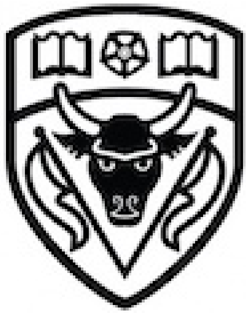

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Canadian Institute of Resources Law
Institut canadien du droit des ressources

International Wildlife Law

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Canadian Wildlife Law Project

Paper #1

February 2006

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Foreword

This publication is the first in a series of papers on Canadian Wildlife Law being published by the Canadian Institute of Resources Law. The research and writing of these papers has been made possible as the result of generous grant by the Alberta Law Foundation, and the Institute thanks the Foundation for its support of this work. The Foundation of course bears no responsibility for the content of the papers and the opinions of the various authors. The Canadian Wildlife Law Project was originally developed and proceeded under the direction of John Donihee, then a Research Associate with the Institute. Following Mr. Donihee's return to private practice, the supervision and general editorship of the project has been assumed by Institute Research Associate Monique Passelac-Ross. I would like to thank both these individuals and all those who have contributed to the success of the project for their efforts towards developing a greater awareness of this important area of natural resources law.

Wildlife and a concern for wildlife are fundamental aspects of the Canadian heritage, and the fur trade and the harvest of wild game were essential parts of Canadian history. The need to provide a land base and the habitat to sustain wildlife populations is a recurring theme in both national and provincial natural resources policy; in particular, there has been a growing recognition of the need to preserve habitat for endangered species. Similarly, wildlife and access to wildlife have a particular importance for aboriginal peoples, and the rights to wildlife have been central among the concerns of First Nations in Canada. Finally, internationally, Canada is party to numerous conventions whose goals are the protection and sound management of wildlife – perhaps most notably in recent years, the Convention on International Trade in Endangered Species and the Biodiversity Convention.

Despite the obvious importance of wildlife to Canadians in all these contexts, surprisingly little has been written about wildlife law, and certainly no comprehensive overview of such law exists in Canada. The purpose of this series of papers is to begin to remedy this shortfall in Canadian legal literature, and, given the significant attention that has been given to Canada's international obligations in this respect in recent years, it is particularly timely that the first paper in the series is Professor Bankes' contribution on the international dimension of wildlife law.

J. Owen Saunders
Executive Director
Canadian Institute of Resources Law

Calgary, Alberta
February 2006

Preface

This paper was written to provide an international dimension on Canadian Wildlife Law as part of a larger project conceived by John Donihee, then of the Canadian Institute of Resources Law. My thanks go to John and the Institute for asking me to participate in this project. John believed that the principal audience for the book would be those involved in the administration of wildlife laws in Canada rather than purely an academic audience.

All of this has two implications for the paper as it now stands. First, I have tried to provide the more general reader with a context within which to view the customary and treaty law relating to wildlife. Second, since the paper was written as part of a larger project, it assumes that the reader will have ready access to that other material. I therefore refer the interested reader to other papers that will be forthcoming in the current series.

Several people provided assistance on this manuscript as it evolved. Sue Parsons provided the formatting expertise; Christine Plante and Pauline McLean assisted with references; and Anne Daniel of the federal Department of Justice provided useful critical comments on the final version of the manuscript. I thank them all.

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December 22, 2005

The term "international wildlife law" as used in this paper refers to the body of rules of international law that apply to the protection, conservation, and harvesting of wildlife, the rules that restrict international trade in wildlife, and the international body of rules that apply to the protection of wildlife habitat.[1]

The paper begins with the question of sources (*i.e.*, what counts as international law). Then, in order to establish the relevance of international wildlife law in a domestic setting, the paper considers the relationship between international law and domestic law and the process of incorporating international norms into domestic law.

The bulk of the paper follows and is given over to an examination of some of the key wildlife treaty regimes to which Canada is a party.[2] This part of the paper is divided into three: (1) bilateral wildlife agreements, (2) regional wildlife agreements, and (3) global agreements. For each of the treaty regimes I endeavour to provide a summary of the objective and key provisions of the agreement, some indication of how the regime has evolved and some discussion of the key domestic implementation measures.

The paper concludes by looking briefly at some important multilateral agreements to which Canada is not a party (such as the Migratory Species Convention[3]) as well as a couple of instruments which, while not perhaps binding as a matter of formal international law do, as a practical matter influence wildlife law and policy in Canada. These two instruments are the North American Waterfowl Management Plan[4] and the

---

[1]The paper does not cover the international laws relating to marine wildlife including fish and marine mammals such as whales and seals. Neither does the paper cover the more general rules of international environmental and resources law unless they have a particularly direct impact on wildlife or wildlife habitat. For example, the paper does not discuss the international rules that pertain to environmental impact assessment, (see the Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, Finland, 25 February 1991 [Espoo], online: <http://www.unece.org/env/eia/eia.htm>). Canada ratified Espoo on 13 May 1998. The United States has not ratified Espoo). But the paper does discuss the Convention on Biological Diversity, Rio de Janeiro, Brazil, 15 June 1992 [CBD], online: <http://www.biodiv.org/convention/articles.asp>.

[2]There are some excellent web-based sources for researching questions of treaty law. In many cases the secretariat of the treaty maintains its own website and this is always a useful starting point. Home pages for particular treaties (and see, for example, the CBD's website, *ibid.*) typically provide treaty texts (together with amendments), ratification tables, as well as relevant decisions of treaty bodies (*e.g.* the Conference of the Parties (CoP)) and other relevant documents both retrospective and contemporary.

[3]Bonn, Germany, 23 June 1979, website: <http://www.cms.int>.

[4]The Plan was first agreed to by Canada and the United States in 1986. Mexico joined in 1994. The Plan is available online: <http://www.nawmp.ca/eng/index_e.html>.

various plans, programs and strategies that fall under the auspices of the Arctic Environmental Protection Strategy and the Arctic Council.[5]

1. Some Basic Concepts of International Law

1.1. The Sources of International Law

There are significant differences between domestic and international law most of which can be traced to the decentralized nature of international law making. There is no international parliament or congress to make laws and thus the international community is forced to develop international law in different ways. Most commentators take the view that Article 38 of the Statute of the International Court of Justice[6] offers the most succinct and authoritative account of the different sources of international law:

> "a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. … judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

While there is no hierarchy amongst the first three of these sources,[7] the first two are by far the most important for our purposes and we shall leave the remaining sources to more technical discussions of the subject.[8]

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[5]The Arctic Council was created in 1996: Declaration on the Establishment of the Arctic Council, Ottawa, 19 September 1996. For further information on its programs, see website: <http://www.arctic-council.org/>.

[6]Text available at International Court of Justice website: <http://www.icj-cij.org/>.

[7]Paragraph (d) expressly acknowledges that the contents of that paragraph constitutes a "subsidiary" source. For discussion see Michael Akehurst, "The Hierarchy of the Sources of International Law" (1976) 47 Brit. Y.B. Int'l L. 273; Bin Cheng, "On the Nature and Sources of International Law" in Bin Cheng, ed., *International Law: Teaching and Practice* (London: Stevens & Son, 1982) at 203-233 esp. at 231-233 and W. Czaplinski & G. Danilenko, "Conflicts of Norms in International Law" (1990) 21 Nethl. Y.B. Int'l L. 3.

[8]For a general discussion, see any major text on public international law, *e.g.* Ian Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press, 2003). A leading Canadian source is Hugh M. Kindred *et al.*, *International law, chiefly as interpreted and applied in Canada*, 6th ed. (Toronto: Emond Montgomery, 2000).

1.1.1. Treaties

The term "international conventions" includes all forms of agreements between states that are intended by the parties to create legal relations. The term therefore includes conventions strictly so-called, as well as agreements, treaties, and protocols. The term would generally *not* include declarations made at conferences,[9] memoranda of understanding, or accords signed by the wildlife agencies of, say, Canada and the United States, or the decisions made by the conference of the parties (CoP) to a multilateral environmental agreement (MEA).[10] The distinction between these forms of resolution or agreement is not based on the name that the parties give to the agreement but on whether the language of the agreement suggests an intention to create legal relations.[11] A few examples will make the point. The Migratory Birds Convention[12] and the Agreement Between the Government of Canada and the Government of the United States on the Conservation of the Porcupine Caribou Herd[13] are both "international conventions" within the meaning of the Statute of the International Court of Justice and subject to the Law of Treaties,[14] but the North American Waterfowl Management Plan[15] is not.[16]

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[9]Consider, for example, the Rio Declaration on Environment and Development, 1992, website: <http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=78&ArticleID=1163>. Any legal status that a particular provision of the Declaration may have is dependent on the claim that certain provisions represent customary international law. See, for example, the discussion of the precautionary approach and Principle 15, *infra* note 25.

[10]This is simply a generalization. In particular cases the text of the agreement may make it clear that certain types of CoP decisions were intended to create legal obligations. For further discussion of this point see the introduction to Part 3, *infra*.

[11]Allan Gotlieb, *Canadian Treaty-making* (Toronto: Butterworths, 1968). For a more recent discussion of the issue, see Timo Koivurova, *Environmental Impact Assessment in the Arctic: A study of international legal norms* (Aldershot, U.K.: Ashgate Publishing, 2002) and especially c. 3. Koivurova examines in some detail the legal status of a series of instruments designed to foster environmental co-operation amongst arctic states. The instruments include the 1991 Rovaneimi Declaration on the Protection of the Arctic Environment and its accompanying Arctic Environmental Protection Strategy as well as subsequent declarations (the Nuuk and Inuvik Declarations) as well as the 1996 Declaration Establishing the Arctic Council. Koivurova suggests that there is in each case a presumptions that these instruments are binding in international law unless the contrary can be shown. For the texts of these documents, see the Arctic Council's website, *supra* note 5.

[12]Washington, D.C., 16 August 1916, produced as an appendix to the *Migratory Birds Convention Act*, R.S.C. 1985, c. M-7. This Act is now repealed. For the new Act, see S.C. 1994, c. 22.

[13]Agreement Between the Government of Canada and the Government of the United States on the Conservation of the Porcupine Caribou Herd (Ottawa, 17 July 1987) online: <http://www.canadianembassy.org/environment/caribou-en.asp>.

[14]See the Vienna Convention on the Law of Treaties, Vienna, 23 May 1969 [VCLT], online: <http://www.un.org/law/ilc/texts/treaties.htm>.

Treaties and conventions derive their authority and bindingness from the express consent of the parties. A treaty becomes binding upon the parties in accordance with its terms. For example, Article 8 of the Porcupine Caribou Agreement indicates that it enters into force upon signature. Multilateral environmental agreements (MEAs) more typically indicate that the MEA will only bind a state once it has taken the further step of ratification; a signature alone will not suffice.[17]

What constitutes ratification is a matter of domestic law and not a matter of international law. In Canada the act of ratification is an act of the executive branch evidenced by an Order in Council authorizing the designated person to deliver Canada's instrument of ratification to the depositary for the treaty. There is no constitutional requirement for an Act of Parliament to authorize ratification although in exceptional circumstances (*e.g.*, the Kyoto Protocol[18] to the United Nations Framework Convention on Climate Change[19]) the government of the day may seek a resolution of the House of Commons and the Senate endorsing or authorizing ratification. In the United States of America ratification of a treaty requires the advice and consent of the Senate, a requirement that has caused more than one U.S.-Canada bilateral agreement to die.[20]

Once a treaty has entered into force it continues to bind the parties until terminated in accordance with its terms. The Migratory Birds Convention[21] (Article IX), for example,

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[15]*Supra* note 4.

[16]The same would be true of the Framework for Cooperation Between the U.S. Department of the Interior and Environment Canada in the Protection and Recovery of Wild Species at Risk (Washington, 7 April 1997) online: <http://www.grare.org/legal/federal/framewrk.htm>, and the Memorandum of Understanding Establishing the Canada/Mexico/United States Trilateral Committee for Wildlife and Ecosystem Conservation and Management (Oaxaca, Mexico, 9 April 1996), online: <http://www.trilat.org/general_pages/mou_eng.htm>.

[17]See, for example, Article 34 of the CBD, *supra* note 1, which contemplates that entry into force shall be subject to the ramification, acceptance or approval of a state (as well as a minimum number of ratifications). Canada ratified the CBD on May 13, 1998. The U.S. has signed the CBD but has never ratified it. The websites for the secretariats for MEAs generally provide the best and most up-to-date source of ratifications. Prior to ratification, the treaty will not bind a signatory state although Article 18 of the VCLT, *supra* note 14 stipulates that a signatory state "is obliged to refrain from acts which would defeat the object and purpose" of the treaty.

[18]Kyoto, 11 December 1997, website: <http://unfccc.int/resource/docs/convkp/kpeng.pdf>.

[19]The United Nations Framework Convention on Climate Change, New York, 9 May 1992, online: <http://unfccc.int/essential_background/convention/items/2627.php>. For a useful recent discussion of Canadian treaty making practice (in the context of NAFTA) see *R.. v. Council of Canadians*, 2005 CanLII 28246 (Ont. S.C.) esp. at paras. 33 *et seq.*

[20]On the role of the Senate, generally see Michael J. Glennon, "The Senate Role in Treaty Ratification" (1983) 77 Am. J. Int'l L. 257.

[21]*Supra* note 12.

provided that it was to have an initial term of 15 years but was thereafter terminable on one year's notice but continuing from year to year in the absence of such notice. The treaty, although amended recently, continues in force today. Even multilateral treaties contemplate that a state may withdraw or "denounce" the treaty. A well known and relevant example here is Canada's denunciation of the International Whaling Convention effective June 1982.[22]

1.1.2. Custom

Treaties represent a form of positive and readily identifiable law. The second major source of international law is custom. Custom is based upon the actual practice of states; more specifically the practice that they engage in out of a sense of obligation.[23] A custom may be global or regional.[24] Evidence of practice is found not only in what states actually do, but also in their policy statements in a variety a fora including parliament and international conferences. Because of the diffuse nature of state practice, and the subjective element of the sense of obligation, there is often disagreement as to whether or not a particular practice amounts to custom. A current example is the status of the "precautionary principle" or approach.[25]

Writers often try to assess the status of particular practices. Occasionally, groups of experts convene and endeavour to assess and perhaps synthesize or codify emerging norms. A prominent example of such an exercise that is relevant here is the Draft Principles of Conduct in the Field of the Environment for Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States.[26] These principles, developed by a group of experts convened by the United

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[22]International Convention for the Regulation of Whaling (Washington, 2 December 1946); Article XI permits denunciations effective June 30 of any year provided that at least six months notice is given. Text available online: <http://www.iwcoffice.org/commission/convention.htm>.

[23]*North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark and Netherlands)*, [1969] I.C.J. Rep. 3.There are collections of "state practice". For example, the Canadian Yearbook of International Law reports annually on Canadian practice.

[24]*Asylum Case (Columbia v. Peru)*, [1950] I.C.J. Rep. 266 at 276-278.

[25]There are many different articulations of the precautionary principle – and indeed therein lies one of the obstacles to the assertion that the principle is an accepted part of customary law. Perhaps the best known articulation of the principle is Principle 15 of the Rio Declaration, *supra* note 9. There is a growing number of references to precaution in federal statutes. Perhaps most relevant here is the *Species at Risk Act*, S.C. 2002, c. 29 and the *Canadian Environmental Protection Act*, S.C. 1999, c. 39, ss. 1.1, 76.1. For a recent review of the precautionary principle, see David L. Vanderzwaag *et al.*, "Canada and the Precautionary Principle/Approach in Ocean and Coastal Management: Wading and Wandering in Tricky Currents" (2002-2003) 34 Ottawa L. Rev. 117. For further discussion of the precautionary principle and its status in domestic law, see the text to note 33 *infra*.

[26]Reproduced in (1978) 17 I.L.M. 1097. Another example is the report of the group of experts

Nations Environment Programme, apply to both renewable and non-renewable resources. The principles reflect both procedural duties, such as the duties to notify and consult in relation to activities that may affect shared resources, but also substantive duties such as the duty of equitable utilization.

