal divisions of responsibility. Because of the interdependence and the community base of Canadian federalism, judicial determinations of jurisdiction become less appealing. Katherine Swinton notes:¹²⁴

When Simeon spoke of the community perspective, he suggested that the search for the appropriate community was drawn from citizen views about jurisdiction. This focus on a source outside the judge is appealing, because it seems to meet charges of subjectivity and illegitimacy.

As a result, Simeon states that the guiding principle of modern federalism is the need for cooperation. F.R. Scott noticed, with frustration, the increasingly dominant position of federal-provincial diplomacy and the agreements in the Canadian polity.¹²⁵

¹²² S.L. LaSelva, *supra* note 116 at 25.

¹²³ R. Simeon, *Federal-Provincial Diplomacy: The Making of Recent Policy in Canada* (Toronto: University of Toronto Press 1972).

¹²⁴ K. E. Swinton, *The Supreme Court and Canadian Federalism*, (Toronto: Carswell, 1990) at 207.

¹²⁵ F.R. Scott, *supra* note 140 at 59.

Despite the wording of the constitution, and despite her growth in international prestige and importance, Canada is now, eighty-five years after Confederation, troubled with such a trend toward “States Rights” (to use Macdonald’s name for it) that the federal government must rely more and more on a new legal doctrine of “national emergency” in order to legislate on matters of unquestioned national importance, and the national Parliament is increasingly obliged to defer to agreements made in a kind of General Assembly of Sovereign Provinces called a Dominion-Provincial Conference, where each government possesses a veto over decisions.

In areas of new legislative competence, reliance on diplomacy is especially acute. Constitutionally, every provincial government is autonomous in that neither the federal or provincial governments may exercise control over the other. Where authority is allocated unambiguously, neither level can dictate to the other.¹²⁶ Lord Atkin noted this in the *Labour Conventions* case:¹²⁷

...while the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure.

Conversely, Lord Stanley in *Edwards v. A.G. Canada* maintained that:¹²⁸

...the *B.N.A. Act* planted in Canada a living tree capable of growth and expansion within its natural limits.

Both of these views are expressed in federal-provincial models of diplomacy. As was explained in chapter two, legitimacy in the implementation of environmental agreements is dependant on compliance with institutional arrangements and long-standing “rules in use” that are just as important as the formal legal documents. As such, institutionalism, the study of the interaction of institutions at the international law-making level, becomes an important tool in determining how successful implementation of MEAs is achieved in the Canadian federal state. In this section of the paper, I will examine Canadian federal-provincial relations through an institutional lens. It will become apparent that models of institutional interaction are important in defining legitimate policy making in the Canadian federation.

¹²⁶ R. Simeon, *supra* note 190 at 3-4.

¹²⁷ *A.G. Canada v. A.G. Ontario*, [1937] A.C. 326 at 354.

Harvey Lazar notes that there is a spectrum of federal relations in Canadian federalism. These models are relevant to the way in which broad policy frameworks are developed and how such policies are implemented. Policy implementation includes all facets of program design, interpretation, monitoring and enforcement. The models include cooperative federalism, competitive federalism, and collaborative federalism.¹²⁹

Each of these models is used in policy implementation within the Canadian federation. The collaborative model is often used where the constitution authorizes both orders of government to act in a particular subject area. It is marked by political and administrative agreements among governments addressing how they intend jointly to deal with matters of public policy or public administration. Moreover, the agreements imply: “freely given political consent as there is no constitutional requirement to act in this way; and to qualify as consensual one order of government cannot be ‘forced’ to agree to the dictates of the other by virtue of some form of financial or other dependence on the other order”.¹³⁰ The collaborative model has emerged as the favoured model of federal-provincial diplomacy especially with respect to areas of shared jurisdiction like environmental policy.

The collaborative approach is somewhat ambiguous. Lazar describes it as:¹³¹

...case by case management of individual files under which improved relations with provinces, including Quebec, were an important determinant of the federal approach but by no means the sole or even the overriding consideration. In that sense, the non-constitutional approach was less a strategy than an umbrella under which it was possible to group many federal initiatives and activities. What these measures all had in common was that they did not entail constitutional change, they generally involved less spending and they required new understandings between the two orders of government. This approach was characterized also by the idea that the kind of intergovernmental relationship that is appropriate will vary according to the functional realities and specific circumstances of each file.

¹²⁸ [1930] A.C. 114 at 136.

¹²⁹ H. Lazar, “The Federal Role in a New Social Union”, *Canada: The State of the Federation 1997*, (Kingston: Institute of Intergovernmental Relations, 1997) 105 at 110-111.

¹³⁰ H. Lazar, *supra* note 196 at 111.

¹³¹ H. Lazar, “Non-Constitutional Renewal” in Harvey Lazar, ed., *Canada: The State of the Federation, 1997: Non-Constitutional Renewal* (Kingston: McGill Queen's University Press, 1998) at 10.

Thus, collaborative federalism is a process whereby national goals are achieved, not by the federal government acting alone or by the federal government shaping provincial behaviour through the exercise of its spending power, but by some or all of the 11 federal and provincial governments and the territories acting collectively.¹³² Richard Simeon notes that collaborative federalism may take two forms.¹³³ The first is collaboration among federal, provincial, and territorial governments seeking appropriate roles and responsibilities. The second form is collaboration among provincial and territorial governments without the federal government. Working under one of these two frameworks, the provinces, territories and the federal government have reached agreement for national policies regarding health, internal trade, social policy, and the environment.

All of these agreements have been concluded in one or another institutional “ministerial council”. The number of councils has increased and they have played a more formal role in policy implementation. As Richard Simeon notes:¹³⁴

They (ministerial councils) have become the workhorses of the system, assuming a central role in the policy process, including, in some cases, developing close relationships with related interest groups. Councils now exist for ministries concerned with social-policy renewal, forestry, transportation, education, and the environment. Other groupings of ministers go by names such as forums, committees, and meetings of "Ministers Responsible." Some meet regularly, others on an *ad hoc* basis.

Simeon also notes several common threads to these agreements and their negotiation.¹³⁵ First, the equality between provinces and Ottawa is always at the forefront. Most councils and meetings are co-chaired by a federal and a provincial minister. The northern territories of Canada-Yukon, the Northwest Territories, and Nunavut - are now integrated with the provinces.

Most agreements stress that the formal constitutional powers assigned to governments remain unchanged; the goal is to exercise these powers in a coordinated manner.

¹³² Simeon, *supra* note 190 at 55.

¹³³ *Id* at 56.

¹³⁴ *Id* at 62.

¹³⁵ *Id*, at 63.

There is an emphasis on minimizing duplication and overlap in order to achieve greater efficiency and cost saving. Finally, presumably in response to criticisms of executive federalism, an increasing number of agreements explicitly acknowledge the need to engage stakeholders in the process.

The collaborative approach recognizes the consensual nature of the federal contract and the equality of the provinces. Lazar notes that this model is now dominant in every field.¹³⁶ Moreover, it is doubtful that another model will emerge, at least as the primary one, in the field of environmental policy making.

Although Canadian federalism generally exhibits several dynamics including competitive federalism, cooperative federalism and collaborative federalism, the history of environmental policy in Canada is one of collaborative federalism. As Grace Skogstad notes:¹³⁷

The negative impacts on Canadian public policy of strong provincial and national governments, often competing, sometimes cooperating, but always central to the formulation of economic and social policies, have been widely viewed to overshadow any positive benefits. Most critical assessments are predicated on the model of competitive federalism, one that highlights the intergovernmental conflict that results from self-aggrandizing and self-preserving behaviour of governmental elites. This model has not tended to prevail historically when it comes to pollution control policy.

Transnational legal theory, which is predicated on dialogue between state and non-state actors, is particularly useful in examining policy implementation in the Canadian federation. The collaborative model has long been the means of implementing policy in the environmental field. Furthermore, there is no clear constitutional legislative power over the environment `at either level of government and many provinces are hostile to federal unilateralism in the area¹³⁸ and growing weary of the precarious legal nature of federal commitments in areas where cooperative

¹³⁶ *Id* at 112.

¹³⁷ G. Skogstad, *supra* note 236 at 110-111.

¹³⁸ See for example, M.S. Winfield, *supra* note 243 at 124.

federalism is prevalent.¹³⁹ Finally, the competitive model has attracted much hostility from the environmental movement.¹⁴⁰ Indeed, Kenneth McRoberts doubts that the federal government can deviate from the collaborative model where jurisdiction is shared. McRoberts states:¹⁴¹

...within areas occupied by both levels of government, unilateralism would seem to be costly for the Canadian system as a whole. Without federal-provincial collaboration, there is bound to be duplication and waste. A government that is concerned with achieving “visibility” and which initiates programs to do so, is bound to duplicate some existing programs of the other level of government. More important, there is the possibility that, without consultation and collaboration, the two levels of government will develop contradictory policies.

In general, it can be demonstrated that while the legal basis for federal-provincial models of diplomacy is murky, the patterns of relations remain part of provincial political communities’ understanding of legitimate policy implementation and cannot be ignored. This is especially true where jurisdiction is shared, as is the case with environmental policy-making.

¹³⁹ see *supra* p. 65.

¹⁴⁰ See for example M.S. Winfield, *supra* note 243; S. Scott, “Piecemeal Decentralization: The Environment”, in R. Boadway, T. Courchene, and D. Purvis, eds., *Economic Dimensions of Constitutional Change, vol. 1* (Kingston: John Deutsch Institute for the Study of Economic Policy 1991).

¹⁴¹ K. McRoberts, *supra* note 201 at 113.

Part II: IMPLEMENTATION OF CITES IN CANADA

1.0 Introduction: Regulation of Trade Under CITES

Lon Fuller and W.R. Perdue wrote in 1937:¹⁴²

The proposition that legal rules can be understood only with reference to the purposes they serve would today scarcely be regarded as an exciting truth. The notion that law exists as a means to an end has been commonplace for at least half a century. There is, however, no justification for assuming, because this attitude has now achieved respectability, and even triteness, that it enjoys a pervasive application in practice. Certainly there are even today few legal treatises of which it may be said that the author has throughout clearly defined the purposes which his definitions and distinctions serve. We are still all too willing to embrace the conceit that it is possible to manipulate legal concepts without the orientation which comes from the simple inquiry: toward what end is this activity directed?

Nietzsche reminds us: "The most fundamental form of human stupidity is forgetting what we were trying to do in the first place."

This Part of the paper will examine the process of implementing international environmental law in Canada through an examination of the domestic implementation of the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES). In order to avoid the conceit warned against by Fuller and Perdue, I will, first, explain the background to CITES and the requirements they impose on member states in order to elucidate the underlying norms of this convention.

Next, the specific requirements imposed on member states will be explained. Third, the manner in which these requirements are addressed in the domestic implementation of the convention in Canada will be examined. Finally, I will attempt to determine the degree to which the norms were internalized.

In examining the degree to which the norms of these conventions are internalized, the primary test will be the degree to which Canadian domestic legislation achieves the purposes, as they

¹⁴² L. Fuller & W.R. Perdue, "The Reliance Interest in Contract" (1937), 46 *Yale L.J.* 52 at 52.

have evolved, of CITES in light of the challenges posed to environmental policy making by federalism. The successful implementation of international environmental law is dependant on “internalizing” environmental norms within domestic actors so that they act out of a “logic of appropriateness” rather than a “logic of consequences”. The broad purpose of CITES is to protect the environment. The means chosen to do this is to restrict trade in both hazardous wastes and endangered species. CITES establishes a standardized system of controls on the trade of certain species of flora and fauna within the framework of international commercial transactions.¹⁴³ The rules of the dominant liberal economic ideology require that regulation that restricts trade be based on an ethical or moral norm, in this case environmental protection that takes precedence over the values of the liberal economic order.¹⁴⁴ Otherwise, it will be seen as an illegitimate restriction on the already internalized liberal trade regime. Accordingly, the norms underlying CITES must be accepted by states at the international level as a legitimate restriction on liberal trade.¹⁴⁵ Gabrielle Marceau of the World Trade Organization explains:¹⁴⁶

There are hundreds of treaties dealing with environmental issues. Many of these have implications for international trade. Because economic activity relies on and affects the environment, MEAs regularly encourage, and sometimes require, States to enact measures that affect the way economic activity within or between States is conducted. In addition, a narrower category of MEAs uses specific trade measures to address environmental harm by regulating the transboundary movement of certain environmentally harmful products.

