ABORIGINAL RIGHTS AND THE MIGRATORY BIRDS CONVENTION:

DOMESTIC INSTITUTIONS, NON-STATE ACTORS AND INTERNATIONAL ENVIRONMENTAL GOVERNANCE

By

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A dissertation submitted to the
Faculty of Graduate Studies and Research
in partial fulfilment of the requirements for the degree of
Doctor of Philosophy

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Ottawa, Ontario, Canada

December 2000

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ABSTRACT

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Ph.D. Dissertation
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The 1916 *U.S.-Canada Migratory Birds Convention* constitutes the legal foundation of the continental regime making possible the management of migratory birds populations in North America. While considered a success in international environmental governance, the Convention failed to fully recognize the special needs and rights of Aboriginal Peoples who depend on the continuing harvest of waterfowl for their subsistence during the spring. In order to answer long-standing grievances, the national governments of Canada and the United States have attempted twice in the last thirty years to amend the Convention. A first attempt led to an agreement in 1979 but it failed to be ratified. It took a second agreement, signed in 1995, to finally succeed in amending the continental regime. How can we account for this difficult process of international regime change? What finally triggered the process of regime change after sixty years of injustice? Why did the 1995 agreement succeed while the 1979 agreement failed?

This dissertation answers these questions by providing an in-depth examination of the politics of the case. We demonstrate that changes in the domestic political environment of both countries were important in triggering efforts to change the Convention and that the constitutional rules for treaty-making in both countries played an important role in structuring the politics of regime change. In the 1980s, the U.S. Senate veto over treaty approval helped a transnational coalition of environmentalists, recreational hunters and state/provincial wildlife agencies defeat the 1979 agreement against the will and efforts of both national governments. In the 1990s, national governments successfully amended the Convention only after concessions to non-state opponents, a lobbying campaign by the Canadian government in the U.S. and changes in Canadian constitutional law helped them overcome the threat of the American Senate's veto. Overall, the dissertation suggests that our understanding of international regime change could be advanced by better accounting for the role of transnational coalitions of non-state actors and domestic political factors, such as constitutional rules for treaty-making.

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INTRODUCTION

The U.S.-Canada Migratory Birds Convention is one of the oldest international agreements in the world for managing a shared environmental resource and it is also considered one of the most successful in the history of international environmental management. Since 1916, it has been the cornerstone of a complex set of norms and procedures – what is referred to as a regime – that has made it possible to preserve the migratory birds populations of North America from decline and potential extinction. Unfortunately, since its ratification, the Convention has also been an important object of grievance and injustice for northern indigenous[1] communities who have seen some of their most valued cultural and environmental practices forbidden by some of its core provisions. By prohibiting them from harvesting waterfowl during the spring reproductive season even for subsistence purposes, the Convention has been trampling Aboriginal peoples' rights and has made it more difficult for them to meet their essential social, nutritional and cultural needs for the greater part of the past century.[2]

While this problem had long been acknowledged, it took over sixty years after the Convention was ratified for a significant effort to be deployed to rectify this situation. And once the Canadian and American governments committed to the change, it took almost twenty years of efforts to amend the Convention. From 1978 to 1997, both governments have devoted considerable energy and resources to securing an amendment to the Convention. A first attempt led to the successful signature of a protocol of amendment in December 1979. However, the *1979 Protocol amending*

the Migratory Birds Convention was never ratified and made into law. It took a second attempt and the ratification of the *1995 Protocol amending the Migratory Birds Convention* in 1997 to successfully change the continental bird management regime in favour of indigenous subsistence hunters. How can we account for this difficult process of international regime change? Why did it take so long to initiate the amendment process? What factors finally triggered the process of change after more than sixty years of injustice? Why was the amendment so difficult to secure? Given that the two protocols dealt precisely with the same issue and involved the same policy actors, how are we to account for the two different outcomes of the 1979 and 1995 protocols of amendment? Why did the 1995 Protocol succeed where the 1979 Protocol failed?

The purpose of this dissertation is to provide some answers to these questions and to further our understanding of how international environmental regimes can change over time. To answer these questions, I needed to investigate the history and politics of this controversy about the recognition of special rights to indigenous peoples to harvest waterfowl for subsistence purposes throughout the year in both Canada and Alaska. The dissertation provides a detailed examination of this history and politics involving wildlife authorities, environmentalists, recreational hunters and indigenous peoples. In Canada, wildlife policy has been relatively under-investigated in comparison to policies dealing with pollution issues and sustainable development and this dissertation is a modest contribution to filling this gap in policy research.