Treaty and custom may cover the same ground. Indeed, a treaty may serve to codify or crystallize custom.[27] This overlapping coverage may be important if state B is a party to a multilateral agreement but state C is not. State B cannot rely on the treaty as the source of an obligation owed by C but it can insist that C fulfil its obligations under customary law. So, for example, neither the United States nor Canada could rely upon Article II of the Bonn Migratory Species Convention[28] to require the other "to provide immediate protection" for a listed migratory species since neither is party to that multilateral convention, but it might be possible to argue that there are similar responsibilities arising under customary international law to protect shared species that are considered endangered.

Since there is no recognized hierarchy between the different sources of international law[29] it is conceivable that a treaty may modify the application of custom as between the parties to the treaty and also that evolving custom may modify or supplement an existing treaty obligation.[30]

1.2. The Relationship Between International Law and Domestic Law in Canada

There is a considerable body of case law and literature on the relationship between domestic law and international law.[31] Consequently, rather than trying to summarize the

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convened by the Brundtland Commission: Brundtland, Gro Harlem, *Our Common Future/World Commission on Environment and Development* (Oxford: Oxford University Press, 1987).

[27]*North Sea Continental Shelf Cases*, *supra* note 23 at 17. Much of the work of the International Law Commission deals with the codification of international law. In some cases (*e.g.* the VCLT, *supra* note 14) the codified text may be adopted as a Convention by an appropriately convened diplomatic conference.

[28]Bonn Convention, *supra* note 3.

[29]*Supra* note 7.

[30]Nancy Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law* (Oxford: Clarendon Press; New York: Oxford University Press, 1994).

[31]Kindred *et al.*, *supra* note 8. See also Gibran Van Ert, "Using Treaties in Canadian Courts" (2000) 38 Can. Y.B. Int'l L. 3 (a thorough survey in which Van Ert attempts to explain the Canadian case law on the basis of the tension between two competing principles: the principle of self-government and the principle of respect for international law) and Jutta Brunée & Stephen Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002) 40 Can. Y.B. Int'l L. 3 (offers a judicial primer as well as a good survey of the case law; suggests that courts need to be much more discriminatory

position I shall focus on a number of practical questions that may be important to wildlife managers: (1) Is international law part of domestic law and if so how does it become part of domestic law? (2) If not part of domestic law, what account should a court or statutory decision-maker take of Canada's treaty obligations? (3) What are the constitutional implications of treaty ratification? (4) What happens if there is a conflict between domestic law and international law?

1.2.1. Is International Law Part of Domestic Law?

1.2.1.1. Custom

In answering this question Canadian law distinguishes between treaty and custom. For custom, the basic Canadian position is that a customary rule of international law is part of the common law of Canada and should be applied by a Canadian court in much the same way as that court would apply a common law rule.[32] The customary rule might create rights or obligations if sufficiently specific, or might be used to aid in the interpretation of federal or provincial statutes. A relevant example of the latter is the Supreme Court of Canada's decision in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town).*[33] In that case the plaintiffs contested the validity of a municipal by-law regulating and restricting pesticide use. The relevant provincial statute contained at least two provisions authorizing municipalities to make by-laws with respect to varying subject matters. One source of authority was a generally couched "general welfare" or omnibus provision. A second source of a authority was a more specific provision referring specifically to toxics but under this head Ministerial approval was required before a by-law could enter into force. The court held that the by-law had been passed under the general welfare provision but the majority of the court went on to support its conclusion on this point by noting that its interpretation "respects international law's precautionary principle".[34]

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and demanding in their use of international sources).

[32]In the event of a conflict between a federal statute and a customary norm, the federal statute would prevail. The conflict issue is more controversial where the conflict is between a customary norm and a provincial statute: see Gerard V. La Forest, "May the Provinces Legislate in Violation of International Law?" (1961) 39 Can. Bar Rev. 78. For further discussion of the conflict scenario, see below in Section I.B.4.

[33][2001] 2 S.C.R. 241. For comment see Gibran Van Ert, "The Problems and Promise of *Spraytech v. Hudson*" (2001) 39 Can. Y.B. Int'l L. 371.

[34]*Ibid.* at para. 31. See also *Wier v. British Columbia (Environmental Appeal Board)*, [2003] B.C.S.C. 1441 esp. at para. 38 where the court notes that a precautionary interpretation of a pesticide statute "would favour an interpretation that permitted the Board to consider evidence of toxicity beyond that limited to site specific and application specific concerns." Other cases have emphasised that the precautionary principle cannot be used to "confer jurisdiction that is otherwise absent": *Imperial Oil v. McAfee*, [2005] B.C.J. 576

A case closer to the topic of the present chapter is *Western Canada Wilderness Committee v. British Columbia (Ministry of Forests, South Island Forests District).*[35] In that case, the petitioners sought to argue that the District Manager had erred in approving a forest development plan for a block of old growth timber. The argument was that in doing so the District Manager acknowledged that the harvesting plan would pose some risk for the recovery of the spotted owl. The relevant statutory provision required a District Manager to approve a plan if satisfied that it "will adequately manage and conserve the forest resources of the area to which it applied". The petitioners argued that this provision had to be interpreted in light of relevant principles of international law, including the precautionary principle, and if properly applied in this case, the District Manager would not have approved a plan that exposed the spotted owl to additional risk. The court rejected that argument holding that the legislature had not chosen to incorporate the precautionary principle in the *Forest Practices Code*.[36]

1.2.1.2. Treaties

By contrast, for treaty obligations, the basic Canadian rule is that a treaty is not self-implementing. A treaty does not become part of domestic law by the act of ratification. A treaty only becomes part of domestic law (to the extent that it requires a change in domestic law) when incorporated by the relevant jurisdictional authority: parliament or provincial legislatures and their delegates.[37] Until made part of domestic law in this manner (and subject to what we shall say below about the interpretive use of a treaty), a treaty cannot create rights or obligations for any person under domestic law. So, for example, the requirement in Article 3(h) of the Porcupine Caribou Agreement[38] that

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esp. at para. 32 and *Croplife Canada v. Toronto (City)*, [2005] O.J. 1896 (C.A.) esp. at paras. 68-71.

[35] 2003 B.C.C.A. 403, (2003) 15 B.C.L.R. (4th) 229. While the decision provides a useful illustration of a form of argument it is not free of difficulty. For example, the decision seems unduly concerned with the question of whether or not the legislature had chosen to incorporate the precautionary principle – that should be irrelevant if the principle has the status of customary law. The court bolstered its conclusions by noting that, in any event, there was evidence that the District Manager had acted cautiously and furthermore suggested that it was not at all clear that incorporation of the precautionary principle would result in such a fundamentalist position as that contended for by the petitioners; some risk was surely tolerable and there was evidence that the District Manager had applied a risk management approach. This latter argument serves to emphasise that the debate over the content of the precautionary approach continues.

[36] Forest Practices Code (17 December 2002) available online: <http://www.for.gov.bc.ca/tasb/legsregs/fpc/>.

[37] Ruth Sullivan, ed., *Dreidger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994) at 396. Sullivan properly adds that an agreement might be implemented by the prerogative to the extent that a residual prerogative power is engaged.

[38] *Supra* note 13.

parties “prohibit the commercial sale of meat from the Porcupine Caribou Herd” cannot make it an offence for a person to engage in this activity unless there is an enactment of domestic law having that effect.

Techniques for implementing treaties in domestic law vary. Ruth Sullivan describes two techniques, implementing legislation and incorporation by reference.[39] Of the two, the simplest technique is incorporation by reference. Using this technique the competent legislature simply gives the force of law to the international agreement. A case in point is the *International Boundary Waters Treaty Act*[40] which “confirmed and sanctioned” the Boundary Waters Treaty[41] and then provided that (s. 3) “The laws of Canada and of the provinces are hereby amended and altered so as to permit, authorize and sanction the performance of the obligations undertaken by His Majesty in and under the treaty, and so as to sanction, confer and impose the various rights, duties and disabilities intended by the treaty to be conferred or imposed or to exist within Canada.”

Implementing legislation refers to a technique in which the state party to the agreement first interprets the agreement, then decides which provisions of the agreement require legislative action and then decides on the appropriate legislative technique (*e.g.* statute, regulation, ministerial order etc) for giving effect to those requirements.[42]

Where a treaty has been incorporated into domestic law a question may arise as to how the terms of the statute should be interpreted. Recent decisions of the Supreme Court of Canada make it clear, especially where the implementing statute uses the precise language of the treaty, that domestic courts should apply rules of treaty interpretation derived from international law (and especially the Vienna Convention on the Law of Treaties) in order to determine the meaning of a clause in domestic law.[43] The starting point is therefore to define the purpose of the treaty as a whole and then the purpose and place of a particular article or clause within that scheme.

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[39]Sullivan, *supra* note 37 at 396. The *Council of Canadians* case, *supra* note 19, emphasises that mere parliamentary “approval” of a treaty does not incorporate the treaty into Canadian law.

[40]R.S.C. 1985, c. I-17, s. 3.

[41]Washington, 11 January 1909. The text is reproduced as a schedule to the federal statute, *ibid.*

[42]Examples that we discuss in this chapter include the *Migratory Birds Convention Act*, *supra* note 12 and the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, S.C. 1992, c. 52.

[43]*Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 esp. paras. 51-64 referring to the Convention Relating to the Status of Refugees); *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689; and *Thomson v. Thomson*, [1994] 3 S.C.R. 551 referring to the Convention on the Civil Aspects of International Child Abduction.

1.2.2. If not Part of Domestic Law, What Account, if any, Should a Statutory Decision-Maker or Court take of Canada's Treaty Obligations?

If we cannot point to specific implementing legislation does that mean that an international treaty is irrelevant for the purposes of domestic law? There are a couple of reasons for thinking that that is much too negative a view. First, there is a long-standing principle of statutory interpretation according to which it is presumed that legislation is meant to comply with international law and with Canada's international law obligations. Thus, in "choosing among possible interpretations … the courts avoid interpretations that would put Canada in breach of any of its international obligations" and "the legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional."[44] The latter branch of the principle might, for example, require a court not to apply an otherwise relevant statutory rule.

The second reason is an extension of the first and suggests that the exercise of statutory discretions must also take account of ratified but un-implemented international agreements. Consider an example. Suppose that the *Wildlife Act* of a particular jurisdiction provides that "the director of wildlife may, under exceptional circumstances, issue a permit to allow the taking of caribou for commercial purposes." Suppose further: (1) that Z applies for a licence and the Director responds by refusing to issue the licence on the grounds that to do so would be inconsistent with Article 3(g) of the Porcupine Caribou Agreement,[45] Z seeks judicial review; or (2) suppose in the alternative that the Director grants the application and a third party seeks judicial review of the decision on the grounds that the decision failed to take account of Canada's international commitments. Each of these two hypotheticals raises an interpretive question and a jurisdictional question.[46] In the first case the question would be: did the Director err by taking account of Canada's international obligations in exercising her discretion? In the second case the question would be: did the Director err by failing to take account of those obligations in exercising her discretion? The specific obligation in question is actually a duty "to prohibit the commercial sale of meat from the Porcupine Caribou Herd." The

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[44]Sullivan, *supra* note 37 at 330. See *Zingre et al v. The Queen* (1981), 127 D.L.R. (3d) 223, hodling that the then s. 43 of the *Canada Evidence Act* should be interpreted in light of an 1880 Imperial extradition treaty, and *arguendo* (at 238) so should the exercise of judicial discretionary powers.

[45]*Supra* note 13.

[46]There would doubtless be other questions as well. For example, what would be the relevant standard of review, i.e., what deference would a reviewing court owe to the efforts of the statutory decision maker to apply international law? Since this will raise a question of law that will not ordinarily fall within the expertise of the statutory decision-maker, the standard will likely be correctness rather than the more deferential standards of reasonableness or patent unreasonableness. See generally, *Pushpanathan*, *supra* note 43.

relevant legislature had clearly failed to translate that obligation into domestic law directly, so, should any account be taken of the treaty in the interpretation of the Director's statutory discretion? I think that the answer is clearly affirmative.

The leading Canadian authority on this point is *Baker*.[47] Baker had been ordered deported from Canada and thereupon applied for permanent residency status and an exemption, based on humanitarian and compassionate considerations, from the usual requirement that such an application be made from outside the country. Baker had four infant children. Baker's counsel made the argument that the Minister should have taken account of the requirement of the Convention on the Rights of the Child to the effect that the best interests of the child should be a *prima facie* consideration in the exercise of that discretion.[48] Counsel made this argument notwithstanding the fact that the *Immigration Act* did not expressly incorporate the terms of the treaty. The Minister argued that it would be improper to interpret the statute and the regulations in accordance with the treaty in the absence of direct statutory implementation of the treaty provisions "since it would interfere with the broad discretion granted by Parliament and with the division of powers between the federal and provincial governments."[49] The Supreme Court of Canada unanimously found for Baker but the court split on the role of the treaty in reaching that conclusion.

The majority, in a judgement rendered by Justice L'Heureux- Dubé, took the view that the Minister was completely dismissive of the interests of the children and had therefore reached a conclusion that was an unreasonable exercise of discretion because it was inconsistent with the purposes of the Act, the treaty, and guidelines issued by the Minister herself. In effect, the majority was prepared to extend the interpretive use of international instruments to the exercise of statutory discretion:[50]

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[47]*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

[48]Counsel also made an additional argument (discussed *ibid.* at para. 29) to the effect that the articles of the treaty gave rise to a "legitimate expectation" that she would be entitled to a positive finding on humanitarian and compassionate grounds as well as specific procedural rights. The court found that the Convention was not "the equivalent of a government representation" and rejected the specific argument.

[49]*Ibid.* at para. 50.

[50]*Ibid.* at para. 71. See also *Bouzari v. Iran*, [2002] O.J. 1624 esp. at para. 39, aff'd [2004] O.J. 2800 (Ont. C.A.) esp. at paras. 63-67; and *Ahani v. Canada (Attorney General)* (2002), 58 O.R. (3d) 107 (Ont. C.A.). *Ahani* involved the Optional Protocol to the International Covenant on Civil and Political Rights. Ahani had brought an application before the Human Rights Committee which in turn had asked Canada to stay its deportation order pending its consideration of the matter. Canada had declined to do so and Ahani sought judicial review. The majority refused to grant the order sought principally on the grounds that Canada had never introduced implementing legislation for the Optional Protocol. The dissent took a somewhat broader view arguing that Canada's ratification of the Protocol should affect the interpretation of Ahani's entitlements under s. 7 of the Charter.

> "The values and principles of the Convention recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future. In addition, the preamble, recalling the Universal Declaration of Human Rights, recognizes that 'childhood is entitled to special care and assistance'. A similar emphasis on the importance of placing considerable value on the protection of children and their needs and interests is also contained in other international instruments. The United Nations Declaration of the Rights of the Child (1959), in its preamble, states that the child 'needs special safeguards and care'. The principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values that are central in determining whether this decision was a reasonable exercise of the H & C power."

Justice Iacobucci speaking for himself and Justice Cory expressly dissociated himself from this view:[51]

> "It is a matter of well-settled law that an international convention ratified by the executive branch of government is of no force or effect within the Canadian legal system until such time as its provisions have been incorporated into domestic law by way of implementing legislation: *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141. I do not agree with the approach adopted by my colleague, wherein reference is made to the underlying values of an unimplemented international treaty in the course of the contextual approach to statutory interpretation and administrative law, because such an approach is not in accordance with the Court's jurisprudence concerning the status of international law within the domestic legal system.
>
> In my view, one should proceed with caution in deciding matters of this nature, lest we adversely affect the balance maintained by our Parliamentary tradition, or inadvertently grant the executive the power to bind citizens without the necessity of involving the legislative branch. I do not share my colleague's confidence that the Court's precedent in *Capital Cities*, *supra*, survives intact following the adoption of a principle of law which permits reference to an unincorporated convention during the process of statutory interpretation. Instead, the result will be that the appellant is able to achieve indirectly what cannot be achieved directly, namely, to give force and effect within the domestic legal system to international obligations undertaken by the executive alone that have yet to be subject to the democratic will of Parliament.
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> The primacy accorded to the rights of children in the Convention, assuming for the sake of argument that the factual circumstances of this appeal are included within the scope of the relevant provisions, is irrelevant unless and until such provisions are the subject of legislation enacted by Parliament."