CITES focuses on the regulation of international trade in endangered species of flora and fauna in order to protect such species and preserve the biodiversity that is essential to the ecosystem. Acceptance of these trade restrictions will require internalization of the norms of the conventions at both the domestic and international level.

¹⁴³ J. Thomsen and A. Brautigam, “CITES in the European Economic Community: Who Benefits? (1987), 5 B.U. Int’l L.J. 269 at 272; J. Heinen and D. Chapagain, “On the Expansion of Species Protection in Nepal: Advances and Pitfalls of New Efforts to Implement and Comply with CITES” (2002), 5 *Int. Wildlife and Policy* 235 at 237.

¹⁴⁴ M. Trebilcock & R. Howse, *The Regulation of International Trade*, (London: Routledge, 1995) at 360.

¹⁴⁵ *Id.*, at 360.

¹⁴⁶ G. Marceau, “Conflicts of Norms and Conflicts of Jurisdiction: The Relationship between the WTO Agreement and MEAs and other Treaties” (2001), 35(6) *Journal of World Trade* 1081 at 1095 (Marceau specifically cites CITES as an example of an MEA that incorporates restrictions on trade).

The background to CITES that follows demonstrates the internalization of the norms of the convention at the international level. Following the adoption of the *Stockholm Declaration* in 1972 the development of international environmental policy and law progressed towards what can be termed a “holistic” approach.¹⁴⁷ There is now recognition of the need to address environmental protection in terms of protecting the earth as a whole. The idea of a collective responsibility of the world community to protect the environment from such harm is now more broadly internalized in the international community.

The broad purpose of the conventions has similarly evolved over time. The provisions of CITES initially were considered by the parties, particularly Canada, to be a trade agreement and were implemented using existing domestic trade legislation. Since ratification, the Canadian understanding of the purposes of the conventions has broadened. This paper will demonstrate that Canadian legislation implementing CITES domestically is now more clearly linked to environmental protection through a commitment to broadly accepted concepts of the precautionary principle and cooperation between states.

Moreover, there has been a shift in international policy and law from the traditional mechanisms focusing on remedies for environmental damage after the event to mechanisms that aim for prevention of environmental damage. These mechanisms focus on obligations to implement or make changes to domestic policy and include:¹⁴⁸

- The absolute or conditional prohibition of certain activities;
- The requirement of prior informed consent (PIC);
- Requirements of prior environmental assessment and evaluation;
- Requirements of exchange of information, consultation, cooperation, and technical financial assistance;

¹⁴⁷ K. Kummer, *International Management of Hazardous Wastes*, (Oxford: Clarendon Press, 1995) at 32.; see also P. Birnie & A. Boyle, *International Law and the Environment* (2nd), (London: Oxford University Press, 2002) at 97.

¹⁴⁸ Kummer, *id* at 34.

- Requirements of emergency preparedness and elaboration of emergency plans;
- The adoption and application of technical norms setting qualitative and quantitative standards; and
- The establishment of specialized institutions with the functions of policy formulation, facilitation of international cooperation and compliance monitoring.

The evolution of CITES has mirrored this shift. When examining the international and domestic legislative regime governing trade in endangered species and the degree to which it has been internalized, one question must be kept in mind: toward what end is this activity directed? The narrow goal of CITES may be stated quite simply: to regulate international trade in endangered species. However, this narrow goal has evolved and is now linked to broader holistic goals related to sustainable use of endangered species in order to preserve biodiversity. More recently, these more holistic goals have taken a central place in attempts to implement CITES domestically in Canada. Accordingly, this chapter will look at the historical background to the international law of trade in endangered species generally, and CITES in particular, as well as the evolution of the Canadian legislative regime. It will be demonstrated that as the international and domestic regimes have evolved, the link between the effective regulation of trade in endangered species and society's broader goal to preserve biodiversity has tended to become more prominent.

Today, the worldwide commercial exchange of wildlife (including plants) is estimated to be up to 50 billion USD annually.¹⁴⁹ Exploitation of wildlife for profit is a long-standing phenomenon and attempts to regulate it domestically and internationally came at an early stage.¹⁵⁰ The exponential increase in humankind's potential to exploit wildlife on a grand scale led to significant species depletion.¹⁵¹ CITES establishes a standardized system of controls on the trade of certain wildlife species among its contracting parties within the framework of international

¹⁴⁹ P.H. Sand, *supra* note 313 at 29; R. Reeve, *supra* note 317 at 11.

¹⁵⁰ C. Huxley, "CITES: The Vision" in J. Hutton (ed.), *Endangered Species, Threatened Convention*, (London: Earthscan Publications, 2000) 3 at 4.

commercial transactions.¹⁵² Under CITES, trade is banned or limited in species listed in three revisable appendices through a system of import/export permits issued by the parties.

Early legislation aimed at regulating trade in endangered species was concerned almost exclusively with the protection of wildlife for its economic potential. Domestic legislation has been in place for a long time in the form of poaching and conservation laws to protect wild flora and fauna from over-exploitation.¹⁵³ However, early attempts at broader environmental protection can also be found in several conventions, both regional and international, aimed at protecting various species of plants and animals.¹⁵⁴ International conventions aimed at wildlife protection gradually shifted in focus from protection of the economic potential of wildlife to protection of biodiversity.

The origin of CITES lies in the United Nations' Arusha Conference of 1961. The conference proposed an international convention to control trade in endangered species.¹⁵⁵ This was reiterated at the United Nations Conference on the Human Environment in 1972. A diplomatic conference held at Washington D.C. adopted the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*¹⁵⁶ (CITES) in 1973.

¹⁵¹ *Id* at 3.

¹⁵² J. Thomsen and A. Brautigam, "CITES in the European Economic Community: Who Benefits?" (1987), 5 *B.U. Int'l L.J.* 269 at 272.

¹⁵³ P.B. Munch, *Gentlemen and Poachers: The English Game Laws, 1671-1831*, (Cambridge: Cambridge University Press, 1981); see also P.H. Sand, *supra* note 313 at 35.

¹⁵⁴ The first "international" convention aimed at protection was the 1781 treaty between the King of France and the Bishop of Basel which protected the forests and game-birds on the borders of their territories against damage by the local population through penal measures. (See P. van Heijnsbergen, *International Legal Protection of Wild Flora and Fauna*, (Amsterdam: IOS Press, 1997) at 9.) Other conventions include the *Convention to Protect Birds Useful to Agriculture*, 51 *L.N.T.S.*221; and the *Convention Designed to Ensure the Conservation of Various Species of Wild Animals in Africa Which are Useful to Man or Inoffensive Convention to Protect Birds Useful to Agriculture*, (*International Protection of the Environment, Treaties and Related Documents* at 1605 as cited by P. van Heijnsbergen, *supra* note 520 at 13) the 1933 *Convention relative to the Preservation of Fauna and Flora in their Natural State* (172 *League of Nations Treaty Series* 79, all as cited by P. van Heijnsbergen *supra* note 520 at 16) which is often referred to as the "Magna Carta" of wildlife preservation. Many are focused on marine-based species on a global basis, such as the *International Convention for Regulation of Whaling* ((1946), 161 *U.N.T.S.* 72. Others focus on regional areas, such as the *Convention on Nature Protection and Wild-Life Preservation in the Western Hemisphere* ((1940), 161 *U.N.T.S.* 193).or specific types of ecosystems, such as the *Ramsar Convention on Wetlands of International Importance* ((1972),11 *I.L.M.* 963).

¹⁵⁵ P. van Heijnsbergen, *id* at 26.

¹⁵⁶ (1973), 12 *I.L.M.* 1085.

From its inception, CITES was seen as the flagship of wildlife preservation treaties. There was a far greater impetus from both parties and interested non-state actors to get the agreement under way than for previous similar conventions.¹⁵⁷ Indeed, it has become the world's best-known wildlife conservation convention.¹⁵⁸ CITES is both a conservation and trade instrument aimed at protecting wild flora and fauna to preserve the natural environment.¹⁵⁹

No treaty protects all wild flora and fauna on a global basis¹⁶⁰ but five international treaties come close to accomplishing this goal.¹⁶¹ The 1992 Rio *Convention of Biological Diversity*¹⁶² recognizes that the environment depends on a wide variety of plant and animal species to remain healthy and human development has served to reduce this variety.¹⁶³ Accordingly, although there is much debate on what means should be used to preserve that biodiversity, there is a general consensus that a precautionary approach should be adopted that both identifies serious threats to biodiversity and also outlines the measures required to counter the erosion of biodiversity.¹⁶⁴ The precautionary approach to protecting biodiversity lends normative force to specific instruments outlined in other treaties.

The *Convention on Wetlands of International Importance* (Ramsar) stresses the need to protect habitats as an integral part of retaining biodiversity.¹⁶⁵ The *Convention for the Protection of the World Cultural and Natural Heritage* imposes an obligation on states to conserve and protect the natural heritage, including habitats, of threatened species of animals and plants with respect to

¹⁵⁷ J. Lanchbery, "Long-Term Trends in Systems for Implementation Review in International Agreements on Fauna and Flora" in P.H. Sand (ed.), *Transnational Environmental Law: Lessons in Global Change*, (London: Kluwer Law International, 1999) 57 at 69.

¹⁵⁸ C. Huxley, *supra* note 516 at 3.

¹⁵⁹ P.H. Sand, *supra* note 313 at 34.

¹⁶⁰ P. Birnie & A. Boyle, *supra* note 309 at 600.

¹⁶¹ *Id* at 601.

¹⁶² (1992), 1760 *United Nations Treaty Series* 79.

¹⁶³ E.O. Wilson, *The Future of Life*, (New York: Alfred Knopf, 2002) at 14.

¹⁶⁴ P. Birnie & A. Boyle, *supra* note 309 at 546; In order to further these broader goals, the Secretariats of CITES and the *Convention on Biological Diversity* (CBD) signed a formal resolution at the 10th meeting of the CITES Conference of the Parties in 1997. CITES Resolution Conf. 10.4: *Cooperation and synergy with the Convention on Biological Diversity* at http://www.cites.org/eng/resols/10/10_4.shtml

¹⁶⁵ *Ramsar Convention on Wetlands of International Importance* (1972), 11 I.L.M. 963, preamble.

specific sites (although that is not its primary focus).¹⁶⁶ The *Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention)*¹⁶⁷ relates to protection of species that cross international borders and their habitats including migratory paths crossing borders. Finally, CITES attempts to regulate and, in some cases prohibit, the trade in endangered species.

Taken together, these treaties fail to address all human interaction with wildlife. However, they do reveal the key issues the international community has concluded must be addressed for successful protection of biodiversity. These can be summarized as:

- sustainability of use;
- flexibility in regulatory systems;
- maintenance of habitats and ecosystems;
- control of introduction of alien species;
- creation of protected areas or reserves; and
- limitation of trade in endangered species of animals and plants.

The principal purpose of CITES, therefore, is to ban or limit trade in species listed in revisable appendices through a system of import/export permits issued by the parties. However, it is part of an international effort aimed at protecting biodiversity. Rosalind Reeve states:¹⁶⁸

But even if wildlife trade is not the main cause of biodiversity loss, the pressure of international consumer demand adversely affects many individual species. Collection and harvest from the wild for trade can also cause collateral damage to ecosystems through the removal of keystone species, specific age classes or sexes; the removal of plants providing a food supply for wild fauna; or the use of destructive collection techniques such as cyanide and dynamite fishing.

¹⁶⁶ (1972), 11 I.L.M. 1358, Article 2.

¹⁶⁷ (1980), 19 I.L.M. 15.

¹⁶⁸ R. Reeve, *supra* note 317 at 8.