To understand the political dynamics and conditions that led to the changes in the Migratory Birds Convention, it was also necessary to draw from the body of knowledge accumulated over the last decades about international environmental regimes. However, a survey of the regime literature shows that the problem of regime change remains under-investigated and that it largely rests on an ontological division between domestic and international politics that is unproductive in an age of increasingly globalized politics. Moreover, as I will argue, existing explanations of regime change are insufficient for convincingly explaining the recent history of the Migratory Birds Convention. For these reasons, the dissertation also provides a new exploratory framework for analysing international regime change. This framework is less state-centric than current explanations of regime formation and change. In particular, I argue that an appropriate understanding of the politics of international regime change requires accounting for the role of transnational politics, constitutional procedures regarding treaty-making, and domestic political conditions affecting the behaviour national states in international negotiations.

Explaining the recent history of the Migratory Birds Convention

In the case of the Migratory Birds Convention, my contention is that domestic political conditions, constitutional procedures for treaty-making and the transnational politics of non-state actors are essential variables for explaining the sources of regime change, the political dynamics associated with the amendment process, and the contrasting fates of the 1979 and 1995 protocols of amendment.

More precisely, the dissertation will show that the amendment process launched in 1978 was mostly triggered by changes in domestic political conditions in Canada and the United States. While northern grievances about the Convention had existed for decades, it is the rise of aboriginal militancy in the 1960s and, more importantly, the signing of land claims agreements with northern indigenous nations for the purpose of securing the orderly exploitation of northern natural resources that led national governments to actively pursue an amendment. Even after the defeat of the 1979 Protocol, it is domestic factors, namely a series of judicial decisions by domestic courts, that created sufficient pressures for national states to re-launch the amendment process. These domestic sources of international regime change are not adequately accounted for by prevalent hypotheses about regime change.

The dissertation also shows that transnational relations and domestic institutions have been important factors in the politics of amending the Migratory Birds Convention. In particular, I argue that the 1979 Protocol was essentially defeated by a transnational coalition of environmentalists, recreational hunters and sub-national wildlife state agencies opposed to more generous provisions for indigenous subsistence hunters for fear that these amendments would threaten bird populations, affect their own quotas of the resource and generate new injustices among stakeholders. This transnational coalition of non-state and sub-national state actors defeated regime change despite the considerable efforts of national states to adopt such an amendment. Again, this is a result that is difficult to account for under existing frameworks for analysing international regimes.

Finally, the dissertation also shows that domestic institutions can be important variables for explaining the politics of international regime change. Constitutional procedures for treaty-making vary from country to country and they provide for a varying number of institutional veto points that can be used to block changes in international agreements. These veto points, their number and their ease of access, make the domestic political process of regime members more or less permeable to political opposition, including opposition by transnational coalitions of non-state actors. As a result, the presence of institutional veto points, and their distribution among regime members, will affect the politics of regime change, making such changes more or less difficult and affecting the strategic behaviour of political actors.

In the case of the recent political history of the Migratory Birds Convention, the dissertation will show that the U.S. Senate veto over treaty approval played an important role in the politics of amendment. The relative unavailability of veto points provided by constitutional procedures in Canada made the U.S. the privileged target of transnational opposition. In 1979, while the opponents of the subsistence amendment were unable to block regime change in the context of the less permeable Canadian institutions, the transnational coalition of opponents was able to prevent the same change by focusing on the more fragmented American institutions. As a result of the institutional characteristics of both countries included in the regime, the transnational politics associated with regime change was clearly targeted on opposing the changes in the United States.

Moreover, the dissertation shows that, if the 1995 Protocol was successfully ratified, its success came as a result of an extensive effort by national states, and especially by Canadian wildlife authorities, to weaken the opposing coalition of environmentalists, recreational hunters and wildlife sub-national state agencies that had defeated the 1979 Protocol. These efforts, which were unparalleled compared to those associated with the 1979 Protocol, included granting concessions to opponents by modifying the terms of the amendment and winning over others by implementing an extensive strategy of advocacy in the United States. These significant advocacy and outreach measures by national wildlife authorities, and which differentiate the politics of the 1995 Protocol from the politics of the 1979 Protocol, were largely the result of the need for state actors to prevent the potential use of its veto by the U.S. Senate. In sum, domestic constitutional procedures structured the politics of amendment by requiring the development of a broader coalition of supporters and by directly affecting the strategy of national states pursuing regime change.