In summary, a ratified treaty (even when unimplemented by specific statutory provisions), may be used to prefer one interpretation of a statute over another and at least the majority view in *Baker* confirms the argument that such a treaty should influence the

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[51]*Ibid.* at para. 78.

exercise of statutory discretions and the subsequent judicial review of the exercise of statutory authority.

1.2.3. The Constitutional Implications of Treaty Ratification

It is a basic proposition of Canadian constitutional law that while the federal government has the exclusive competence to enter into international agreements, the existence of an international treaty commitment does not expand parliament's legislative authority. The leading authority on this point is still the Privy Council's decision in the *Labour Conventions Case*.[52] The principal implication of the *Labour Conventions* rule is that prior to ratification, the federal government needs to satisfy itself that it has the jurisdiction itself to implement the entire treaty in domestic law or must pursue other strategies to protect itself from potential legal responsibility under international law for breach of treaty. These strategies might include: insisting upon the inclusion of a so-called federal clause during the negotiation of the treaty,[53] making ratification subject to an appropriately drafted reservation that is, in effect, designed to operate as a federal clause,[54] or seeking appropriate undertakings from provincial governments that they will take the necessary steps to fulfil the terms of the international agreement.[55]

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[52]*AG Canada v. AG Ontario*, [1937] A.C. 326. In that case Parliament purported to pass laws dealing with weekly rest, hours of work and minimum wage all in order to give effect to three International Labour Organization Conventions that Canada had ratified dealing with these subject matters. For further discussion of *Labour Conventions*, see N. Bankes & A.R. Lucas, "Kyoto. Constitutional Law and Alberta's Proposals" (2004) 42 Alta. L. Rev. 1-43.

[53]A federal clause allows a ratifying party to qualify its obligations so that they are limited to those that the federal government is able to implement domestically. While such clauses may be relatively common in certain classes of agreements such as those designed to provide for uniform laws they are almost unknown in international environmental agreements. For general discussion see Ivan Bernier, *International Legal Aspects of Federalism* (London: Longman Group Ltd., 1973) esp. at 171 *et seq*.

[54]On reservations generally see the VCLT, *supra* note 14, Articles 19-23. Canada made such a reservation upon ratifying the Espoo Convention, *supra* note 1. A number of other countries however take the view that the reservation is inadmissible. For the text of the reservation and objections see the Espoo website and for discussion see Koivurova, *supra* note 11 at 308-313. MEAs frequently prohibit general reservations: see for example, the "no reservations" clause in the CBD, *supra* note 1, Article 27. On the other hand, the importance of securing broad participation results in agreements that effectively permit states to negotiate their level of commitment. The Kyoto Protocol, *supra* note 18 and its negotiated Annex B provides a case in point. On the importance of "participatory efficiency" in the context of non-hierarchical legal system see Jonathan Bart Wiener, Global Environmental Regulation: Instrument Choice in Legal Context (1999), 108 Yale LJ 677. In the context of wildlife the reservation clause (Article XXIII) of the Convention on International Trade in Endangered Species of Wild Fauna and Flora [CITES], Washington, 3 March 1973, website: <http://www.cites.org/eng/disc/text.shtml#text6top>, is worth noting. On the one hand, the clause prohibits "general reservations" but on the other hand the same clause (along with Articles XV and XVI) allows states to enter reservations to particular species on the initial list and to subsequent amendments that add species to the list. The result of a reservation is that the state filing the

Not all federal states adhere to this position. For example, the federal compacts in both Australia and the United States afford considerable latitude to their federal governments in the domestic implementation of their international commitments. In both countries the leading judicial authorities confirm the authority of the federal governments to implement obligations arising under international wildlife or environmental agreements: the Migratory Birds Convention[56] in the case of the United States[57] and the UNESCO World Heritage Convention[58] in the case of Australia.[59]

There is one exceptional provision in the Canadian constitution that deserves mention. This is section 132 of the *Constitution Act, 1867* which accords special treatment to so-called "Imperial treaties". The section provides as follows:

> "The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries."

As the text suggests this section affords parliament the authority to implement any international treaty that the United Kingdom negotiated on behalf of Canada prior to Canada obtaining control over its own external relations in the early 1920s. While the section provides no federal implementing authority for agreements that Canada has entered into in its own name since then it does provide continuing federal implementation authority for some older agreements including the Migratory Birds Convention of 1916.[60]

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reservation assumes no obligations with respect to that species.

[55]See for example the agreements between British Columbia and Canada in relation to the ratification of the Columbia River Treaty, Washington, 17 January 1961. An electronic version of the treaty and related documents are available through the website of the Columbia Basin Trust at <http://water.cbt.org/publications.html>. I discuss these agreements in *The Columbia Basin and the Columbia River Treaty: Canadian Perspectives in the 1990s*, (Portland, Or.: Northwest Water Law and Policy Project, Northwestern School of Law of Lewis and Clark College, 1996). The question of what constitutes an appropriate undertaking is a difficult one since it raises the questions of enforceability that always plague intergovernmental agreements. I have discussed this subject in other contexts, see "Constitutionalized Intergovernmental Agreements and Third Parties: Canada and Australia" (1992) 30 Alta. L. Rev. 524-554, and "Co-operative Federalism: Third Parties and Intergovernmental Agreements in Canada and Australia" (1991) 29 Alta. L. Rev. 792-838, and see also *Reference re Canada Assistance Plan*, [1991] 2 S.C.R. 525.

[56]*Supra* note 12.

[57]*Missouri v. Holland*, 252 U.S. 416 (1920).

[58]UNESCO World Heritage Convention, Paris, 23 November 1972, online: <http://whc.unesco.org/en/conventiontext/>.

[59]*Commonwealth v. Tasmania* (1983), 57 Austl. L.J.R. 450.

[60]This is discussed in more detail, *infra*, text to notes 79 *et seq*. The section is also the principal

1.2.4. What Happens if There is a Conflict Between Domestic Law and International Law?

It is important to consider the question of conflict between domestic and international law from the perspective of each of the two systems of law. A useful way to do so is to pose a concrete example to assist in identifying the issues that will arise.

Under the terms of the original Migratory Birds Convention,[61] each of the Contracting Parties agreed to establish a close season for migratory game birds between March 10 and September 1 of each year during which period hunting was to be prohibited. Suppose that Canada, without negotiating an amending protocol to the Convention, unilaterally recognized an exception to this prohibition for the benefit of aboriginal people exercising an existing an aboriginal or treaty right to hunt migratory game birds. This is effectively what happened as a result of several court cases that arose after section 35 of the *Constitution Act, 1982*[62] came into effect. This section accord constitutional status to aboriginal and treaty rights and the courts have interpreted this provision as trumping the *Migratory Birds Convention Act* and regulations.[63] What are the legal consequences?

From the perspective of international law there is little doubt that this non-application of the treaty provision would put Canada in breach of its international treaty obligations and incur international responsibility.[64] Another way to put this proposition is

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authority for the federal implementing legislation for at least one other bilateral resource agreement, the Boundary Waters Treaty of 1909 implemented by the *Boundary Waters Treaty Act*, *supra* note 41. While some point to the *Statute of Westminster* 1931 22 Geo. V, c.4 as the authority for the proposition that Canada could enter into international treaties in its own right, as a matter of practice, Canada assumed full powers to enter into several such agreements prior to that date, the first being the US-Canada Halibut Convention of 1923, text available online: <http://www.oceanlaw.net/texts/iphc23.htm>.

[61] *Supra* note 12, Article II(1).

[62] This section recognizes and affirms the existing aboriginal and treaty rights of the Aboriginal peoples of Canada.

[63] *R. v. Flett*, [1989] 6 W.W.R. 166 (Man. Q.B.) aff'd in *R. v. Daniels*, [1990] 1 C.N.L.R. 108 and *R. v. Arcand*, [1989] 3 W.W.R. 635 (Alta. Q.B.). In effect, *Flett* and *Arcand*, relying upon ss. 35 and 52 of the *Constitution Act, 1982* reversed the trumping rule of another earlier conflict, that between the terms of aboriginal treaties and the federal implementing legislation for the Migratory Birds Convention. Earlier case law took the view that the federal legislation would trump the terms of the aboriginal treaties. The leading authorities are *Sikyea v. R.*, [1964] S.C.R. 642, 48 W.W.R. 306; *Daniels v. White* (1968), 64 W.W.R. 385 (S.C.C.); and *R. v. George*, [1966] S.C.R. 267. Canada and the United States did eventually finalize a protocol that had been long in the making to deal with the issue, Washington, 14 December 1995, entered into force 7 October 1999. The protocol is reproduced as an appendix to the federal statute, *supra* note 12 and is discussed *infra*.

[64] This conclusion flows from both the law of treaties and the law of state responsibility. As to the law of treaties Article 27 of the VCLT, *supra* note 14, provides that "A party may not invoke the provisions of

that a state cannot rely upon its domestic laws, even its constitution, to excuse non-performance of a treaty obligation. But, from the perspective of domestic law, there is equally no doubt that an accused, taking the benefit of an exception available under constitutional law or more generally under a valid domestic law, could not be convicted. In the event of a clear conflict between domestic law and international law a domestic court will prefer the domestic law.[65]

With these preliminary issues out the way we are now in a position to consider the specifics of Canada's obligations in relation to wildlife under international law.

2. Canada's Wildlife Treaty Obligations[66]

This Part of the paper provides an overview of Canada's principal treaty commitments in the wildlife area under the headings of bilateral agreements, regional agreements and global agreements.[67]

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its internal law as justification for its failure to perform a treaty". As to the law of state responsibility Article 3 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts provides that "The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law." Furthermore, Article 32 provides that "The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part." In this situation the burden would then shift to Canada to adduce some defence (if available) that might preclude a finding of wrongfulness. The International Law Commission Articles and commentary are reproduced in James Crawford, *The International Law Commission's articles on state responsibility: introduction, text, and commentaries* (Cambridge: Cambridge University Press, 2002).

[65]*Schreiber v. Canada (Attorney General)*, [2002] 3 S.C.R. 269 at paras. 49-50. This assumes that the provision was valid and could not be read so as to avoid the conflict, see the rules of interpretation discussed above in Section I.B.2.

[66]Finding the relevant international law is never as easy as finding the relevant domestic law; nevertheless the process is now much easier because of the availability of web-based resources. Perhaps the most useful source for Canada's international environmental obligations is the database developed by the Office of the Auditor General and the Commissioner of the Environment and Sustainable Development but now maintained by the Department of Foreign Affairs and International Trade and available on their website: <http://pubx.dfait-maeci.gc.ca/A_Branch/AES/Env_commitments.nsf/VEWelcome/about>. The North American Commission on the Environment also maintains a database of relevant laws, treaties and agreements. The database may be accessed through the North American Commission on Environmental Co-operation's main website: <http://www.cec.org/>. The basic text source listing Canada's treaty obligations is Christian Wiktor, *Multilateral Treaty Calendar* (The Hague; Boston: M. Nijhoff Publishers, 1995) which provides a list of treaties to which Canada is a party but does not provide the actual text of those agreements.

[67]The Department of Foreign Affairs and International Trade database, *ibid.*, lists wildlife treaties under the heading "fauna". As of June 2005, the database listed some 18 conventions and protocols under

2.1. The Bilateral Agreements

The key bilateral wildlife agreements to which Canada is a party are the Porcupine Caribou Herd Agreement and the Migratory Birds Convention and Protocol. The discussion of the Migratory Birds Convention is supplemented by a brief reference to the citizen petition process under the trilateral North American Agreement on Environmental Co-operation.

2.1.1. The Migratory Birds Convention[68]

This section describes the original agreement of 1916 before looking at the substantial amendments that were effected through the 1995 Protocol. It then turns to analyse the domestic implementing legislation and associated case law.

2.1.1.1. The Original Agreement

The preamble to the Convention records that the agreement was designed to protect migratory game birds and such other birds as are "useful to man or are harmless" during the nesting season and while migrating to and from their breeding grounds. It was anticipated that this would be achieved through the adoption of "some uniform system of protection". The emphasis on game birds and insectivorous birds means that the Convention is far from comprehensive; in particular, it does not protect raptors, including owls.[69]

The principal vehicle for this uniform system of protection was the agreement of the parties to adopt a close season for migratory game birds between March 10 and September 1 each year and their further agreement to restrict the hunting season in their jurisdiction to a period not exceeding three and a half months. The Convention also calls for close seasons throughout the year for migratory insectivorous birds and for migratory non-game birds (Article II). In addition, the parties agreed to prohibit the taking of nests of migratory game birds or insectivorous or nongame birds (Article V) and interstate, interprovincial and international traffic in migratory birds and their eggs (Article VI). The agreement provided exceptions for scientific and propagation purposes as well as exceptions authorized by permit when required "under extraordinary conditions" that

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this heading of which 12 deal with marine resources. There are two listings for the Migratory Birds Convention, one for the Convention itself and one of the Protocol.

[68]*Supra* note 12. For background to the Convention see Kurkpatrick Dorsey, *The Dawn of Conservation Diplomacy: U.S.-Canadian Wildlife Protection Treaties in the Progressive Era* (Washington, D.C.: University of Washington Press, 1998) chapters 6-8.

[69]For judicial recognition of this, see *Re African Lion Safari and Game Farm Ltd. and Kerrio et al.* (1987), 37 D.L.R. (4th) 80.

"may become seriously injurious" to agricultural or other interests "in any particular community." Those phrases fell to be interpreted in *Animal Alliance of Canada v. Canada (Attorney General)*. In that case the applicants sought to contest the validity of an amendment to the Migratory Regulations authorizing a special season for the harvesting of snow geese due to a population explosion of that species as well as an incidental harvest of other "look-alike" species.[70] Justice Gibson had little difficult in concluding that an overabundance of snow geese might amount to extraordinary conditions but expressed greater hesitation about how to link this to a "a particular community". In the end he developed a remarkably progressive interpretation of the clause, fully consonant with developments in environmental consciousness since the Convention was first ratified:[71]

> "I am satisfied that, in the context of Article VII of the Convention, the term 'particular community' should be broadly interpreted to include the portion of the arctic in which snow geese spend the summer months and that the biological diversity of the arctic ecosystem is another interest within the same genus as 'agricultural interest'."

The original Convention had very little to say about the protection of habitat;[72] the only specific provision was Article IV pursuant to which the parties agreed to take special

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[70][1994] 4 F.C. 72 (T.D). Justice Gibson held that the harvest was authorized by the language of Article VII of the Convention notwithstanding the fact that the original Convention did not specifically authorize a special harvest to protect habitat. The Court (at para. 38) referred to the article as an "escape-clause" drafted with "a great deal of foresight" to allow for unforeseen circumstances. The U.S. seems to take the view that there is an additional implied exception for incidental takes in the course of U.S. military activities: see "Exemption of U.S. Military for Migratory Birds Treaty Act" (2003), 97 A.J.I.L. 445 [note on U.S. state practice].

[71]*Ibid.* at para. 43. Although Justice Gibson did not further justify his conclusion his interpretative approach does find some support in the language of Article 31(3)(c) of the VCLT, *supra* note 14, and the jurisprudence of international tribunals including the decision of the International Court of Justice in *Case Concerning the Gabcíkovo-Nagymoros Project*, Hungary/Slovakia, [1997] I.C.J. Rep. 7. The court did, however, indicate that the regulations could not be sustained insofar as they authorized the harvesting of Ross geese and "other species that are not easily distinguishable from snow geese."