Through a biennial COP, reporting by parties and domestic legislation, the institutional framework underlying CITES is aimed at achieving this goal. In recent years, the COP has increasingly seen its mandate as extending beyond trade to preserving biodiversity through its original purpose of restricting trade in endangered species of flora and fauna.¹⁶⁹

The preamble sets out the normative values of CITES, which are also reflected in the *Biodiversity Convention*, as well as international environmental law generally. CITES is based on an understanding that a wide variety of fauna and flora is an irreplaceable part of the natural ecosystem of the earth. Further, the diversity must be maintained by protecting it not just for this generation but for generations to come. Finally, CITES maintains the practical need for maintaining biodiversity in species of wild fauna and flora not just from an aesthetic, but also a scientific, cultural, recreational and economic viewpoint.¹⁷⁰

In order to achieve these goals, CITES lists several species of flora and fauna in three appendices and places trade restrictions on them. Domestic institutions monitor trade and gather scientific data in order to identify those species that are endangered or may become endangered. The convention outlines the circumstances under which trade in endangered species may take place. Generally, depending on the danger of extinction, trade in certain species deemed endangered by the parties is permitted under CITES only where a permit is obtained recognizing the prior informed consent of the importing and exporting state to the proposed trade. The CITES Conference in 1992 defined the necessary minimum of domestic implementation measures as establishing legal authority to:¹⁷¹

- (a) designate at least one Management Authority and one Scientific Authority;
- (b) prohibit trade in specimens in violation of the Convention;

¹⁶⁹ L. Marshall, "Canada's Implementation of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (Cites): The Effect of the Biodiversity Focus of International Environmental Law" (1999), 9 *J. Env't L. & P.* 31 at 35, 38.

¹⁷⁰ CITES, *supra* note 522, Preamble.

¹⁷¹ CITES Conference Resolution 8.4 (1992) as cited in P. Sand, *supra* note 313 at 47; see also R. Reeve, *supra* note 317 at 53.

- (c) penalize such trade; and
- (d) confiscate specimens illegally traded or possessed.

1.0.0 Domestic Control of Trade in Endangered Species

Instead of drafting new legislation, the Canadian government used existing legislation to implement CITES in 1975. The *Export and Import Permits Act*¹⁷² and the *Game Export Act*¹⁷³ were amended to include CITES species. The *Export and Import Permits Act* regulates the export and import of articles that are scarce in Canada, or in the world, or subject to governmental controls in other countries. Export and import permits are required for various goods listed in two schedules: an Export Control List and an Import Control List.¹⁷⁴ These lists were amended to include species subject to CITES regulations. Permits were required to trade in protected species in compliance with the basic CITES permit requirements.

The *Game Export Act* was enacted in 1941 to deter poachers from escaping prosecution by simply leaving the jurisdiction in which the animal was illegally taken.¹⁷⁵ The *Game Export Act* required permits for interprovincial transport, and export outside of Canada, of dead game, and possession of game killed in another province or jurisdiction.¹⁷⁶ The agencies responsible for enforcing the domestic regime, federally, were Revenue Canada and the Royal Canadian Mounted Police.¹⁷⁷ In the provinces, wildlife officers enforced the provisions of the *Game Export Act*.

It is not uncommon for MEAs to prescribe weaker standards than those in place domestically in developed states, in order to attract more parties.¹⁷⁸ Only the most essential elements are

¹⁷² R.S.C. 1985, c. E-19.

¹⁷³ R.S.C. 1952 c. 128.

¹⁷⁴ *Export and Import Permits Act*, *supra* note 538, s. 5.

¹⁷⁵ L. Marshall, *supra* note 535 at 46.

¹⁷⁶ *Game Export Act*, *supra* note 539, s.4.

¹⁷⁷ L. Marshall, *supra* note 535 at 46.

¹⁷⁸ S. Lyster, *International Wildlife Law: An Analysis of International Treaties Concerned With the Conservation of Wildlife*, (Cambridge: Grotius 1985) at 240.

mandatory, but it is hoped that those member states that are able to will go beyond the obligatory provisions.¹⁷⁹ CITES is especially dependant on this. The predominant direction of the trade in endangered species is south to north, mainly driven by consumer demand from developed countries for fashion, food, medical/pharmaceutical research, exhibition or collection purposes.¹⁸⁰ As wealthier parties make up the market for trade in endangered species, enforcement of both the minimum requirements and the overall broader goals becomes essential in order to effectively control this market.

Accordingly, domestic legislation in Canada must go beyond the minimum requirements in order to uphold the broader environmental goals of CITES. Domestic legislation should be coordinated to address domestic problems that may be outside the scope of CITES but undermine its broader goals.¹⁸¹ These domestic problems include:¹⁸²

- domestic legislation that favours land owners' property rights over wildlife roaming their land;
- absence of incentives for "good practice";
- corruption among officials;
- a lack of political interest in conservation;
- inadequate human and financial resources;
- lack of effective penalties for transgressions of domestic law;

¹⁷⁹ L. Marshall, *supra* note 535 at 46.

¹⁸⁰ P. H. Sand, *supra* note 313 at 30.

¹⁸¹ M. A du Plessis, "CITES and the Causes of Extinction", J. Hutton (ed.), *Endangered Species, Threatened Convention*, (London: Earthscan Publications, 2000) 13 at 17.

¹⁸² A similar list of threats to biodiversity identified by the Secretariat of the *Convention on Biological Diversity* can be found in the *Secretariat's note to the Subsidiary Body on Scientific, Technical and Technological Advice* (Document UNEP/CBD/SBSTTA/2/3) as cited in R.B. Martin, "CITES and CBD", in J. Hutton (ed.), *Endangered Species, Threatened Convention*, (London: Earthscan Publications, 2000) 125 at 127; see also J.B. Heppes, "The Convention on International Trade in Endangered Species of Wild Flora and Fauna: Improving the Prospects for Preserving our Biological Heritage" (1987), 5 *B.U. Int'l L.J.* 233.

- poor record-keeping; and
- trade with non-parties.

In Canada, some of these general criticisms of domestic implementation were specifically relevant to the *Export and Import Permit Act* and the *Game Export Act* regime including enforcement, record-keeping and federal-provincial issues.

Only two people were charged by the R.C.M.P. for CITES export violations between 1988 and 1992. Indeed, it has been estimated by Lynn Marshall that less than one percent of illegal Canadian wildlife exports were identified in that year.¹⁸³ Studies of other jurisdictions such as Russia, Finland and the United States produced similar results.¹⁸⁴ Although the *Export and Import Permits Act* controlled international entry of illegal endangered species products, it did not outlaw possession, purchase or sale of such products.

Several other flaws in the regime prevented effective enforcement of the underlying norms of CITES, even if the minimum requirements of the convention were met. The *Game Export Act* was insufficient in regulating trade because it applied solely to dead game species. The *Game Export Act* and *Export and Import Permit Act* did not make it illegal to import wildlife or wildlife products taken illegally in their country of origin. The Federal government lacked the power to prosecute persons in one province who have violated endangered species laws in another province. The maximum penalty for an indictable offence under the *Export and Import Permit Act* was a fine up to \$25,000 and/or imprisonment for up to five years.¹⁸⁵ This fine was far below other jurisdictions' penalties, such as the U.S., and Canada was an attractive point of transit for illegal trafficking.¹⁸⁶

Further, there was a lack of resources available to enforce the Acts. There were only 32 wildlife enforcement officers in the Canadian Wildlife Service, and less than 10 of these worked on

¹⁸³ L. Marshall, *supra* note 535 at 46.

¹⁸⁴ J.B. Heppes, *supra* note 548.

¹⁸⁵ *Export and Import Permit Act*, *supra* note 538, s. 19.

¹⁸⁶ L. Marshall, *supra* note 535 at 47.

CITES enforcement full time.¹⁸⁷ Because of the lack of manpower and other resources dedicated to CITES enforcement in Canada, the record keeping was predictably weak.

The federal government considers integration of federal-provincial efforts to implement CITES essential to effective implementation of the convention in Canada.¹⁸⁸ Bill C-42 (the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act* (WAPPRIITA)) was introduced in 1991 following four federal-provincial workshops. At the 1990 Meeting of the Wildlife Ministers Council of Canada, the Ministers discussed expanding the scope of wildlife policy. The purpose was to provide a comprehensive set of policies guiding the management of Canada's wildlife. The Wildlife Policy stated that: "Canadians are increasingly concerned with biodiversity ... and not just the birds and land mammals that traditionally have been termed 'wildlife'."¹⁸⁹ It further noted that governments should broaden their definition of wildlife to include any species of wild organism.¹⁹⁰ Whereas provincial wildlife departments had previously focused on game animals and commercial and sport fisheries, their focus began to change, due to the federal government's changing policies to wildlife, as influenced by the international regime.¹⁹¹

On October 2nd 1996, the federal, provincial and territorial governments agreed upon a National Accord. Under this Accord, the provinces and territories agreed to cooperate with the federal government to ensure that complementary legislation was in place for endangered species protection in Canada.¹⁹²

However, governments were just one of the groups advocating a new approach to CITES implementation that went beyond simple compliance with the minimum obligations. In 1987, the

¹⁸⁷ N. Chalifour, *Canada's Role in the Tiger Trade: Recommendations for a Tiger Safe Nation* (Toronto: World Wildlife Fund, 1996) at 12, as cited by L. Marshall, *supra* note 535 at 48.

¹⁸⁸ *Commons Debates*, March 17, 1992 at 8336.

¹⁸⁹ Meeting of the Wildlife Ministers Council of Canada, *A Wildlife Policy for Canada*, Document No. 830-367/017 (Campbell River, B.C. 26-27, September 1990) at 6.

¹⁹⁰ *Id* at 6-7.

¹⁹¹ L. Marshall, *supra* note 535 at 49.

¹⁹² Environment Canada, News Release, "Government Tables First-Ever Federal Legislation to Protect Endangered Species" (31 October, 1996).

Government of Canada sponsored the meeting of the sixth COP to CITES. The then Minister of the Environment announced that Environment Canada was developing new legislation to control international trade in, and interprovincial transport of, foreign and Canadian wild species.¹⁹³ In a February 1991 submission to the Minister of the Environment a coalition of leading wildlife and nature organizations, known as the Group of Eight, identified 10 priority issues for biodiversity and sustainable development in Canada. One of these was improved federal wildlife legislation concerning poaching and illegal trade in wildlife and effective enforcement of such legislation.¹⁹⁴

The new legislation also had as its impetus the 1990 federal Green Plan for a Healthy Environment. The plan proposed introduction of new legislation to deter poaching and illegal trading of wild animals and plants.¹⁹⁵ Lee Clark, Parliamentary Secretary to the Minister of the Environment cited these two reports when introducing WAPPRITTA noting specifically:¹⁹⁶

Any coordinated and comprehensive approach aimed at fostering a healthy environment must take into account the protection of wildlife.

At the second reading of Bill C-42, Jean Charest, Minister of the Environment, identified three objectives for the new legislation:¹⁹⁷

- To protect wild animal and plant species in foreign countries from poaching and smuggling;
- To protect Canada's wild animal and plant species from illegal trade; and
- To protect Canada's ecosystems from the introduction of designated harmful species or so-called biological pollutants.

The result of the broad-based consultations with provincial governments and environmental groups was the adoption of the WAPPRITTA in 1992. WAPPRITTA was proclaimed in force on

¹⁹³ March 17, 1999, *Commons Debates* at 8336.

¹⁹⁴ *Id.*, at 8336.

¹⁹⁵ *Canada's Green Plan: Canada's Green Plan for a Healthy Environment*, (Ottawa: Supply and Services Canada, 1990).

¹⁹⁶ *Commons Debates*, *supra* note 559 at 8336.

¹⁹⁷ December 11, 1992, *Commons Debates* at 15158.

May 14, 1996.¹⁹⁸ The legislation addressed the concerns surrounding the old legislative regime. Additionally, the new legislation was more cognizant of both CITES' broader objective to protect the environment by maintaining biodiversity as well as federal-provincial cooperation.