[72]A point made by Justice Dawson in *Hamilton-Wentworth (Regional Municipality) v. Canada (Minister of the Environment)*, [2001] F.C.T. 627, as part of her conclusion that a mere threat to some bird habitat was not a sufficient constitutional basis on which to ground a federal environmental assessment. This constitutional aspect of the case was not considered further on appeal: [2001] F.C.A. 347. But while it is true that there is little emphasis on habitat a broad interpretation of the prohibition on the taking of nests may serve to protect at least nesting habitat: see discussion of the North American Commission on Environmental Co-operation's Ontario Logging and U.S. Migratory Birds petitions, *infra*, texts to note 91 *et seq*. And for discussion of the habitat implications of the case law on U.S. implementing legislation see: Betsy Vencil, "The Migratory Bird Treaty Act – Protecting Wildlife on our National Refuges – California's Kesterson Reservoir, a Case in Point" (1986) 26 Nat. Resources J. 609; Bob Neufeld, "The Migratory Bird Treaty: Another Feather in the Environmentalists Cap" (1974) 19 San Diego L. Rev. 307 and more recently Helen Kim (canvassing both the literature and the relevant case law especially in relation to logging

protection measures for wood duck and eider duck, one possible measure being "the establishment of refuges."

2.1.1.2. The 1995 Protocol to the Convention

One of the problems with the original Convention was that, apart from two minor exceptions, it failed, as we have seen, to accommodate the special needs of aboriginal people and especially northern aboriginal peoples.[73] This had long been a serious irritant for Canada's aboriginal people and it was not resolved until the adoption and entry into force of a Protocol to amend the treaty. The Protocol was adopted in 1995 and entered into force in October 1999.

In addition to dealing with the issue of aboriginal harvesting, the Protocol also effected other substantial changes and indeed completely replaces the first five articles of the Convention. In summary, Article I updates the listing of migratory birds; Article II establishes conservation principles to guide the Convention, stipulates the close seasons, establishes the basic principles that migratory birds, their nests and eggs shall not be traded, continues the possibility of taking migratory birds for special purposes (scientific, educational, propagating), creates a set of special provisions for aboriginal harvesting and creates a special regime for murre harvesting in Newfoundland and Labrador; Article III calls for regular meetings of the parties; Article IV deals with protecting the environment of migratory birds; and the new Article V prohibits the taking of nests or eggs.

Perhaps the most significant change made to the Convention was to change the focus of the text from that of sustaining a harvest of game species and to expand it to recognize a broader range of values. These changes are reflected in both the preamble and the operative articles. The preamble now recognizes that the parties are:

> "COMMITTED to the long-term conservation of shared species of migratory birds for their nutritional, social, cultural, spiritual, ecological, economic, and aesthetic values through a more comprehensive international framework that involves working together to cooperatively

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operations), "Chopping Down the Birds: Logging and the Migratory Bird Treaty Act" (2001), 31 Environmental Law 125.

[73]The exceptions were Article II.1 (an exception for harvesting scoters) and Article II.3 (an exception for harvesting auks, auklets, guillemots, murres puffins and their eggs for food and clothing). The Convention was a particular irritant to northern aboriginal peoples because the open periods for hunting were fixed such that there were no birds in many northern areas during this period: see *Sikyea*, *supra* note 63, M.W. Wagner & J.G. Thompson, "The Migratory Birds Convention: Its History and the Need for an Amendment" (1993) 21:2 Northern Perspectives 2-6; and Dan Gottesman, "Native Hunting and the Migratory Birds Convention Act: Historical, Political and Ideological Perspectives" (1983) 18 Journal of Canadian Studies 67. For U.S. commentary to the same effect, see David Case & David Voluck, *Alaska Natives and American Laws*, 2d ed., (Fairbanks: University of Alaska Press, 2002) at 264-265.

> manage their populations, regulate their take, protect the lands and waters on which they depend, and share research and survey information;"

The Protocol text complements this with a new Article II which provides a statement of conservation principles accompanied by a non-exhaustive list of means to pursue these principles before stipulating the applicable close seasons.

Habitat protection assumes a more prominent position in the new Protocol. One of the conservation principles endorsed by the Protocol is to "provide for and protect habitat necessary for the conservation of migratory birds" and the new Article IV requires the parties to "preserve and enhance the environment of migratory birds" and, within its constitutional authority, to "pursue cooperative arrangements to conserve habitats essential to migratory bird populations."

The Protocol also shows a concern with review arrangements insofar as the new Article III calls upon the parties to meet regularly to review the implementation of the Convention and issues important to the conservation of migratory birds. This is in line with modern bilateral and especially multilateral agreements all of which supplement the bare provisions of the treaty with a variety of (and in some cases very complex) institutional arrangements.[74]

2.1.1.3. The Aboriginal Harvesting Provisions of the Protocol

Introduced by a common chapeau that recites the importance of "respecting aboriginal and indigenous knowledge and institutions" and designed to create a set of exceptions to the close season and a prohibition on harvesting eggs and nests for sale, the new Article II.5 frames two separate provisions for aboriginal harvesting in each of Canada and the United States. It will be useful to examine the Canadian clause in some detail.

The Canadian provision begins by recognizing that its operative clauses are subject to certain aspects of the Canadian domestic regime: (1) the constitutional protection of aboriginal and treaty rights, and (2) the regulatory and conservation regimes defined by (a) treaties, (b) land claims agreements, (c) self-government agreements and (d) co-management agreements.[75] The balance of the clause deals separately with harvesting by Aboriginal and non-aboriginal peoples.

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[74]See generally, Robin Churchill & Geir Ulfstein, "Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little Noticed Phenomenon in International Law" (2000) 94 Am. J. Int'l L. 623.

[75]This clause has a broad ambit; in particular it seems to assure the supremacy of those instruments that are clearly entitled to constitutional protection (aboriginal and treaty rights and land claim agreements and their defined regimes) but also those instruments whose constitutional status is more contested, such as self-government agreements and co-management agreements.

With respect to Aboriginal peoples, paragraph II.4(a)(i) makes three further distinctions between the right to harvest and the right to trade which may be set out as follows:

> "(1) Aboriginal peoples of Canada may harvest migratory birds and their eggs throughout the year pursuant to their aboriginal or treaty[76] rights.
>
> (2) They may sell down and any inedible by-products from such harvest without restriction.
>
> (3) However, they may only offer for barter, exchange, trade or sale, birds and eggs within or between Aboriginal communities and then only to the extent provided for in relevant treaties, land claims agreements, self-government agreements and co-management agreements."

The provision relating to non-aboriginal harvesters is at least as complicated. First, it recognizes that the provisions of treaties, land claims agreements, self-government agreements and co-management agreements may themselves recognize that "Aboriginal peoples" may "permit" qualified non-aboriginal residents in areas of Northern Canada[77] to take migratory game and non-game birds and their eggs throughout the year for food. Second, and quite independently of the first part of the clause, the provision stipulates that the relevant authorities may vary the fall season for the taking of migratory game birds by qualified residents in the Yukon, Northwest Territories and Nunavut.[78] Third, the provision makes it clear that neither birds nor eggs taken by a non-aboriginal harvester under its terms may be sold or offered for sale.

2.1.1.4. Domestic Implementation

The original Migratory Birds Convention of 1916 is clearly an Empire treaty within the meaning of section 132 of the *Constitution Act, 1867*,[79] The principal authority for the

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[76]Presumably this term is intended to embrace land claim agreements as well since s. 35 of the *Constitution Act, 1982* stipulates that "treaty rights" includes rights acquired under land claim agreements.

[77]The protocol does not define the term "northern Canada". However, it appears that its meaning must be broader than that of the three territories since a later sub-clause of the paragraph refers specifically to these jurisdictions. Presumably then it may include the northern parts of the provinces of at least B.C., Alberta, Saskatchewan, Manitoba, Ontario, Quebec and Labrador. Neither does the Protocol define the term "qualified" and in the absence of a definition one presumably looks at how the concept is used in modern land claim agreements.

[78]Since the Protocol pre-dates the creation of Nunavut in 1999 the text refers only to the Northwest Territories.

[79]See discussion above in Section I.B.3. The extent to which subsequent amendments to the original Convention are entitled to the same protection is more controversial. For discussion see: Andrew R. Thompson & Nancy A. Morgan, "Migratory Birds" in *Report of the Canadian Bar Association Committee on Sustainable Development in Canada: Options for Reform* (Ottawa: Canadian Bar Association, 1990) at 242-250, and David R. Percy, *Wetlands and the law in the Prairie Provinces of Canada* (Edmonton:

Convention's domestic implementation is therefore the federal *Migratory Birds Convention Act*, originally passed in 1917[80] and revised in 1994[81] and the regulations to that *Act*, principally the *Migratory Birds Regulations*[82] and the *Migratory Birds Sanctuary Regulations*.[83]

The decision of the Manitoba Court of Appeal in *R. v. Stuart*[84] is the leading decision on the constitutionality of the *Act*. In that case Stuart, who had been convicted of an offence under section 6 of the *Migratory Birds Convention Act* sought to establish that section 6 was *ultra vires* on the grounds that it over-reached the Treaty. Counsel for the accused and the Province pointed out that while the Treaty called upon the contracting parties to establish a close season during which all hunting would be prohibited, section 6 went beyond this and made it an offence to be in possession of migratory game birds during the close season. The argument was rejected and the case therefore stands as authority for the proposition that the federal government must be accorded a margin of appreciation as to the manner in which it chooses to implement the terms of an Imperial treaty.

But how broad is that margin of appreciation? In upholding the conviction in *Stuart,* the court emphasized the idea of effectiveness and from that idea emerges the following test: could it reasonably be said that the prohibition on possession was needed to effectively implement the treaty obligation? The court in *Stuart* answered "yes"; the prohibition was simply ancillary to the fulfillment of the treaty obligation. In reaching this conclusion the court relied upon both the objectives of the Convention and the court's own knowledge of the difficulties that would be encountered in enforcing treaty obligations simply by fastening on the act of illegal hunting. Justice Fullerton put the point this way:[85]

> "While it is true that the Convention does not in terms deal with buying, selling or having in possession, it seems to me that the power to prohibit the having in possession is ancillary to

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Environmental Law Centre, 1993).

[80]R.S.C. 1985, c. M-7.

[81]S.C. 1994, c. 22. The Act was also amended in 2005 (S.C. 2005, c.23) to extend the Act to Canada's Exclusive Economic Zone and to add other provisions to attempt to deal with the oiling of birds at sea. This amendment also expanded the purposes clause of the *Act* to state that "The purpose of this Act is to implement the Convention by protecting <u>and conserving</u> migratory birds – <u>as populations and individual birds</u> – and their nests." The underscoring indicates the new language added to the section.

[82]C.R.C. 1978, c. 1035.

[83]C.R.C. 1978, c. 1036.

[84](1924), 43 C.C.C. 108; see also the *Labour Conventions Reference*, *supra* note 52 at 349 and *Hamilton-Wentworth*, *supra* note 72, esp. at paras. 163-177.

[85]*Stuart*, *ibid.* at 110.

legislation dealing with killing of migratory game birds, and is within the power of the Dominion.

The purpose of the Convention as set forth in the recital to it is the saving from indiscriminate slaughter and insuring the preservation of game birds. I know of no more effective way of bringing about this object than the prohibition against having birds in possession during the close season."

Justice Dennistoun echoed this approach:[86]

"Sec. 132 must be construed as conferring powers which will enable the Dominion to keep full faith with the United States of America and to take all necessary measures to prevent the indiscriminate slaughter of migratory birds. This is a national question, not a provincial one, and a liberal construction should be given to the enabling legislation.

All persons who are familiar with the operation and enforcement of the game laws know that the best way to protect the live bird is to place careful restrictions on the right to possess a dead one.

In the great marshes of Manitoba it is in practice found impossible for game wardens to supervise the bag limit, or even the shooting of game out of season, but the possession of dead birds is something which cannot be effectively concealed. When brought into cities and towns, detection is often easy and prosecution effective.

Spring shooting … can be and is, in my opinion only prevented by making it unlawful to have birds in one's possession during that season. If it is necessary for the enforcement of the objects of the treaty that there should be any curtailment whatsoever of the right to have in possession then, the length of time such restriction should be operative is a question of degree only. If Parliament may lawfully legislate to prevent indiscriminate slaughter in the spring season, it may do so for the whole season.

In my view sec. 6 of the Dominion Act when it provides that no one, without lawful excuse, shall have a bird in his possession during the close season, is clearly within the scope of the powers necessary to make the treaty effective, and therefore within the jurisdiction of Parliament under sec. 132 of the BNA Act."

Justice Trueman similarly emphasised the importance of the principle of effectiveness in assessing the validity of any specific provision of the Dominion statute:[87]

"The test of what is properly or necessarily incidental or ancillary in order to carry out the treaty cannot be made to depend upon whether or not a provisions of the Act or the regulations has an immediate relation to the act of hunting. It is sufficient that the provision, though the consequences from it are indirect, is necessary if anything like a proper execution of the treaty is to be secured."

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[86]*Stuart, ibid.* at 112.

[87]*Stuart, ibid.* at 118.

While *Stuart* supports the validity of the *Migratory Birds Convention Act* it says nothing about the validity of provincial legislation that also purports to regulate the hunting or possession of migratory birds. But here too the position seems fairly clear – while provincial laws may not conflict with the *Migratory Birds Convention Act* and regulations in the sense of purporting to authorize hunting when the federal rules prohibit it, the provincial legislature may impose additional requirements.[88]

The *Migratory Birds Convention Act, 1994* is best described as authorizing or framework legislation. Much of the *Act* is given over to such matters as permitting the appointment of game officers, inspections of premises, search and seizures without warrant, forfeiture of seized goods and offences and sanctions but there are a few provisions that merit more attention. First, the *Act* (s. 2(3)) contains an interpretive version[89] of a non-derogation clause designed to protect aboriginal and treaty rights. Second, the *Act* does contain one basic prohibition. This is a prohibition, without lawful excuse, and except as authorized by the regulations, on the possession of migratory birds or nests, as well as a prohibition on the buying, selling, giving or exchanging of migratory birds or nests (s. 5). Third, section 12 of the *Act* confers extensive regulation-making authority on the Governor in Council "to carry out the purposes and provisions of this Act, and the Convention". This includes the power to make regulations for close and open seasons, bag limits, for granting permits to deal with the exceptional circumstances envisaged by the Convention, for prohibiting, killing, capturing, injuring, taking or disturbing migratory birds or their nests and for prescribing protection areas and for the control and management of those areas.[90] As indicated above, the key regulations are the *Migratory Birds Regulations* and the *Migratory Birds Sanctuary Regulations*.

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[88]See *R. v. Paling*, [1946] 2 W.W.R. 49 esp. at 55 *et seq*., and 57 *et seq*. where the accused argued that a provision of the provincial fish and game statute that prohibited the hunting of game on a Sunday was *ultra vires*. The court rejected the challenge. Justice Dennistoun suggests that while the Province cannot go below the minimum of the *Migratory Birds Convention Act* it can "exceed it, even to the point of the total prohibition of shooting." A more difficult question arose in *R. v. Blackbird* (2005), 248 D.L.R. (4th) 201 (Ont. C.A.) (leave for appeal to the S.C.C. dismissed August 25, 2005) where the accused sought to defend a charge under the *Migratory Birds Convention Act* regulations by contending that they were engaged in hunting activities on an Indian reserve and that therefore their activities should be regulated under the terms of a band by-law. While the accused succeeded at trial by the time the case reached the Court of Appeal the accused accepted that the by-law actually incorporated the *Migratory Birds Convention Act* regulations as they were amended from time to time and that there was therefore no operational conflict. Efforts by the accused to the effect that the by-law was intended to form a complete code intended to exclude the *Migratory Birds Convention Act* regulations failed and Justice Laskin for the Court made it clear that the accused faced an uphill battle given the international nature of the issues.

[89]S.C. 1994, c. 22.

[90]Unlike most of the agreements and their implementing legislation discussed in this chapter there is a plethora of reported cases on the *Migratory Birds Convention Act* and regulations. Many of the cases are concerned with what are in effect purely domestic matters such as the nature of the offence created by the

Of the regulations little need be said. The *Migratory Birds Regulations* create a classical permitting regime to authorize not only hunting as contemplated by the Convention but also other activities such as scientific permits and permits to take birds causing damage to property. Section 35 of the regulations makes it an offence to deposit oil or other harmful substance in waters or an area frequented by migratory birds.

As the name suggests, the *Migratory Birds Sanctuary Regulations* serve to list and protect migratory bird sanctuaries. Many of these sanctuaries are amongst the largest protected areas in Canada. It is one of the ironies of the Convention that its implementation has served to create such an important network of protected areas notwithstanding the fact that the Convention itself is all but silent on the question of habitat protection.

2.1.1.5. The North American Commission on Environmental Co-operation and Alleged Non-Enforcement of Domestic Laws: An Excursus

It seems appropriate to mention at this juncture the trilateral North American Agreement on Environmental Co-operation which gave rise to the North American Commission on Environmental Co-operation.[91] Although this agreement, also known as the environmental side agreement to the North American Free Trade Agreement, might not ordinarily be classified as a wildlife agreement[92] it may have a significant impact on wildlife law in each of the three countries for two reasons. First, one of its features is to require each country to effectively enforce its environmental laws including laws pertaining to "the protection of wild flora or fauna, including endangered species, their habitat, and specially protected areas."[93] The agreement backs up the duty to enforce environmental laws through a widely used scheme for citizen submissions.[94] Second, in

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Act and regulations (*e.g. R v. Chapin*, [1979] 2 S.C.R. 121). Much of the case law deals with the conflict between aboriginal treaty rights and domestic legislation (see *e.g. Flett* and *Arcand*, *supra* note 63). Relatively few cases are concerned with the protection of migratory bird habitat (*e.g. R.* v. *Neptune Bulk Terminals (Canada) Ltd.*, [2001] B.C.J. 798), charge under s. 35(1) of the *Migratory Birds Regulations* for depositing a substance harmful to migratory birds in waters frequented by migratory birds; and *Goodsman v. Saskatchewan Power Corp.*, [1997] S.J. 204 (holding that the same section does not apply to limit the construction of a power line).

[91]Mexico City, Washington and Ottawa, 8-9, 12 & 14 September 1993 (1993), 32 I.L.M. 1480 and see also website: <http://www.cec.org/home/index.cfm?varlan=english>.

[92]That said, Article 1 of the Agreement, *ibid.*, lists among its objectives to "(c) increase cooperation between the Parties to better conserve, protect, and enhance the environment, including wild flora and fauna."

[93]*Ibid.*, Article 45(2), *ibid.*, defining the term "environmental law" for the purposes of the citizen petition and dispute settlement parts of the agreement.

[94]*Ibid.*, Article 14. In addition, Part 5 of the Agreement contemplates party to party consultations and ultimately more formal dispute resolution procedures where there is a persistent pattern of failure adequate

establishing the North American Commission on Environmental Co-operation with a Council, a Secretariat and a Joint Public Advisory Committee, the Agreement authorized the Council (comprising cabinet-level representatives or their designates) to consider and develop recommendations on a range of matters including exotic species, the conservation and protection of wild flora and fauna and habitat and protected areas and the protection of threatened and endangered species.[95]

The Article 14 citizen submission process contemplates that a non-governmental organization or citizen may petition the Secretariat asserting that one of the three state parties "is failing to effectively enforce its environmental law". Provided that the petitioner is able to satisfy the Secretariat that the submission meets certain formal conditions precedent the Secretariat may invite a response from the Party. After consideration of any response the Secretariat may prepare what is called a "factual record" provided that the Secretariat's decision to do so is endorsed by two of the three state parties. The factual record is designed to provide a neutral assessment of the facts. The resulting record may be made publicly available, again by a two-thirds vote.

The factual record process is principally designed to make enforcement practices (or lack thereof) transparent.[96] There is no direct connection between the factual record process and the obligations of any of the three parties under international wildlife laws. However, it is possible that a state might be the subject of a petition with respect to its domestic implementing legislation for an international wildlife agreement. Such is the case for both Canada[97] and the United States[98] in relation to their respective Migratory

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to enforce environmental laws.

[95]Article 9(2) and see also Article 16(4) authorizing the Joint Public Advisory Committee to provide advice to the Council on any matter within the scope of the Agreement. The Secretariat may also, with some restrictions, prepare reports on matters within the scope of the agreement. One such report, for example, pertains to the *Death of Migratory Birds at the Silva Reservoir (1994-95)* and offers lessons for the management of bird habitat in other areas of North America.

[96]For further details see *Bringing the Facts to Light: A Guide to Articles 14 and 14 of the North American Agreement on Environmental Co-operation,* available online: <http://www.cec.org/files/PDF/SEM/BringingFacts-Jun02_en.pdf>

[97]SEM-02-001 (Ontario Logging). The specific assertion is that Canada is failing to effectively enforce s. 6(a) of the *Migratory Birds Regulations* against the logging industry in Ontario. Subsection 6(a) of the MBR makes it an offence to disturb, destroy or take a nest or egg of a migratory bird without a permit. The factual record has yet (June 2005) to be released.

[98]*Factual Record for SEM-99-002 (Migratory Birds)*, available online: <http://www.cec.org/files/pdf/sem/MigratoryBirds-FFR_EN.pdf>.The specific assertion is that the United States Government is failing to effectively enforce s. 703 of the *Migratory Bird Treaty Act of 1918*, 16 U.S.C. §§703-712, which prohibits the killing of migratory birds without a permit. In the case of the United States the relevant legislation serves to implement several other bilateral migratory birds agreements with Japan, Mexico and Russia in addition to the agreement with Canada.

Birds Convention implementing legislation and the effect of logging operations on migratory bird habitat, especially nesting sites. This is hardly the place to examine these petitions and subsequent factual records. Rather, the principal reason for mentioning this procedure here is to draw attention to the way in which the petition process may facilitate the involvement of civil society in the domestic application of measures implementing international wildlife agreements. Furthermore, the focus of each of these two petitions on the effects of land-use activities on wildlife shows the extent to which the Migratory Birds Convention regime reaches beyond the regulation of traditional hunting activities notwithstanding earlier comments about the near silence of the Migratory Birds Convention on habitat protection issues.

2.1.2. Agreement on the Conservation of the Porcupine Caribou Herd[99]

2.1.2.1. The Agreement

The Porcupine Caribou Herd is a herd of migratory barren ground caribou that migrates between the state of Alaska and the Yukon and Northwest Territories and which shares common and traditional calving and post-calving aggregation grounds between the Canning River in Alaska and the Babbage River in Yukon.

The PCH Agreement contains a broad sounding statement of objectives but seeks to implement those objectives through a set of relatively weak commitments. The objectives are: to conserve the PCH and its habitat, to ensure opportunities for customary and traditional uses of the PCH, to enable harvesters to participate in the international coordination of conservation and to encourage co-operation amongst governments and users. The Agreement also provides a mechanism, the International Porcupine Caribou Board (discussed below), to set overall harvest limits and appropriate limits for each country.

Article 3, headed "conservation" contains the principal commitments of the parties. Under this article the parties agree: to take *appropriate* action to conserve the herd and its habitat, to ensure that the herd, its habitat and the interests of user groups are given "effective consideration" in evaluating proposed activities within the range of the herd, and to consult before making decisions on activities that will likely cause significant long-term adverse impact on the herd or its habitat. The parties also recognized that approved activities might require mitigation measures and that they "should avoid or minimize activities that would significantly disrupt migration … patterns … or otherwise lessen the ability of users … to use the Herd". They also agreed to consider cumulative

[99] *Supra* note 13. For discussion of the background to the Agreement see N. Bankes, "A Migratory Caribou Convention" (1980) 18 Can. Y.B. Int'l L. 285.

impacts of activities on the herd. The most concrete commitment the parties assumed was to "prohibit the commercial sale of meat from the herd" (Article 3(h)).

The Agreement addresses the need for appropriate institutions by creating (Article 4) an International Porcupine Caribou Board. The Board is designated as an advisory board. It may make recommendations and provide advice on those aspects of the conservation of the herd and its habitat that "require international co-ordination." These aspects include harvest limits (where advisable to conserve the herd) and "identification of sensitive habitat deserving special consideration". The latter has led to the Board endorsing a report on this issue.[100] Paragraph (e) of Article 4 emphasises that the recommendations of the Board are not binding.

There is widespread recognition that the most critical issue for the long-term health of the herd is protection of habitat and especially the important calving and post-calving aggregation grounds. Within this context the status of a portion of the Alaska coastal plain known as the "1002 lands" or the Refuge has been of particular concern. These lands are currently within a protected area known as the Arctic National Wildlife Refuge, but, from time to time, the U.S. Congress debates Bills which, if passed into law, would authorize opening these lands to oil and gas exploration. To date these efforts have not been successful.[101] While these issues are multi-faceted, Canada has relied upon the Porcupine Caribou Agreement in arguing that these lands not be opened for development. Canada proposes instead that the protected status of the lands should be confirmed and consideration given to twinning the protected areas on both sides of the border.[102]

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[100]International Porcupine Caribou Board, *Sensitive Habitats of the Porcupine Caribou Herd* (Whitehorse: International Porcupine Caribou Board, 1993).

[101]See, "Senate rejects drilling in Alaska Refuge" *Washington Post* (19 March 2003). For academic reviews of the issues see Lisa J. Booth, "Arctic National Wildlife Refuge: A Crown Jewel in Jeopardy" (1988) 9 Pub. Land L. Rev. 105; and Samuel Stanke, "Like wilderness, but need oil? Securing America's future Energy Act puts little between accident-prone oil companies and the Arctic National Wildlife Refuge" (2002) 32 Envtl. L. 905.

[102]The protected areas on the Canadian side of the border are the Vuntut and Ivvavik National Parks. For one articulation of Canada's reaction to proposed drilling that relies not only upon the Porcupine Caribou Agreement but also on the Agreement on the Conservation of Polar Bears, Oslo, 15 November 1973, C.T.S. 1976, No. 24, online: <http://pbsg.npolar.no/ConvAgree/agreement.htm>, the Migratory Birds Convention, *supra* note 12 and the North American Waterfowl Management Plan, *supra* note 4. See *Comments by Canada on Arctic National Wildlife Refuge, Alaska, Coastal Plain Resource Assessment: Report and Recommendations to the Congress of the United States and Final Legislative Environmental Impact Assessment*, November 1987. Consideration has also been given in some quarters to a joint world heritage designation for the entire range of the herd: IUCN, World Conservation Congress, 14-23 October 1996, Montreal, Canada, Resolution 1.107.

2.1.2.2. Domestic Implementation

There is no specific statute or regulation that we can point to as the Canadian implementation legislation for the Porcupine Caribou Agreement.[103] However, there is a domestic interjurisdictional agreement amongst the relevant governments and user groups[104] that pre-dates the Porcupine Caribou Agreement but provides much of the policy basis for domestic implementation. Both agreements are in effect further implemented by provisions of land claim agreements[105] and territorial wildlife legislation.[106]

2.1.3. Conclusions

This concludes the review of bilateral wildlife agreements. Once we exclude bilateral fisheries agreements from our analysis[107] the list is very short and surprisingly so given not only the range of issues that arise between Canada and the United States but also given the potential for bilateral agreements with our other neighbours, France (in relation to St. Pierre and Miquelon), Denmark (in relation to Greenland[108]) and immediately

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[103]Neither is there any case law dealing with the agreement. The one Canadian case that deals with the effect of proposed drilling operations on the winter habitat of the herd does not refer to the agreement, *Vuntut Gwitchin First Nation v. Canada (Minister of Indian and Northern Affairs)*, [1999] 1 C.N.L.R. 299, aff'd [1999] 1 C.N.L.R. 306, leave to appeal to S.C.C. denied, [1998] S.C.C.A. 398.

[104]Porcupine Caribou Management Agreement, 26 October 1985, between the Governments of Canada, Yukon and Northwest Territories, the Council for Yukon Indians, the Inuvialuit Game Council and the Dene Nation and Metis Association of the Northwest Territories. The agreement is conveniently reproduced in the successive annual reports of the Porcupine Caribou Management Board established by part C of the agreement. Section 1 of para. L of the Porcupine Caribou Management Agreement provides (subject to some further qualifications) that "There shall be no commercial harvest of Porcupine Caribou in Canada."

[105]See, for example, s. 12.6.4 of the Gwich'in Comprehensive Land Claim Agreement, 1992, which provides that the provisions of the Porcupine Caribou Management Agreement "shall apply … notwithstanding any provisions" of the land claim agreement. There is a similar but not identical provision in s. 4.26 to Schedule A to Chapter 10 of the Vuntut Gwitchin First Nation Final Agreement, 1993. Federal legislation gives effect to both of these land claim agreements.

[106]For example, s. 54 of *Wildlife Act*, R.S.N.W.T. 1988, c. W-4 dealing with the prohibition on trafficking in wildlife. There is a similar provision in s. 102 of the Yukon's *Wildlife Act*, R.S.Y. 2002, c. 229.

[107]These agreements include the Pacific Salmon Treaty, Quebec City, 17 March 1985 available online: <http://www.psc.org/pubs/treaty.pdf> and the Convention on Great Lakes Fisheries, Washington, 10 September 1954, text available online: <http://www.glfc.org/pubs/conv.htm>.

[108]While there exist formal and informal cooperative arrangements in relation to fisheries (*e.g.* the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, 24 October 1978, online: <http://www.nafo.ca>) and marine mammals (the Canada-Greenland Joint Commission on Narwhal and Beluga, 1991) there are no bilateral agreements relating to other wildlife such as polar bears and

adjacent states (*e.g.* Russia[109]) with whom we have shared populations of wildlife. However, this chapter's focus on formally binding international agreements should not disguise the fact there exists a multiplicity of less formal arrangements dealing with particular species or groups of species.

2.2. Regional Agreements

The key regional wildlife agreement to which Canada is a party is the Agreement on the Conservation of Polar Bears.[110] The reader will recall that I have, in addition, already made some limited reference to the trilateral North American Agreement on Environmental Co-operation which gave rise to the North American Commission on Environmental Co-operation. I briefly discuss other less formal regional agreements in relation to the Arctic in the concluding section of the chapter.

2.2.1. The Agreement on the Conservation of Polar Bears (ACPB)

2.2.1.1. The Agreement

This short agreement deals with both the regulation of harvesting of polar bears and the conservation of bear habitat. The ACPB regulates the harvesting of polar bears by committing the parties to prohibit the taking of bears (Article I) save for a number of listed exceptions (Article III): (1) for scientific purposes, (2) by the Party for conservation purposes, (3) to prevent "serious disturbance" of the management of other living resources,[111] (4) by local people using traditional methods in the exercise of their traditional rights and in accordance with the laws of that Party, or (5) wherever polar bears might have been subject to taking by traditional means by its nationals. Parties are

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seabirds notwithstanding concerns as to unregulated and over-harvesting by Greenlanders. The multilateral Agreement on the Conservation of Polar Bears is dealt with in the next section. Canada is not a party to the multilateral Agreement on Cooperation in Research, Conservation and Management of Marine Mammals in the North Atlantic, Nuuk, Greenland, 9 April 1992, although it does participate as an observer.

[109]While there are no specific wildlife agreements with Russia there is a more general bilateral Agreement on Environmental Cooperation, C.T.S. 1993/7.

[110]Oslo, Norway, 15 November 1973. The parties are Canada, Denmark, Norway, U.S.A. and the Russian Federation. For background see P. Prestrud & I. Stirling, "The International Polar Bear Agreement and the current status of polar bear conservation" (1994) 20:3 Aquatic Mammals 113, noting that the agreement was principally a response to rapidly increasing levels of recorded harvests during the 1960s. See also A. Fikkan, G. Osherenko & A. Arikainen, "Polar Bears: The Importance of Simplicity" in Oran Young & Gail Osherenko, eds., *Polar Politics: Creating International Environmental Regimes* (New York: Cornell University Press, 1993) at 96-151; and Simon Lyster, *International Wildlife Law* (Cambridge: Grotius Publications, 1985) at 55-61.