Harold Koh distinguishes between three forms of internalization: social, political, and legal. Social internalization occurs when a norm acquires so much public legitimacy that there is widespread general adherence to it. Political internalization occurs when the political elites accept an international norm and advocate its adoption as a matter of government policy. Legal internalization occurs when an international norm is incorporated into the domestic legal system and becomes domestic law through executive action, legislative action, judicial interpretation or some combination of the three.¹⁹⁹

In a federal system, effective implementation of an MEA requires all three forms of internalization outlined by Professor Koh. The federal government has the constitutional jurisdiction to ratify an MEA and bind Canada to the obligations therein but must engage in consultation with the provinces in order to effectively implement such legislation. Thus, effective environmental governance in Canada requires political internalization as well. In order to achieve consensus among the political elite, a degree of social internalization is required so that domestic non-governmental actors will lobby the federal and provincial governments to implement their international commitments.

As was demonstrated in Part I of this paper, implementation of environmental norms in the Canadian federation usually depends on collaborative federalism. Collaborative federalism uses negotiation and consensus-building between the provinces and the federal government to give the implementation of environmental policy legitimacy and thereby successfully internalize the norms promoted by policy initiatives. An important catalyst to such cooperation is public acceptance of the international environmental norms underlying environmental policy.

¹⁹⁸ S.C. 1992, c. 52, proclaimed into force by SI/96-41.

¹⁹⁹ Koh, *supra* note 53 at 642.

CITES strikes a balance between a so-called “framework” treaty, which would lay down the fundamental principles only and leave the regulation of details to regional agreements, and a detailed global regime leaving no room for divergent regional regulation. While establishing fairly detailed global standards, CITES allows for regional regulation that takes into account the specific situations and needs of individual groups of countries. These regional rules do not have to conform to the provisions of the conventions in every detail, but may not derogate from its fundamental concepts.²⁰⁰ In other words, neither convention is:²⁰¹

...“self-executing” so implementation requires – in addition to the formal act of ratification and promulgation in the national language – series of follow-up measures at the appropriate legislative and administrative level of each country (and at several levels in federal states).

Rather than imposing a supranational regulatory mechanism of its own, the regime relies on reciprocal recognition of national regulatory decisions, provided that these are made in accordance with mutually agreed standards.²⁰² Therefore, the individual states have a certain degree of policy instrument choice in implementing the conventions.

Transnational legal scholars attempt to reconcile the general aim of international governance with the specific instrument choices of domestic governance. Legitimate implementation of international environmental law in Canada is dependent upon policy implementation that is consistent with the normative values of federalism that are revealed both by the law of the constitution and these established patterns of federal-provincial diplomacy.

The concept of policy instruments comes from recent literature on public policy. Policy instruments can be defined as strategies and resources employed by governments to facilitate designated ends and goals vis-à-vis target populations.²⁰³ The central idea behind theory on policy instruments is that governments can act through different instruments to achieve particular

²⁰⁰ K. Kummer, *supra* note 309 at 280.

²⁰¹ P.H. Sand, “Whither CITES? The Evolution of a Treaty Regime in the Borderland of Trade and Environment”, (1997) 8 *Eur. J. Int. Law* 29 at 47.

²⁰² *Id* at 47.

²⁰³ K. Woodside, “Policy Instruments and the Study of Public Policy” (1986), 19 *Canadian Journal of Political Science* 775.

goals, and that the instruments chosen are important because they usually involve significantly different policy-making processes and produce different effects. Most treaties both require and seek to facilitate adoption of national measures to enhance treaty implementation and compliance.²⁰⁴ Indeed, the strengthening of MEA compliance systems is one of the most important tasks facing international environmental law today.²⁰⁵ For regulatory MEAs such as CITES, which places specific obligations on parties, it is particularly important that these self-policing systems are effective.²⁰⁶ These MEAs equally rely on member states to adopt effective policy to implement the conventions domestically.

Many factors affect implementation and compliance levels; including the political environment, public opinion, preference of politicians, NGO and INGO advocacy and economic issues in individual nations.²⁰⁷ In Canada, an important factor affecting implementation is provincial political communities' acceptance of the norms underlying an MEA.

In examining CITES, I have identified five areas in which the convention lays down some specific international standards. I will then examine the policy instrument choices made by the Canadian government to respond to these international standards and how federalism affected the policy instrument choice. The areas that I have identified where CITES lays down specific international standards are:

- Institutional Oversight
- Identification of Items Subject to Regulation
- Prior Informed Consent
- Information Sharing with Other Parties and Citizens of Member States

²⁰⁴ J. Heinen and D. Chapagain, *supra* note 305 at 236.

²⁰⁵ R. Reeve, *Policing International Trade in Endangered Species: The CITES Treaty and Compliance*, (London: Earthscan Publications Ltd., 2002) at 6.

²⁰⁶ *Id* at 6.

²⁰⁷ *Id* at 236.

- Enforcement

CITES, like many MEAs relies on a compliance system overseen by domestic and international institutional structures.²⁰⁸ Accordingly, in this part of the paper I will examine first the institutional structure of the convention, addressed in the first category above, and its counterpart in Canada, as well as the compliance systems, addressed by the subsequent four categories, set up by the MEAs. The compliance systems advanced by each of the headings have also been addressed domestically in Canada and in each area the “fact of federalism” affected the policies chosen.

Institutional Oversight

Any examination of environmental agreements will require assessment of the larger institutional structures underlying the agreements.²⁰⁹ Institutional interaction relies on compliance with both formal procedural rules as well as historical patterns of interaction for its legitimacy. This is primarily because:²¹⁰

Institutional supervision, shifting the focus from individual states to intergovernmental entities, places the emphasis on multilateral compliance and supervision, while still relying on states as guarantors of compliance with international rules by individuals. Instead of confrontation between ‘polluter’ and ‘victim’ state, however, this mechanism relies on negotiation and public pressure.

MEAs function through an institutional hierarchy. Kummer notes:²¹¹

Practically all the newer international treaties on environmental protection set up an institutional framework with the functions of administering the treaty, assisting parties in meeting their obligations, facilitating mutual assistance and the exchange of information, and monitoring compliance.

²⁰⁸ R. Reeve, *supra* note 317 at 19, 20.

²⁰⁹ Young, *supra* note 2 at 9.

²¹⁰ K. Kummer, *supra* note 309 at 210.

²¹¹ *Id* at 228.

With most MEAs, the COP is the supreme body. Typically, the COP will meet on a regular basis to examine the effectiveness of the MEA regime and recommend or adopt changes to its operation. For example, at the 12th meeting of the COP of CITES at Santiago, Chile in November of 2002, the COP made 100 decisions including adding big leaf mahogany to Appendix II and adopting various reports on the status of implementation of the treaty and illegal traffic in endangered species.²¹² This involved extensive negotiation among member states. With respect to Canada, the position taken, although constitutionally a federal responsibility, was the result of several months of negotiations between federal agencies, provincial governments, industry and environmental groups. Indeed all of these groups had representatives on the Canadian delegation in Santiago.²¹³ This process demonstrates that implementation, through institutional interaction, of international law relies on both the formal procedures and past practice that have become “soft law”.²¹⁴

CITES has a system of international, and domestic, institutional supervision. CITES learned from the negative lessons of previous conventions, notably the 1933 *London Convention*²¹⁵, and established an institutional structure with autonomous bodies for decision-making and periodic treaty adjustment.²¹⁶ The COP is the supreme decision-making body and meets every two years. The COP’s functions include adopting amendments to Appendices I and II, reviewing progress on restoring species, and making recommendations for improving the convention.²¹⁷ CITES has an elaborate committee structure that reviews the implementation and the adequacy of commitments. This institutional structure was quickly established after the convention came into force.²¹⁸ A secretariat was initially provided by the Executive Director of the United Nations Environment Programme pursuant to Article 12 of the Convention. CITES now has its own secretariat. Inter-governmental, non-governmental international and national agencies and bodies

²¹² <http://www.cites.org/eng/decis/E12-Dec.doc>; Interview with Mike Fullerton of Forestry Canada, January 28, 2003.

²¹³ Interview with Mike Fullerton of Forestry Canada, January 28, 2003.

²¹⁴ P. Birnie & A. Boyle, *supra* note 309 at 641-643.

²¹⁵ See note 520 *supra*.

²¹⁶ P.H. Sand, *supra* note 313 at 35.

²¹⁷ CITES, *supra* note 522, Article XI; R. Reeve, *supra* note 317 at 38.

technically qualified in protection, conservation and management of wild fauna and flora assist the secretariat.²¹⁹

The CITES Secretariat's primary role is to ensure implementation of the Convention.²²⁰ It also arranges meetings of the parties, undertakes scientific and technical studies, publishes and distributes to the parties current editions of Appendices I, II and III which list species subject to the convention's trade restrictions, and prepares annual reports.²²¹ Article 13 gives the Secretariat a supervisory role. It informs parties if they are not effectively implementing the convention and proposes remedial action.

Under the convention, CITES member states must establish an institutional framework domestically to regulate trade in endangered species of flora and fauna. Rather than imposing a supranational regulatory mechanism of its own, the regime relies on reciprocal recognition of national regulatory decisions, provided that these are made in accordance with mutually agreed standards.²²²

Each party must designate one or more Management Authorities and one or more Scientific Authorities.²²³ The Scientific Authority is charged with compiling information regarding the status of species of flora and fauna within the member state's territory. The Management Authority communicates with other parties and the Secretariat. In this way, the Management Authorities operate the system on behalf of the international community.²²⁴ The names and addresses of the Management Authority and Scientific Authority must be indicated on a party's instrument of ratification.²²⁵

²¹⁸ J. Lachenberry, *supra* note 523 at 70.

²¹⁹ CITES, *supra* note 522, Article 12, Paragraph 1.

²²⁰ *Id.*, Article 12, Paragraph 2.

²²¹ *Id.*

²²² P.H. Sand, *supra* note 313 at 47.

²²³ CITES, *supra* note 522 Article 9.

²²⁴ P.H. Sand, *supra* note 313 at 47.

²²⁵ CITES, *supra* note 522, Article 9(1), Article 1(e)(f).

When the federal cabinet decided to ratify CITES, Environment Canada was designated as both the Management Authority and the Scientific Authority for Canada. Both responsibilities were subsequently delegated to the Canadian Wildlife Service, an agency within the Department of the Environment. As prescribed by CITES, the Management Authority is directly responsible for communicating with other CITES parties and reporting to the Secretariat. Additionally, at the federal level, the Department of Fisheries and Oceans, the Canadian Forest Service and the Canadian Wildlife Service each appointed a Scientific Authority for wildlife and flora under their respective jurisdictions. Further, each of the provinces and territories appointed Scientific and Management Authorities for wildlife within their legislative jurisdiction.

The organization of WAPPRIITA in Canada reflects the original goals behind the reformation of the legislative regime in 1992-1996. Within Canada, the implementation and administration of CITES is performed by an institutional framework composed of both federal and provincial/territorial agencies. The Canadian Wildlife Service (CWS) is responsible for managing CITES species in Canada with respect to the international community. CWS also provides the Management Authority and Scientific Authority for imports into Canada of CITES-listed species. The provinces and territories control exports out of Canada except those species falling under the auspices of the Department of Fisheries and Oceans or the Canadian Forest Service. The Law Enforcement Office of Environment Canada is responsible for border controls. Furthermore, each province and territory has a separate Management and Scientific Authority that manages wildlife within its borders and issues export permits in that regard (except for Alberta which has withdrawn from the CITES framework).²²⁶

Identification of Items Subject to Regulation

The system of institutional oversight established by CITES requires that member states and citizens of the member states are aware of what items – be it hazardous waste or endangered

²²⁶ Interview with Jean Robillard, Deputy Administrator, CITES, Canadian Wildlife Service, February 24, 2003; see also p. 165, *infra*.

species- are subject to regulation. In order to achieve this, an open legitimate process must be implemented, both domestically and internationally, that clearly identifies the items subject to regulation. Further, an open process following both established *pro forma* rules and informal “rules in use” must be adopted so that there is consensus on what items should be added or deleted from the convention as circumstances change. There are three components to this process: classification and definition, labelling and amendments to the convention to accommodate changing circumstances.

Inclusion of items on the lists is based on the precautionary approach. That is to say that inclusion does not require scientific certainty that a given waste is hazardous or a given species is endangered.²²⁷ The process also reflects the principle that states may exercise their sovereignty to preserve resources or protect the environment. As such, states can unilaterally add items to the list of items subject to regulation (subject of course to international trade rules). In this way, CITES requires constant consensus building amongst stakeholders domestically to keep the domestic regime consistent with international obligations. In Canada, this means that the federal government must engage with the institutionalized federal-provincial environmental regime to implement MEAs domestically.

Like the conventions that preceded it that were aimed at conservation generally²²⁸, CITES relies on a system of party-negotiated lists of species over which the specific subject of trade is regulated internationally. Three appendices are part of the Convention with lists of species over which restriction of trade is placed in decreasing levels of control. Appendix I contains an agreed “black list” of prohibited species and Appendix II a “grey list” of controlled species.²²⁹ Furthermore each country of origin may unilaterally add to the lists by entering species in Appendix III.

Appendix I is designated to include all species threatened with extinction, which are, or may be, affected by trade. The Convention requires the parties to implement measures to restrict trade, through domestic regulation, of these species: “in order not to endanger further their survival”.

²²⁷ *Id* at 115.

²²⁸ See note 520, *supra*.

²²⁹ P.H. Sand, *supra* note 313 at 35; R. Reeve, *supra* note 317 at 29.

Trade in species listed in Appendix I is authorized only in exceptional circumstances. As a result, trade in these species is essentially banned.²³⁰

Appendix II includes all species which, although not necessarily now threatened with extinction, may become so unless trade is subject to strict regulation aimed at avoiding utilization incompatible with their survival. Appendix II also includes other species that the COP recognises must be subject to regulation in order to bring under effective control species that may become threatened by extinction. This approach is implicitly precautionary.²³¹ Finally, any party may identify a species that should be subject to the CITES regime when being exported from its jurisdiction. These species are included in Appendix III.

The COP practices an “asymmetrical” approach in the criteria that it uses for de-listing a species. By this I mean that the procedure for de-listing is not the mirror image of listing. The criteria for de-listing a species require positive scientific evidence that the plant or animal can withstand the exploitation resulting from its removal from the protection of the treaty.²³²

Where appropriate and feasible, a CITES Management Authority may affix a mark upon any specimen to assist in identifying the specimen. For these purposes "mark" means any indelible imprint, lead seal or other suitable means of identifying a specimen, designed in such a way as to render its imitation by unauthorized persons as difficult as possible.²³³

CITES amendments are subject to a four-stage process: proposal, consultation, adoption and ratification. It is important to distinguish between the amendment of the appendices to CITES and amendments to the Convention itself. Further, CITES distinguishes between amendments to Appendices I and II (the “international” lists) and Appendix III (the “domestic” list). Article XV deals with Amendments to the Appendices I and II. Any Party may propose an amendment to

²³⁰ J. Lanchbery, *supra* note 523 at 69.

²³¹ B. Dickson, “The Precautionary Principle in CITES: A Critical Assessment” (1999), 39 *Nat. Resources J.* 211 at 216.

²³² *Criteria for the Deletion of Species and Other Taxa from Appendices I and II, Resolution of the Conference of the Parties, First Meeting of the Conference of the Parties*, Resolution Conf. 1.2 (Berne, Switzerland, 1976) cited by Dickson, *id* at 217.

²³³ CITES, *supra* note 522, Article 6; R. Reeve, *supra* note 317 at 34.

Appendix I or II for consideration at the next COP. The text of the proposed amendment must be communicated to the Secretariat at least 150 days before the COP.²³⁴

Consistent with MEAs tendency to rely on consultation with parties, the CITES Secretariat then consults the other parties and interested bodies, such as NGOs, on the amendment.²³⁵ Indeed, the convention places specific obligations on the Secretariat to consult with inter-governmental bodies having a function in relation to marine species if the proposed amendments deal with such species.²³⁶ Parties have 60 days to communicate comments on proposed amendments.²³⁷

Amendments to Appendices I and II must be adopted by a two-thirds majority of parties present and voting. Amendments adopted at a meeting shall enter into force 90 days after that meeting for all parties, except those that register a reservation.²³⁸ Until the reservation is withdrawn the party is treated as a non-party to CITES with respect to trade in the species concerned.²³⁹

Article XVI of CITES addresses amendments to Appendix III. Unlike amendments to the “international” lists, amendments to the “domestic” lists require less consultation with the parties. Any party may at any time submit to the Secretariat a list of species that it has identified as being subject to regulation within its jurisdiction.²⁴⁰ Each list submitted must be communicated to the parties by the Secretariat as soon as possible after receiving it. The list shall take effect as part of Appendix III 90 days after the date of such communication. After the communication of such list, any party may by notification in writing to the Government of the party amending its list enter a reservation with respect to the amendment and the state shall be treated as a non-party to CITES with respect to trade in the species concerned.²⁴¹ The party must also submit to the

²³⁴ CITES, *supra* note 522, Article XV, paragraph 1.

²³⁵ *Id.*

²³⁶ *Id.*, Article XV, paragraph 2(b).

²³⁷ *Id.*, Article XV, paragraph 2(e).

²³⁸ *Id.*, Article XV, paragraph 1(c).

²³⁹ *Id.*, Article XV, paragraph 3.

²⁴⁰ *Id.*, Article XVI, paragraph 1.

²⁴¹ *Id.*, Article XVI, paragraph 2.

Secretariat a copy of all domestic laws and regulations applicable to the protection of the species added to Appendix III along with any amendments to the laws and regulations.²⁴²

Conversely, a party that has submitted a species for inclusion in Appendix III may withdraw it at any time by notification to the Secretariat the removal of any species from Appendix III which will be communicated to all parties.²⁴³

Article XVII governs amendments to the CITES convention itself. There are more onerous procedural requirements on parties seeking such amendments. An extraordinary meeting of the COP must be convened by the Secretariat on the written request of at least one-third of the parties to consider and adopt amendments to CITES.²⁴⁴ The text of any proposed amendment shall be communicated by the Secretariat to all Parties at least 90 days before the meeting. Amendments to the Convention must be adopted by a two-thirds majority of parties present and voting.²⁴⁵

Amendments to the convention itself enter into force 60 days after two-thirds of the parties have deposited an instrument of acceptance. However, unlike amendments to the Appendices, amendments to the convention do not enter into force for parties not accepting the amendment.²⁴⁶ Moreover, such parties are not treated as non-parties to the convention for any purposes.

Parties are obligated to implement amendments to the convention itself and its appendices domestically. In this way, the CITES COP exhibits the typical institutional arrangements

²⁴² *Id.*, Article XVI, paragraph 4.

²⁴³ *Id.*, Article XVI, paragraph 3.

²⁴⁴ *Id.*, Article XVII, paragraph 1.

²⁴⁵ *Id.*, Article XVII, paragraph 2.

²⁴⁶ *Id.*, Article XVII, paragraph 3.

exhibited by MEAs as described by Churchill and Ulfstein²⁴⁷ as well as the outward signs of legitimate decision-making identified by Bodansky²⁴⁸.

1.1.1 Domestic Identification of Endangered Species

The *Wild Animal and Plant Trade Regulations*²⁴⁹ were promulgated in 1996 and brought WAPRIITA into effect. The main feature of the regulations is its schedules. The schedules list the species of flora and fauna in the CITES appendices as well as species not listed in the convention but regulated in Canada domestically.²⁵⁰ Environment Canada also distributes widely a list of CITES regulated species in its publication, *CITES Control List*, to regular importers and exporters of wildlife.²⁵¹

The *Wild Animal and Plant Trade Regulations* also set out labelling specifications. Where a person imports into Canada, or exports from Canada, anything that is identified by a mark, label or accompanying document that indicates that the thing is an animal or plant, or a part or derivative of one, that is listed in Schedule I or II of the Act, that thing is, unless there is evidence that raises a reasonable doubt to the contrary, deemed to be the thing so identified.²⁵² Exports to other national jurisdictions are subject to the receiving state's labelling requirements in addition to these Canadian ones.

Prior Informed Consent

²⁴⁷ Churchill and Ulfstein note that MEAs will be governed by a COP with which meet on a regular basis to recommend or adopt changes to the treaty regime. See R. Churchill and G. Ulfstein, *supra* note 19 at 625.

²⁴⁸ Bodansky notes that a policy will be seen as legitimate at the vertical stage of institutional interaction if it has general support as demonstrated by conformity with procedural rules agreed to by the parties. See D. Bodansky, *supra* note 26 at 602.

²⁴⁹ SOR/96-263.

²⁵⁰ *Id.*, s.3.

²⁵¹ *CITES Control List*, 2000, (Ottawa: Environment Canada, 2000)

²⁵² *Supra* note 564, s. 20.

A widely accepted principle of international environmental law is that states are required to cooperate with each other in mitigating transboundary environmental risks. A requirement of prior consultation is a “natural counterpart of the concept of equitable utilization of a shared resource.”²⁵³ As a result, states have attached procedural requirements of prior notification and consultation with other states and international institutions in many conventions.²⁵⁴

There is a long-standing principle that states cannot dictate to other states what measures must be taken to prevent the endangerment of marine-based species. Instead, states must cooperate in determining what measures should be taken to preserve species in international waters, for example.²⁵⁵ With unilateral action unavailable to states to preserve species outside their borders, treaties dealing with endangered species, such as CITES, are designed to come to international consensus on what species are at risk and what action to take to prevent their extinction. The main purpose of CITES is to ensure that states are aware of, and consent to, the export of endangered species from their borders. Concomitantly, the treaty obligates states to ensure that proper notification has been given to a state of export of an endangered species prior to allowing such species to enter the jurisdiction of an importing state.

CITES has a system of prior informed consent.²⁵⁶ The parties to CITES are subject to a blanket ban on allowing trade in specimens of species included in Appendices I, II and III except in accordance with the provisions of the convention.²⁵⁷ In order to obtain this consent, the convention requires parties to allow export of endangered species of flora and fauna only where an export permit has been issued. Because the appendices reflect different levels of endangerment, different standards are applied to each Appendix when a state’s Management

²⁵³ *Id* at 126.

²⁵⁴ *Id* at 406; see also Kummer *supra* note 309 at 23.

²⁵⁵ See for example *Behring Sea Fur Seals Arbitration, 1898* (1999), 1 *Int. Env. Rep.* 43 in which it was held that wildlife conservation was not a principle of international law and that the United States could not prevent Britain from seal hunting in international law to enforce such a principle.

²⁵⁶ Schmidt, Alke, “Transboundary Movements of Waste under EC Law: The Emerging Regulatory Framework” in (1992), 4/1 *J. Env. L.* 57 at 77 cites a parallel prior informed consent structure for ivory trade under CITES.

Authority is considering issuing a permit. CITES institutionalizes the core ideas of cooperation, transparency, sustainable use and a precautionary approach to conservation by subjecting all wildlife imports, including trade with third parties, to mandatory licensing with permits, a kind of “passport”, to be issued by the exporting countries.²⁵⁸

Regulation of Trade in Specimens of Species Included in Appendix I is specifically addressed by Article three of CITES.²⁵⁹ The export of any specimen of a species included in Appendix I requires the prior grant and presentation of an export permit. An export permit will only be granted when the following conditions have been met:²⁶⁰

4. the Scientific Authority of the state of export has advised that such export will not be detrimental to the survival of that species;
5. the Management Authority of the state of export is satisfied that the specimen was not obtained in contravention of the laws of that state for the protection of fauna and flora;
6. the Management Authority of the state of export is satisfied that any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment; and
7. the Management Authority of the state of export is satisfied that an import permit has been granted for the specimen.

Conversely, under CITES the import of any specimen of a species included in Appendix I requires the prior grant and presentation of an import permit and either an export permit or a re-export certificate. An import permit shall only be granted when the following conditions have been met:²⁶¹

3. the Scientific Authority of the state of import has advised that the import will be for purposes which are not detrimental to the survival of the species involved;

²⁵⁷ CITES, *supra* note 522, Article 2, Paragraph 4.