[111]Subject to forfeiture to the Party of the skin, etc.

also required to prohibit the use of "aircraft and large motorized vessels" except where such a prohibition "would be inconsistent with domestic laws" (Article V), and to prohibit the export, import, and traffic within its territory of polar bears or products thereof taken in violation of the agreement.

The habitat provision of the ACPB is much more generally framed and simply commits each Party to take "appropriate action to protect the ecosystems of which polar bears are a part, with special attention to habitat components such as denning and feeding sites and migration patterns …" (Article II).[112] Finally, the Parties agree to manage polar bear populations in accordance with sound conservation practices (Article II), to undertake national and co-ordinated research on polar bears and to consult on a range of matters relating to migrating bear populations (Article VII).

Unlike modern global MEAs, the ACPB did not provide any ongoing institutional mechanism, such as a CoP, that would be responsible for overseeing the implementation of the agreement and evaluating its effectiveness nor a secretariat to receive and collate national reports on implementation. But such a mechanism has not been entirely lacking either since the Polar Bear Specialists Group, formed before the Agreement was developed, has continued to meet every four years or so.[113] The group meets under the auspices of the IUCN's Species Survival Commission.

2.2.1.2. The Canadian Declaration to the ACPB

When Canada ratified the ACPB it appended to its instrument of ratification a document which is known as an interpretive declaration.[114] There are three operative clauses to the declaration. In the first clause Canada signified its understanding that the term "scientific purposes" as used in Article III included both research and scientific management and that the exemptions afforded by Article III permitted taking by "aircraft and large motorized vessels" notwithstanding the general prohibition on such methods.

The second and most significant paragraph of the declaration relates to the two clauses of the Agreement that permit harvesting in the exercise of traditional rights or by

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[112]Prestrud & Stirling, *supra* note 110 at 121 conclude that while the agreement seems to have been relatively successful in responding to concerns of overharvesting "less protection has been made on the protection of habitat under the Agreement, with the exception of protection for a number of denning areas."

[113]For a recent report of this group see, Polar Bears: Proceedings of the 13th Working Meeting of the IUCN/SSC Polar bear Specialists Group (Nuuk, Greenland, 23-28 June 2001), Occasional Paper of the IUCN Species Survival Commission No. 26. There has also been one Consultative Meeting of the Contracting Parties to the Agreement on the Conservation of Polar Bears (Oslo, 20-22 January 1981).

[114]The Declaration is included in the official Canadian Treaty Series version of the agreement: C.T.S. 1976, No. 24.

traditional means. The declaration takes the view that these paragraphs permit "a token sports hunt based on scientifically sound settlement quotas as an exercise of the traditional rights of the local people."[115]

The declaration actually presents itself as a description of the "Canadian practice" governing regulation of the harvest of bears in Canada. That practice is stated to be characterized by the following features: (a) the compilation of research data by a federal-provincial polar bear technical committee which indicates the existence of a harvestable surplus of bears and the committee recommends a quota for each sub-population, (b) the actual polar bear hunt which is an important traditional right of Inuit and Indian people, and "may extend some distance seaward" with traditional methods being followed in the hunt, and (c) in the exercise of their traditional rights "the local people in a settlement may authorize the selling of a polar bear permit from the sub-population quota to a non-Inuit or non-Indian hunter, but with additional restrictions providing that the hunt be conducted under the guidance of a native hunter and by using a dog team and be conducted within Canadian jurisdiction." This practice, developed by both Inuit and Inuvialuit hunters, represents an important economic right and confers significant economic benefits for the communities concerned.[116]

The third paragraph deals with the scope of the procedural obligation to consult referred to in Article VII. Canada indicated that on its interpretation, the duty to consult was only triggered "when any other Party requests such consultation, not as imposing a requirement to hold such consultations annually."

What is the legal effect of a declaration such as this? There is a debate in the literature[117] as to the legal effect that should be accorded to an interpretative declaration.

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[115]The term "token hunt" is not defined. There is a useful discussion of the meaning of the declaration in the U.S. Fish and Wildlife Service's rule making exercise which was designed to allow the import of trophy bears from approved populations as contemplated by the U.S. *Marine Mammal Protection Act*: see (1997) 62 F.R. 7302. The discussion makes the following points: (1) it is not clear whether a sports hunt is justified under para. (d) traditional methods and rights, or (e) traditional means; (2) that on one interpretation only a national of one party should be able to hunt in the territory of that party; and (3) that in light of the purposes of the Convention it was unnecessary to define "token hunt" in quantitative terms and that Canadian Wildlife Service interprets a token hunt as a hunt that is within conservation limits – a very generous interpretation of the term.

[116]While this may a somewhat strained "interpretation" of the relevant text it should be noted that it is certainly consistent with efforts that are being made internationally under the auspices of CITES to ensure that local communities benefit from a limited harvest of even Appendix I CITES species (for discussion, see *infra* Section II.C.1.); see Marco Festa-Bianchet, "Getting your goat: trophy hunting for mountain ungulates" (2002) 3 World Conservation 20, discussing a limited harvest of markhor, a CITES Appendix I species.

[117]See D.M. McRae, "The Legal Effect of Interpretative Declarations" (1978) 49 Brit. Y.B. Int'l L. 155.

There are two possible ways to characterize an interpretative declaration. One possibility is that a declaration, notwithstanding its title, is intended to operate as a reservation to a treaty thereby purporting to limit the scope of the ratifying party's obligations. The important point here is that if a competent court or other tribunal were ever to rule contrary to the terms of the declaration then the ratifying party would be able to take the position that it was not bound by that clause of the treaty since its consent to be bound was in effect conditional upon its expressed interpretation of that clause of the treaty.

The other possibility is that the declaration is a mere declaration of a preferred interpretation of the treaty; should the ratifying party turn out to be mistaken it would still be bound by the terms of the treaty as authoritatively declared by a court or tribunal.

Which is the preferred characterization of the Canadian declaration to the ACPB?

It is my view that the declaration is simply that, a mere declaration; it does not in this case operate as a reservation. I prefer this characterization for two main reasons. First, we are entitled to presume that the word "declaration" was chosen deliberately. The ACPB is not one of those agreements that prohibits reservations. It would have been open to Canada to frame the text as a reservation. Second, and I consider this in recognition of the fact that the label attached to the document should not always be conclusive, there is nothing in the text of the declaration that suggests that it is to be read as a reservation; in particular there is no language suggesting that Canada's expression of its consent to be bound was in any way conditional upon the acceptance by other parties of its preferred interpretation of the agreement.

2.2.1.3. Domestic Implementation

Domestic implementation of the ACPB is achieved through administrative practices and, given that the harvesting of wildlife and the protection of wildlife habitat[118] generally falls under their jurisdiction, provincial and territorial wildlife legislation. There is no specific federal legislation designed to implement the provisions of the ACPB.[119]

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[118]The authority of provinces over habitat protection is clear; the issue is much more difficult in the territories insofar as title to the surface of public lands is, for the most part vested in the federal Crown.

[119]There is still some room for federal rules. The *National Parks Act*, S.C. 2000, c. 32, for example, regulates all activities within National Parks including hunting activities and *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, *supra* note 42, presumably serves to implement not only CITES but also the trade provision of this Agreement (Article V). The polar bear is listed in Appendix II of CITES. For confirmation of the dual functions of this legislation see *R. v. Martin*, [1994] O.J. 1161 at para. 5 which refers to the predecessor legislation for the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, the *Export and Import Permits Act*, R.S.C. 1985, c. E-19, noting that inclusion of polar bears in the Import Control List is "pursuant to Canada's implementation of two intergovernmental agreements", CITES and the ACPB.

We have already noted that the Canadian declaration filed upon ratification of the ACPB provides an outline of the administrative practices in Canada. Central to the scheme are two national committees, the Polar Bear Technical Committee and the Polar Bear Administrative Committee. Each committee is composed of representatives of the federal government (the Canadian Wildlife Service) and Canada's seven polar bear jurisdictions: Manitoba,[120] Newfoundland, Northwest Territories, Nunavut, Ontario, Quebec and Yukon.[121] These committees meet annually to review research and management of polar bears in Canada. The committees recognize thirteen distinct populations of bears in Canada. Many of these populations are shared by more than one community, by more than one domestic wildlife jurisdiction, and, in some cases, the populations are shared internationally (with Greenland or the United States). Where populations are shared, the management authorities (with mixed success) have endeavoured to negotiate management agreements and to agree upon the determination and allocation of an allowable harvest.[122]

An example of a successful agreement is the agreement between the Inuvialuit (Canada) and the Inupiat (Alaska) over the sharing of the southern Beaufort population.[123] This agreement is particularly notable as an example of an effective agreement between user groups rather than between the two states.[124] Within Canada an informal arrangement between Manitoba and Nunavut allows Nunavut hunters to harvest a share of Manitoba's entitlement to the west Hudson Bay population since Manitoba at this time does not permit any form of hunting. A similar arrangement permits Inuvialuit hunters based in the NWT to harvest the quota of bears from the southern Beaufort population that are allocated to Yukon. There are also inter-community agreements in place for the allocation of shared stocks in Nunavut. While of intrinsic importance to the conservation of the stocks, these agreements also constitute a condition precedent for the

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[120]In addition to the *Wildlife Act* see the *Polar Bear Protection Act*, C.C.S.M. c. P-94. This Act is concerned with the possession and export of *live* polar bears.

[121]The reports of the occasional meetings of the Polar Bear Specialists Group provides a useful tabular summary of the main harvest rules although it does not refer to specific pieces of legislation: see *supra* note 113 at 42.

[122]For discussion in the context of Nunavut see A. Diduck *et al.*, "Unpacking social learning in social-ecological systems: case studies of polar bear and narwhal management in northern Canada" in Fikret Berkes *et al.*, ed., *Breaking Ice: Renewable Resource and Ocean Management in the Canadian North* (Calgary: University of Calgary Press, 2005) at 269-290.

[123]Inuvialuit-Inupiat Polar Bear Management Agreement in the Southern Beaufort Sea, Inuvik, 4 June 1999, online: <http://pbsg.npolar.no/ConvAgree/inuvi-inup.htm> and also reproduced as Annex II to the Polar Bear Specialist Group Report, *supra* note 111.

[124]For discussion from a U.S. perspective, see Case & Voluck, *supra* note 61 at 271.

U.S. Fish and Wildlife Service to authorize the import of trophy animals into the U.S. under the terms of the *Marine Mammal Protection Act*.[125]

A complete review of Canada's regulations for implementing the Agreement has to be based on the relevant Wildlife Acts and regulations of the relevant jurisdictions in many cases as modified by the terms of relevant land claim agreements and the co-management institutions of the agreement.[126]

2.3. Global Agreements

The key global agreements concerned with wildlife conservation are the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 1973[127] the Convention on Wetlands of International Importance (Ramsar)[128] and the Convention on Biological Diversity (CBD).[129] Each has a distinct area of operation and focus. The first two of these agreements were amongst the first of the modern generation of MEAs. In common with other MEAs, these three MEAs, in addition to creating substantive obligations also establish an institutional framework based upon a CoP.[130] Hence, anyone interested in acquiring an understanding of the actual practice under a particular instrument needs to look at the proceedings of these various CoPs since the CoPs may serve not only as a vehicle for adopting formal amendments but their decisions may also provide authoritative interpretations of various terms of the agreement[131] or offer guidelines on implementation.[132] In addition CoPs may adopt work programmes that will

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[125]There is further discussion of this in Diduck *et al.*, *supra* note 122. Efforts to reach an agreement with Greenland over the management of the Kane Basin, Baffin Bay and Davis Strait have proven unsuccessful. This issue was raised most recently in June 2005 when Greenland revealed that harvest levels were much higher than had been assumed.

[126]For one such study, see Diduck *et al.*, *supra* note 122.

[127]*Supra* note 54.

[128]Ramsar, 2 February 1971, online: <http://www.ramsar.org/key_conv_e.htm>.

[129]*Supra* note 1.

[130]See CITES Article XI, and CBD Article 23. The Ramsar Convention evolved somewhat differently. The initial agreement made no provision for either an amendment procedure or for a regular CoP. The agreement merely provided for the possibility of occasional (Article 6(1)) "Conferences on the Conservation of Wetlands and Waterfowl". Both omissions have subsequently been rectified by amendments. For discussion, see M.J. Bowman, "The Ramsar Convention Comes of Age" (1995) 42 N.I.L.R. 1; and M.J. Bowman, "The Multilateral Treaty Amendment Process – a case study" (1995) 44 Int'l & Comp. L.Q. 540.

[131]In the case of Ramsar, see for example, Resolution 4.1: Interpretation of Article 10 bis Paragraph 6 of the Convention, (Montreux, 27 June – 4 July 1990).

[132]See generally Churchill & Ulfstein, *supra* note 74.

guide the allocation of resources and priorities on an on-going basis. While the CoP is generally the key institution of an MEA, the agreement itself,[133] or a subsequent CoP decision, may authorize the creation of additional subsidiary bodies.

2.3.1. CITES

2.3.1.1. The Convention[134]

The main purpose of the CITES Convention is the *regulation* of international trade in species which are either endangered or may become so. On the face of it the treaty does not impose an absolute prohibition on trade in endangered species, but neither is it concerned with the protection of habitat, or with the sustainable harvest of threatened species. However, the debate within CITES is increasingly a debate between those who believe that it in some cases it will be necessary to create the conditions for sustainable trade which benefits local communities in order to protect viable populations of wildlife and those who believe that the difficulties associated with monitoring trade and enforcing limits on trade make it impossible to sanction even limited trade in endangered species.

The core commitment of the Parties[135] to the Convention is that they "shall not trade in specimens of species" included in one of three key appendices "except in accordance with the provisions of the present Convention." The Convention applies to animals and plants and to trade in live and dead specimens and parts thereof.

A species may be listed[136] on Appendix I if it is threatened with extinction and may be affected by trade (Article II.1). Trade in such species may only be authorized in "exceptional circumstances" (Article II.1) and subject to the issuance of an export permit

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[133]In the case of the CBD, for example, Article 25 creates the Subsidiary Body on Scientific, Technical and Technological Advice.

[134]The most comprehensive review of CITES is Rosalind Reeve, *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (London: Royal Institute of International Affairs, Earthscan Publications, 2002). The idea for the Convention originated with a resolution at the 1963 meeting of IUCN. The Convention entered into force for Canada on 9 July 1975. Literature that deals with Canadian implementation of CITES includes: Jacquelyn Shaw, "*CITES*: A Toothless Tiger in the Black Market for Traditional Chinese Medicines" (2005) Dal. J. Leg. Stud. 135, and L.P. Marshall, "Canada's implementation of CITES: the Effect of the Biodiversity Focus of International Environmental Law" (1999) 9 J.E.L.P. 3; and from a policy perspective, see Philippe Le Prestre & Peter Stoett, "International Initiatives, Commitments and Disappointments: Canada, CITES and the CBD" in Karen Beazley & Robert Boardman, eds., *Politics of the Wild: Canada and Endangered Species* (Oxford: Oxford University Press, 2001) at 190-216.

[135]As of June 2005, there were 167 parties making the treaty one of the most widely ratified MEAs.

[136]For a discussion of the listing process, see *CITES, A Conservation Tool*, 7th ed. (2001) available online at the CITES website.

and an import permit (Article III).[137] An export permit may only be issued if the designated Scientific Authority certifies that the export will not be detrimental to the survival of the species and if the designated Management Authority is satisfied that: (1) the specimen was not obtained in a manner that contravenes laws for the protection of flora and fauna, (2) if the specimen is a living specimen that the specimen will be shipped in such a manner as to minimize the risk of injury, damage to health or cruel treatment, and (3) an import permit has been granted. Similarly, a state of import may only grant an import permit if its designated Scientific Authority is satisfied that: (1) the import will be for purposes that are not detrimental to the survival of the species, and (2) the recipient of a living specimen is able to take care of it. In addition, its Management Authority must be satisfied that the specimen is not to be used "for primarily commercial purposes."

A species may be listed on Appendix II if, while not threatened with extinction, it may become so unless trade in the species is subject to strict control or if the regulation of the species is necessary as a "look-alike" species in order to protect another species. Trade in an Appendix II species requires the issuance of an export permit. An export permit may only be issued when certain conditions have been satisfied. These conditions track many of the conditions for Appendix I species. A further condition requires the Scientific Authority in each jurisdiction monitor the trade and to take appropriate steps whenever such an authority "determines that the export of specimens of any such species should be limited in order to maintain that species throughout its range as a level consistent with its role in the ecosystem in which it occurs and well above the level at which that species might become eligible for inclusion in Appendix I …".

A species may be listed in Appendix III if the species has been identified by a party as being subject to regulation within its jurisdiction in order to prevent or restrict its exploitation and as needing the cooperation of other parties in the control of trade. Trade in an Appendix III species requires (Article V) that the Management authority certify that there has been no contravention of domestic laws and satisfaction of the minimal harm requirement during shipping; but there is no requirement of a "no detriment" finding.[138]

A species is added to either of Appendix I or Appendix II (or subject to uplisting or downlisting) through the amendment procedure contemplated by Article XV. Amendments are proposed by any Party prior to a meeting of the CoP. Proposals are adopted by a two-thirds majority vote and enter into force 90 days thereafter except for parties which make a reservation. This is a relatively unusual procedure for amending an

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[137]There are additional rules dealing with re-export and the treatment of species introduced from the marine environment beyond the jurisdiction of any state.

[138]On the implications of Appendix III listing for an importing state see *The Queen on the Application of Greenpeace Ltd. v. Secretary of State for the Environment, Food and Rural Affairs and Her Majesty's Commissioners of Customs and Excise*, [2003] Env. L.R. 9.

"obligation annex" to an MEA insofar as there is no requirement of ratification for entry into force.[139] However, the reservation procedure, if exercised, does allow a party to opt-out of the amendment since the effect of depositing a reservation is to cause that state to be treated as not being a party to the Convention "with respect to trade in the particular species or parts or derivatives specified" (Article XV(3)).

Amendments to Appendix III are more straightforward since these amendments take effect (subject to the reservation process just described) 90 days after communication to other parties by the secretariat. There is no requirement that the proposed amendment be adopted by the CoP and consequently there is a similar unilateral process for parties to withdraw species from the Appendix III list.

Of the more than 30,000 species of plants and animals subject to Appendix I or II of CITES, over 90% are listed on Appendix II suggesting that CITES is "increasingly focused on controlled sustainable trade rather than prohibition."[140] Appendix II species of wildlife for which Canada is a range state include polar bear, black bear, grizzly bear, wood bison, sea otter, bobcat, cougar and Canadian lynx. Appendix I listed species for Canada include, in addition to many whale species, peregrine falcon anatum (considered threatened by COSEWIC), leatherback turtle (endangered) as well as gyrfalcon which is not considered at risk in Canada. The only Appendix III species listed for Canada is Atlantic walrus.

The Convention provides that the permits and certificates required by the operative provisions shall follow the model prescribed by an appendix to the Convention. Article VII relaxes or modifies the provisions of the Convention somewhat with respect to a series of matters including "specimens that are personal or household effects",[141] specimens bred in captivity and specimens that are part of travelling zoos or circuses.

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[139]Amendments to the Convention itself (Article XVII) do require an "instrument of acceptance" to be deposited before a party is bound and such amendments only enter into force for those parties when acceptances are received from two-thirds of the parties.

[140]T.R. Young, "Sharpening CITES' teeth" (2002) 3 World Conservation 9.

[141]The provision in relation to Appendix II species is of most interest. The text is convoluted but it provides (so far as relevant) that: (1) Article IV (the basic permit provision for Appendix II species) shall not apply to specimens that are household or personal effects, *unless*, (2)(i) acquired outside usual state of residence, (ii) the specimen is being imported into his usual state of residence, *and* (iii) the state where removal from the wild occurred requires an export permit, unless acquired before the species was listed. The conditions of (2) are cumulative and so, for example, a black bear taken by an American hunter while visiting Ontario would not require a CITES export permit unless Ontario or Canada required such a permit under domestic law.

2.3.1.2. Domestic Implementation of CITES

Within Canada there exists a multiplicity of designated Scientific Authorities (SA) and Management Authority (MA) since each province (save Alberta and Saskatchewan both of which have withdrawn from CITES administration responsibilities) and territory has designated an Scientific Authorities and an MA in addition to the federal designation of the Canadian Wildlife Service of Environment Canada.[142] The Canadian Wildlife Service is responsible for issuing import permits where required and the provinces and territories are generally responsible for issuing the relevant export permits.

When CITES first entered into force for Canada in 1975, Canada elected to implement its international obligations through the existing federal *Export and Import Permits Act*[143] and the *Game Export Act*.[144] The *Export and Import Permits Act* is generic legislation designed to regulate the export and import of all manner of goods and products that the Government of Canada wishes to regulate for a variety of reasons including national security, implementation of UN Security Council resolutions and in the case of CITES, environmental reasons.[145] The *Game Export Act* was first enacted in 1941.[146] The Act prohibited the interprovincial movement of game "except under the authority of an export permit issued under the laws" of the relevant province. "Game"

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[142]Online: <http://www.cites.ec.gc.ca/eng/sct1/index_e.cfm>. In addition to Canadian Wildlife Service, the Department of Fisheries and Oceans assumes SA and MA responsibilities for species managed under the Fisheries Act and the Canadian Forest Service has similar responsibilities for forestry matters.

[143]R.S.C. 1985, c. E-19. There is a limited body of case law on the Act. Perhaps the most significant decision is *R. v. Martin*, [1994] O.J. 1161 in which the Ontario Court of Appeal refused to look behind the decision to list a species in the Convention and thence to place a species on the export control list (the case involved polar bear, listed on Appendix II). Counsel for Martin sought to argue that a species should only be included in the list if it was in fact "threatened with extinction" and if the polar bear was no so threatened then the charge would be unconstitutionally vague. The argument had found favour with the trial judge who had found (at para. 8) that "the polar bear was not an endangered species in the sense of being threatened with extinction." The Court of Appeal refused to consider the merits of this proposition noting that the only issue was whether polar bear was a listed species. In an earlier decision, *R. v. Martin* (1991), 63 C.C.C. (3d) 71 the Ontario Court of Appeal, aff'd by the Supreme Court of Canada 71 C.C.C. (3d) 572 had also rejected another of Martin's arguments to the effect that the *Export and Import Permits Act*, *supra* note 119 created an absolute liability offence that breached the accused's Charter rights; the court found that the offence was a strict liability that permitted the accused to raise a due diligence defence.

[144]REPEALED: S.C. 1992, c. 52, s. 29, effective May 14, 1996 (SI/96-41).

[145]In particular s. 3 of the Act provides that "The Governor in Council may establish a list of goods, to be called an Export Control List, including therein any article the export of which the Governor in Council deems it necessary to control for any of the following purposes: … (d) to implement an intergovernmental arrangement or commitment."

[146]R.S.C. 1985, c. G-1.

was defined to apply to carcasses and parts thereof and therefore the Act did not apply to trade in live animals or any form of plants.

In 1991 the federal government introduced Bill C-42 which was to become the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*.[147] When it was proclaimed in force in 1996 (along with a set of regulations, the *Wild Animal and Plant Trade Regulations*)[148] the Bill replaced the above two Acts as Canada's CITES implementing legislation. The regulations were further amended in 2000[149] to take advantage of the provisions of Article VII of the Convention which relax the application of the permit requirements in relation to specimens that are personal or household effects.

The basic scheme of the *Act* (at least as it relates to CITES) is to prohibit, subject to the regulations (s. 6(2)) the import of export of plants or animals into Canada without a permit.[150] The terms "plants" and "animals" are defined as specimens of species listed in an appendix to the Convention,[151] and the term Convention is of course defined as CITES but in the form of a rolling definition "as amended from time to time". The definition also contemplates the possibility that Canada may file a reservation to a new listing since it goes on to provide that an amendment is only included in the definition "to the extent that the amendment is binding on Canada".[152] Much of the balance of the Act is concerned to put in place the necessary infrastructure to create a workable regulatory regime and accordingly deals with such matters as the issuance of federal permits (s. 10), inspections of premises and searches, forfeiture of seized goods (s. 19) and the creation of offences and sanctions (s. 22).[153] Section 21 of the Act confers wide-ranging regulation-making powers on the Governor in Council.

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[147]S.C. 1992, c. 52.

[148]*Wild Animal and Plant Trade Regulations*, SOR/96-263 and see also the accompanying regulatory impact analysis statement.

[149]SOR/2000-3 and accompanying regulatory impact analysis statement.

[150]See *R v. Deslisle*, [2003] B.C.C.A. 196 at para. 30: "it is apparent that the purpose of the Act is to enforce the Convention by strict regulation of domestic and international trade in endangered and other protected species …. The Act anticipates that the signatory states will respect not only their own laws regarding the regulation of trade in these species, but also the laws of the state from which the species originated."

[151]Note as well that s. 4 of the *Wild Animal and Plant Trade Regulations* offers expansive definitions of the terms "animal" and "plant".

[152]See also s. 21(2) of the Act which contemplates that the CITES appendices shall be included in the regulations and that an amendment to the regulations shall be made no later than 90 days after any change in the appendices.

[153]At the time of writing there is only a small body of reported case law on the Act and regulations. In addition to *Deslisle*, *supra* note 150, see *R. v. Kwok Shing Enterprises*, [2001] B.C.P.C. 305 illustrating

2.3.2. The Ramsar Convention

The Ramsar Convention[154] represents "the first attempt by the international community to establish a legal instrument providing comprehensive protection for a particular ecosystem type …".[155] Canada has been a party to the agreement since 1981. As of June 2005 there were 146 parties to Ramsar.[156] While the Convention seeks to protect wetlands for a range of reasons, it is the subclause to the full title to the Convention ("especially as waterfowl habitat") that principally justifies discussion of the Ramsar Convention in a paper on wildlife law.

The obligations assumed by a Party to the Ramsar Convention revolve around the distinction between wetlands in general and those wetlands that a party designates for inclusion in a List of Wetlands of International Importance. In both cases the obligations are couched at a high level of generality, principally in recognition of the fact that each of the parties has and retains exclusive sovereign rights in relation to those wetlands located in its territory.[157]

2.3.2.1. Obligations in Relation to Wetlands, Generally

The principal obligations of a party in relation to wetlands in general are: (1) to formulate and implement planning exercises to promote, so far as possible "the wise use of wetlands in their territory" (Article 3.1), (2) to promote the conservation of wetlands and waterfowl by establishing nature reserves on wetlands and proving adequately for their wardening (Article 4.1), (3) to endeavour through management to increase waterfowl populations on "appropriate wetlands", and (4) to consult with each other about the implementation of Convention obligations especially in the case of shared wetlands (Article 5). There are other more general duties to encourage research and to promote

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some of the difficulties associated with securing convictions especially when dealing with derivatives of listed species and especially when the products are labelled in a foreign language; *R. v. LaPrairie*, [2003] Y.K.T.C. 34 (interprovincial transport of bison without a licence and sentencing principles), *R. v. Gervais*, [2000] Y.J. 106 (interprovincial transport of bear gall bladders and importance of deterrence in setting the level of the fine), *R. v. Sandbach*, [1998] Y.J. 34 (sentencing).

[154] *Supra* note 128.

[155] Bowman, "Comes of Age", *supra* note 130 at 2.

[156] See the Convention's website: <http://www.ramsar.org>.

[157] For example, even Article 2 which deals with the process for adding a wetland to a List of Wetlands of International Importance contains paragraph (3) which declares that "The inclusion of a wetland in the List does not prejudice the exclusive sovereign rights of the Contracting Party in whose territory the wetland is located"; this represents a dominant theme of the convention notwithstanding the preambular recognition that waterfowl are ecologically dependent on wetlands (Article 1.1) and that migratory waterfowl "should be regarded as an international resource".

training in relation to wetlands. The Convention does not define the term "wise use" although the CoP has offered guidance on the question.[158]

2.3.2.2. Obligations in Relation to Listed Wetlands

Each party to the Convention is obliged to designate a suitable wetland for the List upon joining the Convention. The designation process is a unilateral process[159] and an amendment to the list does not involve an amendment of the Convention. A party has the following additional obligations in relation to listed wetlands: (1) the duty to formulate and implement planning exercises to promote "the conservation" of those lands, and (2) the duty to take steps to be informed as to changes to the ecological character of any listed wetland that has occurred, are occurring, or are likely to occur "as the result of technological developments, pollution, or other human interference" and to pass that information on to the bureau. Furthermore, while the Convention recognizes that a party has the right to delete a wetland from the list or restrict the boundaries of a listed wetland, it also suggests that this should be done by a party only in its "urgent national interest" and that the party "should as far as possible" compensate for the loss of wetland resources particularly through the creation of additional protected areas (Article 4.2).[160]

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[158]The 3rd Meeting of the Conference of the Contracting Parties in Regina, Canada, from 27 May to 5 June 1987, adopted the following definition of wise use of wetlands: "The wise use of wetlands is their sustainable utilization for the benefit of humankind in a way compatible with the maintenance of the natural properties of the ecosystem". Additional Guidance for the Implementation of the Wise Use Concept First adopted as an annex to Resolution 5.6 of the 5th Meeting of the Conference of the Contracting Parties (Kushiro, Japan, 1993). Sustainable utilization is defined as "human use of a wetland so that it may yield the greatest continuous benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations". And see generally, Clare Shine, "Reviewing Laws and Institutions to Promote the Conservation and Wise Use of Wetlands", online: <http://www.ramsar.org/cop7/cop7_doc_17.3_e.htm>.

[159]CoP offers guidance on the listing process. See Resolution VII.11adopting the Strategic Framework and guidelines for the future development of the List of Wetlands of International Importance" (1999).

[160]The Convention does not define the critical terms in this provision. At the eighth CoP, Valencia, Spain, 18-26 November 2002, the Parties adopted general guidance on the meaning of "urgent national interest" and "compensation" (Resolution VIII.20). However, the guidance is still fundamentally premised on the idea of respect for the exclusive sovereign rights of the listing party and therefore the guidance accepts that "the determination of 'urgent national interests' lies solely with the Contracting Party." In other words the concept is subject to auto-interpretation and is effectively non-justiciable.

2.3.2.3. Domestic Implementation of Ramsar[161]

As the above account suggests, many of the obligations assumed by the parties to Ramsar are relatively soft.[162] While the parties commit to conservation or wise use of wetlands there is no commitment to any particular level of protection; and there is no commitment, for example, to regulate or prohibit certain uses of wetlands or to prohibit wildfowl harvesting in listed wetlands. Furthermore, even the more important duties imposed on contracting parties (*e.g.* the duty to inform of changes in the ecological character of listed wetlands) can be fulfilled administratively and do not require any implementing legislation.[163]

Canada has been an active participant in Ramsar over the years and currently has over 36 sites on the List comprising over 13 million hectares, the largest area of any Party to the Convention. While most of the listed areas are owned by the federal Crown and protected under a variety of federal legislation,[164] some areas remain under provincial ownership and control and are therefore protected under provincial legislation.[165] The

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[161]For a much more thorough account of the domestic implementation of Ramsar in another federal jurisdiction (Australia) see D. Farrier & L. Tucker, "Wise Use of Wetlands Under the Ramsar Convention: A Challenge for Meaningful Implementation of International Law" (2000) 12 J. Envtl. L. 21.

[162]Accord, Michael Bowman, "The Ramsar Convention on Wetlands: Has it Made a Difference?" (2002/03) Yearbook of International Co-operation & Development 61 at 65.