²⁵⁸ P.H. Sand, *supra* note 313 at 35.

²⁵⁹ CITES, *supra* note 522, Article 3, Paragraph 1.

²⁶⁰ *Id.*, Article 3, Paragraph 2.

²⁶¹ *Id.*, Article 3, Paragraph 4.

4. the Scientific Authority of the state of import is satisfied that the proposed recipient of a living specimen is suitably equipped to house and care for it; and
5. the Management Authority of the state of import is satisfied that the specimen is not to be used for primarily commercial purposes.

There are parallel provisions dealing with the introduction from the sea of any species included in Appendix I.²⁶²

Article four addresses the regulation of trade in species included in Appendix II in a similar manner to Appendix I. The export of any specimen of a species included in Appendix II also requires the prior grant and presentation of an export permit. An export permit shall only be granted when the conditions set out for species in Appendix I have been met.²⁶³ Similarly, the import of any specimen of a species included in Appendix II requires the prior presentation of either an export permit or a re-export certificate and the re-export of any specimen of a species included in Appendix II requires the prior grant and presentation of a re-export certificate, which may be granted only when conditions, identical to those required when exporting an item under Appendix I, are met.²⁶⁴ However, because of the scientific basis underlying condition one, it is implicitly easier to trade in species listed in Appendix II which contains species less endangered than those listed in Appendix I.

Similarly, the introduction from the sea of any specimen of a species included in Appendix II requires the prior grant of a certificate from the Management Authority of the state of introduction. Again, the conditions to meet are identical to those for species included in Appendix I.²⁶⁵

Article 4 further requires that the Scientific Authority in each party monitor both the export permits granted by that state for specimens of species included in Appendix II and the actual exports of such specimens. Whenever a Scientific Authority determines that the export of a

²⁶² *Id.*, Article 3, Paragraph 5.

²⁶³ *Id.*, Article 4, Paragraph 2.

²⁶⁴ *Id.*, Article 4, Paragraph 5.

²⁶⁵ *Id.*, Article 4, Paragraph 6.

species should be limited in order to maintain that species throughout its range, at a level consistent with its role in the ecosystem, and well above the level at which that species might become eligible for inclusion in Appendix I, the Scientific Authority must advise the appropriate Management Authority of suitable measures to be taken to limit the grant of export permits for that species.²⁶⁶

Article 5 of CITES regulates trade in species included in Appendix III. The export of any specimen of a species from any state, which has included that species in Appendix III, requires the prior grant and presentation of an export permit. An export permit must only be granted when the conditions that must be met for granting an export permit for species in Appendix I have been met.²⁶⁷ The import of any specimen of a species included in Appendix III requires the prior presentation of a certificate of origin and, where the import is from a state which has included that species in Appendix III, an export permit.²⁶⁸ Finally, in the case of re-export, a certificate granted by the Management Authority of the State of re-export that the specimen was processed in that state or is being re-exported shall be accepted by the state of import as evidence that the provisions of the present Convention have been complied with in respect of the specimen concerned.²⁶⁹

Where export or re-export is to, or import is from, a state not a party to CITES, comparable documentation issued by the competent authorities in that state which substantially conforms with the CITES requirements for permits and certificates may be accepted in lieu thereof by any party.²⁷⁰

The convention requires parties' Management Authorities to issue permits prior to allowing trade in endangered species that reflect the importing and exporting states' consent to the trade. The model for export permits is set forth in Appendix IV. There is a separate permit for export, re-export and import of endangered species. The permits are valid for a period of six months from

²⁶⁶ *Id.*, Article 4, Paragraph 2.

²⁶⁷ *Id.*, Article 5, Paragraph 2.

²⁶⁸ *Id.*, Article 5, Paragraph 3.

²⁶⁹ *Id.*, Article 5, Paragraph 4.

the date on which they were granted. The permits must comply with Article 6 of the Convention which provides:

- The permit must contain the information, specified in the model set forth in Appendix IV, and may only be used for export within a period of six months from the date on which it was granted;
- Each permit or certificate must contain the title of the present Convention, the name and any identifying stamp of the Management Authority granting it and a control number assigned by the Management Authority;
- Any copies of a permit or certificate issued by a Management Authority shall be clearly marked as copies only and no such copy may be used in place of the original, except to the extent endorsed thereon; and
- A separate permit or certificate shall be required for each consignment of specimens.

1.0.0 Prior Informed Consent to Domestic and International Trade in Endangered Species in Canada

WAPPRIITA²⁷¹ improves the controls on the illegal trade of wildlife and plants that was in place under the old legislative regime and prohibits trafficking of endangered species. WAPPRIITA prohibits any commercial trade in endangered species unless a permit accompanies it. In addition to contributing to the conservation of Canadian and foreign wild species, it is designed to protect Canadian ecosystems from the introduction of undesirable species that could harm Canadian species. For less threatened species, trade is monitored and regulated through a permit system. Indeed, section 4 of the Act specifically states:²⁷²

The purpose of this Act is to protect certain species of animals and plants, particularly by implementing the Convention and regulating international and interprovincial trade in animals and plants.

There is a blanket prohibition on importing into Canada any animal or plant that was possessed, distributed or transported in contravention of any law of any foreign state.²⁷³ Further, no person

²⁷⁰ *Id*, Article 10.

²⁷¹ *Supra* note 564.

²⁷² *Id*, s. 4.

²⁷³ *Id* s. 6(1).

may import into Canada, or export from Canada, any animal or plant deemed endangered except by way of permit.

WAPPRIITA also requires a permit to transfer any animal or plant deemed endangered from one province to another province.²⁷⁴ This may be in addition to a provincial permit. Finally, transport of an animal or plant from one province to another where the animal or plant was possessed, distributed or transported in contravention of any provincial Act or regulation is prohibited.²⁷⁵ The Act equally prohibits the possession of any animal or plant listed in Appendix I of the Convention or that has been imported or transported in contravention of the Act.²⁷⁶

In an effort to comply with CITES' documentation requirements, section nine of the Act requires every person who imports into Canada, exports from Canada, or transports from one province to another province, an animal or plant, to keep any documents that are required to be kept by the regulations. Section 10 of the Act allows the Minister to issue permits for interprovincial transportation of plants and animals. In order to keep a closer record of high-volume exporters such as florists and to improve administrative efficiency, the Canadian Wildlife Service allows these exporters and importers to apply for blanket permits to allow an unlimited number of transactions over a year. In exchange, the exporter/importer must file yearly reports outlining the transactions.²⁷⁷ In practice, the federal government issues import permits for all species and export permits for those species under its jurisdiction. Species under federal jurisdiction include, for example, migratory birds.²⁷⁸

Provincial governments issue permits for export of all wild flora and fauna within their border. The exception is Alberta, which withdrew from the domestic CITES regime in 1995. When Black Bears were added to Appendix II of CITES in 1992 because of a large market in Asia for the Black Bear's gall bladder, Alberta and British Columbia found the number of permits too large and the administrative requirements overly onerous. As a result, Alberta and B.C. stopped

²⁷⁴ *Id* s. 6(2) and s. 6(3).

²⁷⁵ *Id* s. 7.

²⁷⁶ *Id* s. 8.

²⁷⁷ J.R. Robillard *supra* note 576.

issuing permits altogether (for all species) in 1995 with the Federal government taking control of issuing export permits for flora and fauna originating from that province. B.C. has since resumed issuing permits.²⁷⁹

Alberta continues to rely on the federal government to issue export permits. According to officials with Alberta Environment, they have no involvement in enforcement although it retains the title of Management Authority for the province. There is no involvement with the Canadian Wildlife Service and the Canadian Wildlife Service does not ask it to do anything to implement Canada's obligations under CITES. However, Alberta wildlife officers are occasionally seconded to the Canadian Wildlife Service for training in enforcing the restrictions on interprovincial trade under WAPRITTA.²⁸⁰

The *Wild Animal and Plant Trade Regulations* specify conditions under which a permit must be obtained for export or import of wild flora and fauna into or out of Canada. Under section 6 of the Regulations, a person who imports into Canada an animal or plant that is listed as "fauna" or "flora" in Appendix II or Appendix III to the Convention but is not listed in Schedule II of the Act (or any part or derivative of any such animal or plant) is exempted from holding a permit issued under the Act where the person has obtained: "before import, a permit, certificate or written authorization that satisfies the requirements of the Convention and is granted by a competent authority in the country of export." Under section 7 of the Regulations, no person may export from or import into Canada any "plant" or "animal" included in the Appendices to the convention (including living and dead plants and animals and eggs, sperms, tissue cultures, embryos, spores or pollen).²⁸¹

With respect to plants and animals listed in Schedule II, but not in the Appendices of the Convention, section 8 allows individuals to export from Canada, without a permit, these species

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ Interview with Gordon Court of Alberta Environment, January 21, 2004.

²⁸¹ *Wild Animal and Plant Regulations*, *supra* note 589, s. 7(1).

as long as the province from which it is being exported does not prohibit it. The Regulations also specify conditions under which live animals may be transported for export from Canada.²⁸²

The Regulations also govern interprovincial transport of wild plants and animals. Under section 6(3) of the Act, interprovincial transport of wild plants and animals deemed endangered is prohibited absent a permit issued under Act. Permits are obtained from the province from which the species originated is regulated or banned.²⁸³ However, Regulations allow for several exemptions to the permit requirements for export and import of wild plants and animals including animals raised in captivity,²⁸⁴ pets,²⁸⁵ personal effects,²⁸⁶ and hunting trophies.²⁸⁷ Nevertheless, the regulations require persons subject to such exemptions to sign a declaration.²⁸⁸ The exemptions are also subject to several conditions listed in section 18 of the interprovincial regulations.

Information Sharing with Other Parties and Citizens of Member States

As was explained in Part I of the paper, legitimate domestic implementation of international law requires open dialogue between citizens and communities. As such, legitimacy at the international level requires that the institutional structures hold open debates and adopt measures based on consensus and accurate information. Indeed, the majority of the environmental conventions provide for some form of compliance monitoring by the COP, under which party states must submit reports on their performance on a regular basis. These reports are made available to all parties, and are reviewed by the COP.²⁸⁹ Procedures to monitor and gather information are deemed essential elements for a satisfactory system of compliance control.²⁹⁰

²⁸² *Id.*, s.9.

²⁸³ *Id.*, s. 12.

²⁸⁴ *Id.*, s.13(1)(a) but only those born since 1975 and the exemption is for possession only.

²⁸⁵ *Id.*, s. 17.

²⁸⁶ *Id.*, s. 15.

²⁸⁷ *Id.*

²⁸⁸ *Id.*, s. 19.

²⁸⁹ Kummer, *supra* note 309 at 229.

²⁹⁰ R. Reeve, *supra* note 317 at 19.

Domestically, this is also true. In order to internalize international norms domestically, member states must persuade citizens that the international norms justify adopting restrictions. This is done through open dialogue and making the requirements of the conventions well known to the people generally but, more specifically, those who are directly affected by the provisions of the convention. Neither convention specifically addresses what measures should be taken to increase awareness within a member state of individual obligations under the respective conventions. However, the conventions do impose requirements on member states to make reports to the COP. These requirements have been replicated and expanded domestically in Canada.

Information on member states' compliance with CITES comes from two main sources: self-reporting by members and compliance monitoring by the Secretariat.²⁹¹ Under CITES, the Secretariat must convene regular meetings at least once every two years where the parties' implementation procedures are reviewed.²⁹² Along with the parties to the convention, CITES allows for agencies technically "qualified in protection, conservation or management of wild fauna and flora", as well as states not parties to the convention to observe meetings.²⁹³ Specifically, a review of the progress made towards the restoration and conservation of the species included in Appendices I, II and III is made during these meetings.²⁹⁴ To that end, each party is required to prepare periodic reports on its implementation of CITES to the Secretariat consisting of a biennial report on legislative, regulatory and administrative measures taken to enforce the provisions of the convention which must be available to the public.²⁹⁵

When the Secretariat believes that any species included in Appendix I or II is being affected adversely by trade in specimens of that species, or that the provisions of the convention are not being effectively implemented, it is required to communicate that to the authorized Management

²⁹¹ P.H. Sand, *supra* note 313 at 48.