[163]Given the soft nature of Ramsar obligations and the absence of implementing legislation it is hardly surprising that there is virtually no case law referring to the Convention. The Convention was however brought to bear in *Jones v. Delta (District)*, [1992] 6 W.W.R. 1 (B.C.C.A.). The case involved zoning for a golf course development and interveners, including the Canadian Wildlife Service, took the view that the zoning application should not be approved in light of the impact that the proposal would have on the integrity of the Boundary Bay wetland which was being considered for Ramsar designation. The submission was not persuasive to the zoning authority and the potential Ramsar designation does not seem to have been relevant to the application for judicial review. Similarly inconclusive is *Wellington Centre v. P.E.I. (Minister of Environmental Resources)*, [1996] P.E.I.J. No. 104 where the applicant seems to have argued, unsuccessfully, that the decision-maker had committed a reviewable error in failing to "make special mention regarding the Ramsar Convention" when deciding upon the site of a waste disposal facility.

[164]Some examples: Canada's largest Ramsar site, Queen Maud Gulf in Nunavut, is protected as a Migratory Bird Sanctuary under the *Migratory Birds Convention Act*, S.C. 1994, c. 22 and the *Migratory Bird Sanctuary Regulations*, C.R.C. 1978, c. 1036; at least one federal Ramsar site, Rasmussen Lowlands, Nunavut, has no specific protected area status (see Nigel Bankes, *Review of Conservation Area Legislation in Nunavut*, 1998 at 83; unpublished on file with the author); Alaksen, part of the Fraser River delta in British Columbia is protected as both a Migratory Bird Sanctuary, and as a National Wildlife Area under the *Canada Wildlife Act*, R.S.C. 1985, c. W-9 and the *Wildlife Area Regulations*, C.R.C. 1978, c. 1609; the Peace Athabasca Delta, Alberta is protected by the *National Parks Act*, R.S.C. 1985, c. N-14, repealed and replaced by S.C. 2000, c. 32, s. 46; it is also a World Heritage Site under the terms of the UNESCO World Heritage Convention.

[165]For example, Polar Bear Provincial Park, Canada's second largest Ramsar site, is protected as an

Canadian Wildlife Service has developed a "Procedures Manual" on the Nomination and Listing of Wetlands of International Importance in Canada[166] and Canada's continuing commitment to Ramsar is highlighted in the Federal Policy on Wetland Conservation, 1991.[167] The Canadian Wildlife Service Procedures Manual is designed as a domestic response to the CoP's adoption of Criteria for Identifying Wetlands of National Importance.[168] The Canadian Wildlife Service policy is that it will only support nomination of those sites where:

> "1. Lands and/or waters are in public or private management that is conducive to the conservation of wetlands;
>
> 2. Maintenance of the ecological, hydrological and social/economic characteristics and functions of the site(s) can be assured; and
>
> 3. There is concurrence from the province or territory where the site(s) is(are) located."

2.3.3. The Convention on Biological Diversity

2.3.3.1. The Convention

The CBD was one of the two MEAs negotiated in conjunction with the 1992 Rio Conference on Environment and Development. Its fundamental objectives are: (1) the conservation of biological diversity, (2) the sustainable use of its components, and (3) the fair and equitable sharing of the benefits arising out of the utilization of genetic resources. As with the Ramsar Convention, much of the agreement is concerned to develop international obligations with respect to resources located within the territory of the state. While the preamble to the Convention recognizes that biological diversity is "a common concern of humankind", many of the obligations assumed by parties in the body of the Convention are relatively soft and hedged about with qualifying phrases.[169] As with the Ramsar Convention, the CBD is also at pains to recognize the sovereign rights of the respective countries "to exploit their own resources pursuant to their own

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Ontario provincial park.

[166]Procedures Manual on the Nomination and Listing of Wetlands of International Importance in Canada, February 1999, online: <http://www.cws-scf.ec.gc.ca/publications/AbstractTemplate.cfm?lang=e&id=1029>.

[167]Federal Policy on Wetland Conservation, Environment Canada, 1991 especially at 1 and 12, online: <http://www.wetkit.net/modules/1/showtool.php?tool_id=13>.

[168]Recommendation IV.2 (1990).

[169]A particularly common formulation in the CBD is "as far as possible and as appropriate."

environmental policies."[170] A key part of the Convention is the requirement of Article 6 that each party develop a national biodiversity strategy.

Given the wildlife law focus of this paper it will suffice for present purpose to draw attention to two articles of the Convention,[171] Article 8 dealing with "*in situ* conservation" and Article 10 which deals with the sustainable use of components of biological diversity". While much of Article 8 is concerned with implementing *in situ* conservation through protected area strategies, the article is also concerned with the protection, sustainable use, and recovery of species and their habitat. The following paragraphs are particularly relevant for our purposes:

> "Each Contracting Party shall, as far as possible and as appropriate:
>
> > (d) Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings;
> >
> > (f) Rehabilitate and restore degraded ecosystems and promote the recovery of threatened species, inter alia, through the development and implementation of plans or other management strategies;
> >
> > (k) Develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations;"

Article 10 is principally concerned to ensure that the conservation and sustainable use of biological diversity are brought to the fore in national policy and rule making exercises:

> "Each Contracting Party shall, as far as possible and as appropriate:
>
> > (a) Integrate consideration of the conservation and sustainable use of biological resources into national decision-making;
> >
> > (b) Adopt measures relating to the use of biological resources to avoid or minimize adverse impacts on biological diversity."

---

[170]Article 3. The article is a variation on the famous Principle 21 of the Stockholm Declaration and of Principle 2 of the Rio Declaration. As with those formulations, the article goes on to recognize that the sovereign rights of states are qualified by "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

[171]Other articles of the CBD are also relevant including the Article 8(j) provision dealing with traditional knowledge. There is an extensive literature on the CBD. For more general discussions see Fiona McConnell, *The biodiversity convention: a negotiating history: a personal account of negotiating the United Nations Convention on Biological Diversity, and after*, Kluwer Law International, 1996.

2.3.3.2. Domestic Implementation

Even the limited recitation of the above provisions of the CBD should confirm for the reader that many of the matters covered by the convention, and especially as they relate to wildlife, fall *prima facie* within provincial jurisdiction rather than federal jurisdiction. Furthermore, as with many of the other agreements considered in this chapter, the softness of many of the obligations suggests that the convention can be largely (if not completely) implemented through some combination of policy initiatives and existing legislation covering such diverse areas as wildlife, protected areas, municipal and land use planning, ocean management etc.[172] That this has largely been Canada's position can be gleaned from several official documents that Canada has prepared in conjunction with its implementation activities. These documents include the Canadian Biodiversity Strategy[173] required by Article 6 of the Convention and completed in 1995, and Canada's Second National Report on measures that it has taken for the implementation of the Convention.[174] This report is required by Article 26 of the Convention. Both of these documents were prepared with provincial and territorial input as well as with input from other stakeholders. The Strategy document stresses the need to be sensitive to federalism values in assessing implementation measures. The document articulates five goals one of which is "to maintain or develop incentives and legislation that support the conservation of biodiversity and the sustainable use of biological resources". In this context the document notes that "Legislation is an important tool that can contribute to achieving the conservation of biological diversity … [it] is administered by the various orders of government. Implementing the Convention does not require changing the constitutional

[172]The "softness" of the obligations also perhaps means that we can expect limited judicial consideration of the Convention or any implementing legislation. That is certainly the case to date although the applicants in one case did urge that the CBD should influence the interpretation of the *Forest Practices Code of British Columbia*, R.S.B.C. 1996, c. 159 and that the Code "must be interpreted in a manner that will ensure the conservation of bio-diversity and the use of biological resources in a sustainable manner": *Western Canada Wilderness Committee v. British Columbia (Ministry of Forests, South Island Forest District)*, [2002] B.C.S.C. 1260 at para. 70, aff'd 2003 B.C.C.A. 403. The court was not persuaded by this argument or the accompanying argument based on the precautionary principle as to which see *supra* note 35. In *Repap New Brunswick Inc. v. Pictou*, [1996] N.B.J. 495 the court seems simply to have ignored the argument of one party that Canada's obligations under the CBD were relevant when determining whether to rescind an interlocutory injunction that had been granted on the application of Repap in order to allow it to continue its timber harvesting operations. A similarly imaginative argument to the effect that the CBD obligations to preserve genetic diversity might be used to question the validity of a Bovine Spongiform Encephalopathy-related precautionary decision to destroy all cattle imported from the U.K. in a particular period seems to have fallen on stony ground: *Kohl v. Canada (Department of Agriculture)*, [1994] F.C.J. 1053 (esp. at para. 38), rev'd on other grounds, [1995] F.C.J. 1076.

[173]Biodiversity Convention Office, *Canadian Biodiversity Strategy: Canada's Response to the Convention on Biological Diversity* (Hull: Environment Canada, 1995).

[174]Available online: < http://www.biodiv.org/doc/world/ca/ca-nr-02-en.pdf >.

division of powers in Canada. However, governments are prepared to examine current administrative arrangements …”.[175]

The theme of harmonization and collaborative responses is well illustrated by federal strategy in relation to endangered species. The recent *Species at Risk Act*,[176] is premised on the acknowledgment that the federal *Act* simply represents part of a national response to the issue.[177] Other papers in the Institute’s series on wildlife law deal more specifically with the details of this legislation and it suffices for present purposes to note the carefully drafted preambular language of the *Act* which both acknowledges the CBD and yet at the same time argues the case that, while not strictly necessary to meet Canada’s commitment’s under the Convention, the *Act* will, nevertheless, complement existing legislative undertakings in meeting that goal:[178]

> “Canadian wildlife species and ecosystems are also part of the world’s heritage and the Government of Canada has ratified the United Nations Convention on the Conservation of Biological Diversity, providing legal protection for species at risk will complement existing legislation and will, in part, meet Canada’s commitments under that Convention.”

In sum, much of the CBD is couched at a high level of generality. As a result Canadian governments, federal and provincial, have generally concluded that it is possible for Canada to implement its obligations by using existing legislation.

2.3.4. Conclusions

There has been considerable evolution in international wildlife law from the CITES Convention of 1973 to the CBD in 1992. Both the Ramsar and CITES Conventions focused on specific issues and concerns. The CBD takes a broader view and its entry into force has required state parties to examine how these earlier agreements might be harmonized in light of the broader values of the CBD and so as to enhance coherence and cooperation in their implementation.[179]

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[175]*Strategy*, text following “Strategic Direction” 4.6 (the pdf version on the web is unpaginated).

[176]S.C. 2002, c. 29. See the National Accord for the Protection of Species at Risk, online: <http://www.ec.gc.ca/press/wild_b_e.htm>, other provincial statutes include the *Endangered Species Act* of New Brunswick, S.N.B. 1996, c. E-9.101 and Nova Scotia, S.N.S. 1978, c. 11.

[177]*Ibid.*, preambular paras. 6 and 7.

[178]*Ibid.*, preambular paras. 3 and 4.

[179]This is an ongoing topic of discussion at meetings of the parties. See for example Decision VII/26 of the CBD CoP (Kuala Lumpur, 2004) which called upon its “Executive Secretary, to invite the secretariats of the other four biodiversity conventions (CITES, Ramsar, CMS and World Heritage Convention) to form a liaison group to enhance coherence and cooperation in their implementation”.

2.4. Agreements that Canada has Never Joined and Selected Informal Arrangements

This concluding section of the paper refers briefly to two categories of arrangements not otherwise covered in the paper. First there are important wildlife agreements to which Canada is not a party. A case in point is the Bonn Convention on Migratory Species.[180] Second, while this paper has emphasised legally binding agreements this section also acknowledges the importance of more informal arrangements in relation to wildlife especially the various international initiatives that have been taken in the context of the circumpolar north between the eight arctic states and the long-standing North American Waterfowl Management Plan (1986).[181]

2.4.1. The Bonn Convention

The Bonn Convention provides for the listing of endangered migratory species and migratory species "which have an unfavourable conservation status" as well as other species whose conservation status would benefit from international cooperation. The Convention contemplates that range states should take action to conserve migratory species and should endeavour to conclude agreements on the management and conservation of particular species. Much of the success of the Convention therefore depends upon the willingness of range states to enter into such agreements.[182]

2.4.2. Co-operative Arrangements for Arctic Wildlife

Over the last 15 years the Arctic states (Canada, the United States of America, the Russian Federation, Norway, Denmark, Iceland, Sweden, Finland) have entered into a series of co-operative arrangements with respect to environmental matters, including wildlife issues. While most commentators[183] take the view that these arrangements, which include the 1991 Rovaneimi Declaration on the Protection of the Arctic Environment and its accompanying Arctic Environmental Protection Strategy as well as

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[180] *Supra* note 3. There are other important wildlife agreements to which Canada is not a party by virtue of the regional focus of those agreements. A particularly important example here is the Bern Convention on the Conservation of European Wildlife and Natural Habitats, Bern, Switzerland, 19 September 1979, online: <http://conventions.coe.int/Treaty/en/Treaties/html/104.htm>. The Convention's principal focus is member states of the Council of Europe but it does admit of the possibility of accession by non-members states (Articles 19 & 20).

[181] *Supra* note 4.

[182] For a recent assessment see Richard Caddell, "International Law and the Protection of Migratory Wildlife: An Appraisal of Twenty-Five Years of the Bonn Convention" (2005), 16 Colorado Journal of International Environmental Law and Policy 113.

[183] Koivurova, *supra* note 11, canvasses the different views.

the 1996 Declaration Establishing the Arctic Council,[184] do not give rise to binding legal commitments, they do have a certain normative weight and are of considerable practical significance.

One of these co-operative programs is CAFF, the program for the Conservation of Arctic Flora and Fauna. This program was one of the original four programs (the others were the Arctic Monitoring and Assessment Program, Protection of the Arctic Marine Environment and Emergency Preparedness and Response) adopted as part of the original 1991 Arctic Environmental Protection Strategy. CAFF has been continued since 1996 under the auspices of the Arctic Council. While the Arctic Environmental Protection Strategy placed considerable emphasis on the importance of the exchange of information, CAFF has also adopted a number of strategies and action plans[185] dealing with such matters as the conservation of murres, and a strategy on a Circumpolar Protected Areas Network as well as a Strategic Plan for the Conservation of Arctic Biological Diversity.

2.4.3. North American Waterfowl Management Plan

First negotiated in 1986, the original version of the North American Waterfowl Management Plan[186] was adopted by only the United States and Canada although from the outset the text recognized the importance of participation by Mexico. Mexico ultimately joined in 1994. The Plan was framed around eight principles. Principle 1 recognized the importance of long-term planning within a framework provided by the U.S.-Canada and U.S.-Mexico Conventions. Principle 3 recognized the importance of habitat while other principles referred to such things as ongoing recreational and subsistence harvesting and the need to pool public and private resources to facilitate work on the Plan. Subsequent sections of the Plan addressed sequentially ducks, geese and swans before addressing the important implication of loss of habitat. The Plan established a number of specific habitat goals framed in terms of protecting and enhancing additional acreage for a variety of different purposes including breeding, migration and wintering. The Plan concluded with a set of recommendations for future action. The Plan has been under the continuing review of a Committee which serves as a forum for review and monitoring of the Plan. The Committee has no regulatory authority.

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[184] These and related documents are all available on the home page of the Arctic Council: <http://www.arctic-council.org/>.

[185] For details, see website: <http://www.caff.is/>.

[186] *Supra* note 4.

The Plan (including the governing principles) has been revised from time to time[187] and the goals updated. The state parties along with other participants have adopted a variety of species and habitat joint ventures.

2.5. Conclusions

This paper aimed to provide an overview of international wildlife law as it applies to Canada. The paper began with a discussion of the main sources of international law generally and the relationship and interaction between domestic and international law. The paper then provided an account of the key bilateral, regional and global wildlife instruments to which Canada is a party. Where possible, the paper also provided some discussion of domestic implementing legislation.

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[187]*E.g.* the *1994 Update to the North American Waterfowl Management Plan, Expanding the Commitment* and the *1998 Update to the North American Waterfowl Management Plan, Expanding the Vision.*

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