²⁹² CITES, *supra* note 522, Article 11, Paragraph 2, 3.

²⁹³ *Id*, Article 11, Paragraph 6, 7.

²⁹⁴ *Id*, Article 11, Paragraph 3(c).

²⁹⁵ *Id*, Article 8, Paragraph 7, 8.

Authority of the party or parties concerned. The issue will then be reviewed by the next COP, which may make whatever recommendations it deems appropriate.²⁹⁶

To fulfill its mandate in this regard, the COP relies on an extensive state and non-state reporting network. Information about implementation of CITES enters the reporting process pursuant to the provisions of the agreement. There are now strict deadlines for the submission of annual reports on trade and guidelines for reporting.²⁹⁷

Trade information from the parties is compiled in a database at the Wildlife Trade Monitoring Unit (WTMU) in Cambridge, UK. The Wildlife Trade Monitoring Unit began in the 1970s as part of Trade Records Analysis of Fauna and Flora in Commerce International (TRAFFIC).²⁹⁸ In 1990, TRAFFIC became a separate international body. It monitors trade in fauna and flora and has an extensive network of separate international bodies. It monitors trade in fauna and flora and has an extensive network of NGOs it works with at the domestic level.²⁹⁹ One of the network's primary functions is to keep national authorities informed of illicit trade.

TRAFFIC also keeps in close contact with the WTMU and the Ramsar Bureau (which keeps track of reports from parties to the *Ramsar* Convention) as well as the World Wildlife Foundation. The database at WTMU has over 2.5 million trade records. The database allows import and export records to be cross-referenced and to identify anomalies in reporting.³⁰⁰ The WTMU informs the secretariat of such anomalies. The secretariat then investigates the parties involved for non-compliance. Infractions reported by Non-Governmental Organizations (NGOs) are also entered into the database. A report presented at each COP publishes alleged infractions. NGOs such as the WWF supply information to supplement national reports.³⁰¹ According to Peter Sand, the former Secretary General of CITES, and Rosalind Reeve, cooperation with the

²⁹⁶ *Id.*, Article 13.

²⁹⁷ J. Lachenbery, *supra* note 523 at 70.

²⁹⁸ *Id.* at 70.

²⁹⁹ *Id.* at 72.

³⁰⁰ *Id.* at 71.

³⁰¹ *Id.* at 72.

TRAFFIC network has given CITES one of the best operational information sources of any MEA.³⁰²

The Canadian Wildlife Service conducts an extensive advertising campaign at ports of entry to instil the importance of regulating trade in endangered species in travelers.³⁰³ Environment Canada also distributes widely a list of CITES regulated species in its publication, *CITES Control List*, to regular importers and exporters of wildlife.³⁰⁴ All of this is part of an effort to increase the stigma attached to trade in endangered species in order to encourage Canadians to refuse to buy products made from endangered species while abroad and report those who do bring such products into the country.³⁰⁵ WAPPRITA further attempts to improve on federal-provincial cooperation by allowing the federal government to enter into agreements with the government of any province to: “provide for the cooperative management and administration of this Act and to avoid conflict between, and duplication in, federal and provincial regulatory activity.”³⁰⁶

Scientific Authorities in the provinces and federal departments collect information on use and populations of species from the WAPPRITA permits issued and complement that with information gathered from wildlife officials. This information is used, along with information collected internationally and reported to the Secretariat, to determine what species should be added to, or taken off, the list of species in the WAPPRITA. This information is also used to develop positions with respect to international protection of species.³⁰⁷

Enforcement

³⁰² R. Reeve, *supra* note 317 at 68; P. H. Sand (1997), 'Commodity or Taboo? International Regulation of Trade in Endangered Species', *Green Globe Yearbook of International Cooperation on Environment and Development 1997* http://www.greenyearbook.org/articles/97_01_sand.pdf at 27.

³⁰³ See for example, Environment Canada brochure, *Regulation of Export and Import of Endangered Species*, (Ottawa: Environment Canada, 2000) where it notes:

...your efforts are an important part of the conservation of wild flora and fauna worldwide.

³⁰⁴ *CITES Control List*, 2000, (Ottawa: Environment Canada, 2000)

³⁰⁵ Interview with J.R. Robillard *supra* note 576.

³⁰⁶ *Wild Animal and Plant Regulations*, *supra*, note 598, s. 5

³⁰⁷ Interview with Vicki Handcock – Department of External Affairs and International Trade – CITES liaison, February 24, 2003.

Enforcement has been defined as the “formal legally circumscribed reaction to a breach of an obligation”.³⁰⁸ A distinction can be made between national and international enforcement. National enforcement is the reaction to breaches of national law. Conversely, international enforcement is the response to states that fail to fulfill their international legal obligations.³⁰⁹

CITES has provisions to address non-compliance by member states. The convention equally requires member states to put into place legislative provisions domestically that enforce the restrictions on trade that are required to be implemented by the convention. This explicit obligation on states to penalize certain behaviour of their subjects is an unusual feature in international conventions on environmental protection.³¹⁰ However, it is likely necessary. While legal structures that rely on a logic of consequences for compliance must use the threat of punishment, regimes that seek to rely on a logic of appropriateness require such provisions to an extent as well. For example, an individual is willing to accept a limit on the number of fish that can be caught where he or she has been convinced that this will protect the resource for future use and will apply to others as well. If others catch more than the limit and no enforcement occurs, the individual is encouraged to reconsider the decision to comply. Accordingly, both conventions require member states to implement an enforcement regime. This paper will therefore examine how the Canadian federation addressed the enforcement of obligations under CITES.

CITES imposes minimum obligations on member states with the explicit authorization to adopt more stringent domestic measures.³¹¹ In this way, CITES respects the sovereignty of the parties to choose their own policy instruments as they are the best positioned to determine how best to protect their own wildlife and plantlife. CITES also reflects the general consensus recognized in international environmental law that cooperation between states is essential for the protection of biodiversity. In particular, the preamble specifically refers to over-exploitation through international trade as a threat to biodiversity.³¹²

Member states of CITES are compelled to take appropriate measures to enforce the provisions of the convention and to prohibit trade in specimens in violation thereof. However any party is free

³⁰⁸ Martti Koskenniemi, “New Institutions and Procedures for Implementation Control and Reaction”, in Jacob Werksman (ed.), *Greening International Institutions*, (London: Earthscan Publications Ltd., 1996) at 237 as cited by R. Reeve, *supra* note 317 at 17

³⁰⁹ R. Reeve, *id* at 17, 92.

³¹⁰ *Id* at 233.

³¹¹ CITES, *supra* note 522, Article 14, Paragraph 1.

³¹² *Id*, preamble.

to adopt stricter measures on species listed in the Appendices or regulate trade in species not listed in the Appendices.³¹³ At a minimum, however, a state must adopt measures that:³¹⁴

3. penalize trade in, or possession of, species listed in the Appendices; and
4. provide for the confiscation or return to the state of export of such species.

The parties are also required to ensure that specimens of species listed will pass through any formalities required for trade with a minimum of delay. To facilitate expeditious trade, a party may designate ports of exit and ports of entry at which specimens must be presented for clearance.³¹⁵

The Standing Committee of the CITES COP is the principal instrument for collective action against non-compliance. The Standing Committee has imposed trade bans on: the United Arab Emirates from 1985 to 1990; Thailand from 1991 to 1992; and Italy from 1992 to 1993.³¹⁶ Most recently, the Secretariat, on the instructions of the Standing Committee, issued a notification to the parties recommending that the parties suspend trade in endangered species with India and Gambia in CITES-listed species because those states failed to submit evidence of legislative progress to enact adequate legislation implementing the CITES obligations.³¹⁷ The Secretariat also uses its reports as a means to focus negative publicity on member states that are in non-compliance with the convention.³¹⁸

1.0.0 Domestic Enforcement

In order to deal with the shortage of wildlife officers enforcing CITES domestically, which was a recurring problem under the old system, WAPPRIITA allows the Minister to designate people to

³¹³ *Id.*, Article 14.

³¹⁴ *Id.*, Article 8, Paragraph 1. The parties are also permitted to provide for any method of internal reimbursement for expenses incurred as a result of the confiscation of a species (Article 8(2)).

³¹⁵ *Id.*, Article 8, Paragraph 3.

³¹⁶ P.H. Sand, *supra* note 313 at 38.

³¹⁷ Notification To the Parties No. 2004/079, Geneva, December 22, 2004.

³¹⁸ *Id.* at 49-50; see also R. Reeve, *supra* note 317 at 94 for other examples of recommended trade suspensions.

act as officers to enforce the Act and prescribe their powers.³¹⁹ Specifically, the Act gives officers power to detain any thing that has been imported into, or is about to be exported from, Canada, or from one province to another, until the officer is satisfied that the thing has been dealt with in accordance with the Act and the regulations.³²⁰ Furthermore, the officer may order the removal of the plant or animal from Canada.³²¹

Under WAPPRIITA, a person can be prosecuted anywhere in Canada for contravening a provincial law, as well as for violating foreign legislation.³²² Every person who contravenes a provision of WAPPRIITA may be prosecuted and fined up to \$100,000.00 and faces up to six months in prison. In the case of a corporation, the fine can be as high as \$300,000.00. For subsequent offences, these amounts may be doubled. The court may also order the offender to take remedial action and fine them an additional amount equal to any pecuniary benefit they may have received from the illegal traffic.³²³ The court also has the power to give suspended sentences with the criminal conviction vacated once certain court-imposed conditions are met.³²⁴

CONCLUSION

CITES seeks to both ensure effective conservation of species as well as to regulate trade in species.³²⁵ The purpose of these trade restrictions is to gather information on trade in endangered or near-endangered species to encourage sustainable use. However, rather than imposing a supranational regulatory mechanism of its own, CITES relies on reciprocal recognition of

³¹⁹ WAPPRIITA, *supra* note 564, s. 12.

³²⁰ *Id* s. 13 *Wild Animal and Plant Trade Regulations*, *supra* note 598, s.21-23.

³²¹ WAPPRIITA *supra* note 564, s. 18.

³²² WAPPRIITA, *supra* note 564, s.6(2) and s.6(3).

³²³ *Id*, s. 22.

³²⁴ *Id*, ss. 22(7)-22(10). In May, 2003, as part of a joint federal and provincial wildlife enforcement investigation, charges were laid against a Richmond Hill, Ontario resident for 113 offences involving the illegal possession, transport, export, and trafficking in black bear gall bladders. The new charges were laid by Ontario Ministry of Natural Resources Officials under the Ontario Fish and Wildlife Conservation Act and under the federal Wild Animal and Plant Protection and Regulation of Interprovincial and International Trade Act and the Ontario Fish and Wildlife Conservation Act. In November, 2002, Environment Canada charged two people with 27 offences under the federal legislation involving 418 black bear gall bladders based on an investigation by La Société de la faune et des parcs du Québec. (Environment Canada Press Release, May 2, 2003, at http://www.ec.gc.ca/press/2003/030502_n_e.htm).

³²⁵ J. Heinen and D. Chapagain, *supra* note 305 at 236-237.

national decisions, provided that these are made in accordance with mutually agreed standards. It is then left to the domestic Management Authorities to operate the system on behalf of the international community. When Canada ratified CITES, it attempted to implement its obligations through existing legislation. However, as international environmental norms evolved it became apparent that Canada, while meeting CITES' minimum obligations, was not complying with the broader purpose of CITES to promote sustainable use of the world's flora and fauna and, in a more holistic sense, preserve the world's biodiversity.

Accordingly, the federal government attempted to establish a new legislative regime that reflected these broader goals while still respecting the federal contract. The new regime is the result of extensive federal-provincial dialogue that both reflects the broader international goals of CITES and is consistent with Canadians' understanding of Canadian federalism. The new legislative regime, consisting of the WAPPRITTA and its regulations, addresses the five areas of obligations set down by CITES: institutional oversight, identification of items subject to regulation, prior informed consent, information sharing and enforcement and makes them applicable to interprovincial trade in flora and fauna with standards similar to the international ones laid down by CITES.

According to Professor Koh, transnational legal process is:³²⁶

...the process whereby an international law rule is interpreted through the interaction of transnational actors in a variety of law-declaring *fora*, then internalized into a nation's domestic legal system.

Professor Koh claims that the process of transnational legal process answers the question: "why do nations obey?"³²⁷ I would posit that this process might be applied to the question: "why do provinces obey?". Typically, provinces have no choice to obey. A federal government acting in a constitutionally sanctioned field of legislative jurisdiction may impose its will on the sub-units. Such unilateral action is usually not available to the Canadian federal government in implementing national environmental policy for two reasons. First, legislative jurisdiction is split

³²⁶ H.H. Koh, *supra* note 53 at 626.

³²⁷ *Id.*, at 625.

between the provinces and the federal government. Second, both the provinces and federal government have committed to consensus decision making in the environmental field. Several hundred agreements, legislative initiatives, a constitutional history marked by a contractualist understanding of federalism and the general “rules in use” with respect to Canadian environmental policy-making have served to institutionalize collaborative federalism.

Global governance involves a community of states taking on the responsibility for addressing common problems through a variety of political processes, which are inclusive in character, and have a sense of the collective interest over the particular interests of individual states.³²⁸ Important in this system of governance is the extensive network of supervisory bodies, COPs and commissions established by environmental treaties.³²⁹ These treaties rely on institutional machinery in the form of inter-governmental commissions and meetings of treaty parties as a means of coordinating policy, developing the law, supervising its implementation, putting community pressure on individual states and resolving conflicts of interest.³³⁰

CITES is an important part of this network of global environmental governance. It establishes an institutional framework charged with ensuring compliance with the conventions and monitoring international trade. The international institutions establish a dialogue with their national counterparts to gather scientific information and produce lists of hazardous wastes or endangered species that will be subject to international trading regulation. In turn, some trade is banned outright or may only take place with the prior informed consent of member states. The information gathered from the regulated trade in hazardous waste and endangered species is shared with other member states, interested persons and non-governmental organizations. Finally, both conventions require member states to institute domestic measures to punish trade that is contrary to the provisions of the conventions.

The domestic implementation in Canada of CITES was a long process. When Canada ratified the convention it already had the domestic legislation in place to comply with the minimum

³²⁸ P. Birnie & A. Boyle, *supra* note 309 at 34.

³²⁹ *Id* at 35.

requirements of the treaties. However, through an integrated process of institutional interaction at the provincial-federal level through the CCME and a subsequent broader consultation process involving stakeholders, the treaty was more deeply integrated into Canadian society. As a result, the domestic regime was revised in a manner that better reflects the broader goals of these two treaties.

The domestic implementation of CITES in Canada is an important demonstration of the dynamics of international law-making in a federal regime. In a federal regime, the national government speaks for the nation-state on the international stage. However, the commitments cannot be internalized domestically without extensive involvement of the constituent governments as well as civil society.

This paper has attempted to explain the role transnational legal process might play in an examination of the implementation of MEAs in Canada. Professor Koh describes the utility of transnational legal process to legal analysis as:³³¹

...a theory of transnational legal process has both predictive capacity and explanatory power regarding questions of causation. It predicts that nations will come into compliance with international norms if transnational legal processes are aggressively triggered by other transnational actors in a way that forces interaction in forums capable of generating norms, followed by norm-internalization. This process of interaction and internalization in turn leads a national government to engage in new modes of interest-recognition and identity-formation in a way that eventually leads the nation-state back into compliance.

Part I of this paper examined transnational legal process with respect to its predictive capacity in the milieu of Canadian environmental governance. The following conclusions can be made in this regard:

1. Successful domestic implementation of international norms follows a pattern of relations described as transnational legal process whereby international and domestic actors, both governmental and non-governmental, interact in a variety of public and private *fora* to make, enforce and ultimately internalize rules of international law.

³³⁰ *Id* at 180.

³³¹ H. H. Koh, *supra* note 1 at 206.

2. When international rules are internalized, they are obeyed out of a “logic of appropriateness” rather than a “logic of consequences”. Where international rules are accepted on the basis of a “logic of appropriateness” they are view as more legitimate than those rules that rely on a “logic of consequences”.
3. Legitimate policy is based on the consent of the governed. Consent can be demonstrated through implementation procedures both consistent with the *pro forma* rules and “rules in use” which arise from historical patterns of interaction.
4. Federalism is a form of government based on the consent of political communities to come together for the common benefit of a greater federation. Accordingly, community is an important basis upon which citizens of a federal state perceive the legitimacy of a given action. Any policy enacted in a federation that particularly affects a given sub-unit in the federation must be consistent with both the constitutional division of powers as well as historical patterns of relations between the national government and the sub-units.
5. Environmental governance in Canada is based on an institutionalized form of collaborative federalism. This pattern of relations cannot be ignored when implementing international environmental law domestically in Canada. Policy implementation that is imposed on the provincial government is unlikely to be internalized, as it will be difficult to get provincial governments to commit or cooperate with environmental policy objectives.
6. Provincial government opposition to domestic implementation of an MEA, where the opposition is maintained in the face of federal policy that is consistent with the established pattern of environmental governance, can be overcome where the affected provincial political community is convinced of the efficacy of the underlying norms of a given MEA.

Part II of this paper examined the implementation of CITES within Canada using transnational legal process in its descriptive capacity. The following conclusions can be made in this regard:

1. Each convention sets up an institutional framework that establishes fairly detailed global standards while allowing for regional regulation that takes into account specific local needs. The COP serves as a forum to discuss the ongoing effectiveness of the convention and consider amendments to the conventions and their appendices in order to respond to changing circumstances.
2. The conventions share five common categories of obligations: institutional oversight; identification of items subject to regulation; prior informed consent; information sharing with other parties and citizens of member states; and enforcement.
3. As international environmental law has evolved since CITES was first concluded, the scope of each convention has broadened. There has been a shift in international policy and law from mechanisms focusing on providing a remedy after the event to mechanisms that aim of

preventing damage. This has been informed by increasing international focus on preservation of the environment and sustainable development through cooperation among international institutions and states and a commitment to the precautionary principle.

4. The federal government ratified CITES with the intention of using existing federal legislation to implement the obligations under the conventions. However, as international law evolved and CITES was increasingly identified with the overall international commitment to environmental protection, the existing legislation was increasingly seen as insufficient to address these broader holistic goals.
5. The federal government then entered into extensive dialogue with the provincial governments, and others, to establish parallel domestic regulatory regimes governing interprovincial trade that mirrored the international ones established by CITES. These new institutional structures were established specifically to address Canada's obligations under CITES. Further, the new regimes explicitly recognize the role regulation of trade in hazardous waste and endangered species plays in protecting the international environment.

This paper demonstrates the normative force that Canadians' understanding of federalism has on environmental policy. Environmental policy must take into account the understanding Canadians have about the federal-provincial relationship. This is not to say that environmental policy cannot be implemented where it conflicts with federal values. Instead, policy-makers must engage citizens in a dialogue aimed at re-interpreting Canadians' understanding of the federal contract and refashion the "rules in use" so that a given policy is not viewed as an illegitimate intrusion on provincial jurisdiction. In other words, policy-makers must convince citizens to shift their allegiance from a particularly affected provincial political community to the federal political community and consent to federal environmental policy.

Ultimately, as was demonstrated by this paper, legitimacy does not depend on whether a rule or a decision is substantively correct but instead reflects more general support for a regime, which makes subjects willing to substitute the regime's decisions for their own evaluation of a situation.³³²

It can be concluded that the regime established domestically to implement CITES has been accepted as legitimate although perhaps not fully internalized. CITES was implemented primarily by basing its legitimacy on Canadians' perceptions of federalism. A consensual

process was followed that was consistent with the prevailing mode of environmental governance in Canada. However, as the conventions continue to evolve it may be impossible to continue to implement them through a consensual process. Indeed, it has been predicted that international institutions may be compelled to depart from purely consensual modes of decision making in order to avoid gridlock and least-common denominator outcomes.³³³

One could argue that it is possible for the federal government to act unilaterally in the environmental field if the policy goals are seen as legitimate. The federal government was able to act unilaterally in areas of provincial concern such as health, education and welfare not because it was constitutionally permitted but because a broad consensus was reached that the policy goals were appropriate and the federal government was better able to fund the services. The provincial governments, because of this consensus, generally accept unilateralism and the constitutional legality of the policy model has also been generally accepted. Professors Robert Tucker and David Hendrickson state:³³⁴

Legitimacy arises from the conviction that state action proceeds within the ambit of law, in two senses: first, that action issues from rightful authority, that is, from the political institution authorized to take it; and second, that it does not violate a legal or moral norm. Ultimately, however, legitimacy is rooted in opinion, and thus actions that are unlawful in either of these senses may, in principle, still be deemed legitimate. That is why it is an elusive quality. Despite these vagaries, there can be no doubt that legitimacy is a vital thing to have, and illegitimacy a condition devoutly to be avoided.

Therefore, where there is a broad-based consensus as to the appropriateness of the proposed policy, and acceptance that the federal government is better able to accomplish the goals of the policy, federal unilateralism will be accepted. Where the people sense that federal intervention will be illegitimate, however, collaborative federalism will dominate. Nevertheless, for the most part, given the strength of the provincial political communities in the environmental regime, it is

³³² D. Bodansky, *supra* note 26 at 602.

³³³ *Id* at 599.

³³⁴ R. Tucker & D. Hendrickson, "The Sources of American Legitimacy" (2004) 83(6) *Foreign Affairs* at <http://www.foreignaffairs.org/2004/6.html>.

doubtful the federal government will act unilaterally to implement any future changes to its obligations under CITES.

Although there are scenarios where the norms underlying a MEA or a new international environmental obligation may be internalized deeply enough in Canada to divorce citizens from their provincial political communities and, consequently, be seen as a legitimate policy in spite of its inconsistency with the accepted federal environmental regime, these instances will be rare. Unless it is absolutely necessary to implement an MEA, the federal government will not be able to rely on unilateral action because of the strength, and institutionalized nature, of the collaborative model in the environmental regime.

While internalization may require extensive interaction among state and non-state actors, the role of constituent units in internalization is integral. This is particularly true in Canada where the murky nature of constitutional responsibility over the environment has necessarily led to a collaborative model of federalism. Federalism is a defining feature of the Canadian polity and the provincial political communities' understanding of the federal contract must always be considered when implementing international environmental law domestically. The historical basis of federalism, coupled with its evolution both in constitutional jurisprudence and political negotiations, has made the "fact of federalism" along with Rawls' "fact of pluralism" an unavoidable reality. As Alan Cairns states:³³⁵

Federalism, which had been viewed as transitional by some of the more centralist inclined English-Canadian politicians at Confederation, rooted itself deeply in Canadian society. Its natural and strong Quebec base of support was supplemented by the institutional self-interest of the political and administrative class that operated the provincial order of governments. Further, as the country expanded from four to ten provinces, the increasingly complex tasks of managing space and accommodating territorial diversity enhanced the utility of federalism.

³³⁵ A. Cairns, *Reconfigurations: Canadian Citizenship and Constitutional Change*, (Toronto: McClelland & Stewart, 1995) at 101

While implementation of international environmental norms may be possible through unilateral federal government action,³³⁶ the presence of strong provincial political communities in Canada will more than likely make such action seem illegitimate and internalization of the norms will be incomplete. Not just the formal constitutional framework and, its historical interpretation, under which the Canadian federal system operates but also the long-standing “rules in use” that make up the Canadian view of legitimacy in the federal system, support this.³³⁷

³³⁶ see for example, P. Barton, “Economic Instruments and the Kyoto Protocol: Can Parliament Implement Emissions Trading without Provincial Cooperation?” (2002), 40 *Alberta Law Review* 417.

³³⁷ A. Gotlieb & E. Lederman, “Ignoring the Provinces is not Canada’s Way”, *National Post*, January 3, 2003, at p. A14.