Methodology

The dissertation is essentially an in-depth analysis of a single case spanning about twenty years (1978-1997). While the case study is clearly the prevalent research strategy for the study of international regimes, its choice may still warrant some justification. Firstly, the theoretical issues at the heart of the dissertation particularly call for an in-depth and qualitative analysis of events. Not only have case studies been the method of choice in the analysis of international regimes but studies of the independent effect of institutions in policy-making have also stressed that

institutions matter mostly by their effect on the purposeful behaviour of actors: they provide norms of behaviour or an incentive structure that shapes the actors' strategies in influencing policy outcomes. In this context, it is important to make sure that the research design does not seek solely to impute a direct causal relation between institutions and policy outcomes. We must allow for a fuller examination of the interaction among political agents in their attempt to influence policy outcomes in order to identify how the institutional context of politics might have influenced the results. A contextualized and qualitative analysis constitutes the only approach that would allow to bring those socio-political dynamics to light.

Secondly, while a single international agreement is examined, the research design in fact allows us to divide the case into a set of four observations and to pursue two lines of comparison. The first line contrasts the experience of the 1979 Protocol (1978-1987) to the experience of the 1995 Protocol (1987-1997). Here the objective is to associate the relative success achieved by both protocols as well as their inherent characteristics with differences in the political processes leading to their negotiation and ratification attempts. This approach will allow us to bring to light significant differences in the transnational politics and domestic institutions that affected these respective attempts at policy change.

The second line of inquiry focuses on the differences and similarities between how this same issue (amending the Migratory Birds Convention to allow an Aboriginal subsistence spring harvest) has evolved in the different institutional settings of Canada and the United States in the first and second periods. This

approach allows me to contrast four distinct observations (U.S. 1979, Canada 1979, U.S. 1995, Canada 1995) and to attempt to associate different outcomes with the particularities of the respective domestic political institutions. By following both lines of inquiry, I should be able to make the most out of this single case study and assure a reasonable scientific foundation to the analysis.

Finally, I mean to use the case of the Migratory Birds Convention's amendment as both a critical case and a tool of exploratory research. As a critical case, the study argues that prevalent state-centric theories of regime change fail to explain adequately the recent history of the Convention. But at the same time, I use the case to explore the potential of adopting a new theoretical framework to the study of international regime which would better account of the role of transnational coalitions of non-state and sub-national actors, the structuring effect of constitutional procedures and the importance of changing domestic political conditions. To be sure, the Migratory Birds Convention only provides a first illustration of the usefulness of such a new framework, one limited to the North American institutional context as well. But, after this first venture, I hope that the framework could be extended to new cases and other sets of bilateral or multilateral agreements. In sum, on the basis of this first exploratory case, a broader set of cases could be investigated to assist in the development of more general hypotheses.

In developing our qualitative analysis, I rely mainly on two sources of data: the review of archival documents and a series of unstructured and semi-structured interviews with key informants. Government archival documents were obtained from

the National Archives of Canada (especially RG 108 and RG 109), the National Wildlife Research Centre, and the Canadian Wildlife Service in Ottawa. Several interviewees also provided me with personal notes as well as memoranda and letters pertaining to the history of the Migratory Birds Convention. In total, I reviewed several hundred documents, including federal correspondence with non-governmental organizations, Aboriginal associations and the American government, internal memoranda of various departments, issue papers and backgrounders, various reports, legal opinions from the Department of Justice and personal notes. In addition to these sources, I also relied on additional official and unpublished documents available at the Environment Canada's library as well as on unpublished documents obtained from Aboriginal organisations and non-governmental organisations associated with the case. These documents provided the main source of information for the empirical part of the dissertation.

Interviews have been used mainly in two ways. In the early part of the research, about half a dozen exploratory interviews were held with key informants from the Canadian Wildlife Service. These long interviews were unstructured and served primarily to gain a better understanding of the events spanning twenty years. A second round of interviews with representatives from environmental groups, sport hunters associations, and Aboriginal organisations were then held throughout the research process. These interviews were semi-structured and were generally used to confirm or clarify information obtained through the written material. The content of these interviews varied according to the timing and nature of the interviewees' involvement in the case. In total, 47 interviews were conducted with federal and

provincial officials, representatives of national Aboriginal groups, conservation groups and recreational hunting associations.

With a few exceptions, interviews were done on the promise of confidentiality and on a "not for direct attribution" basis. This approach was strongly recommended to me by interviewees from the outset of the interview process. The events described in the dissertation are fairly recent, many issues regarding the implementation of the subsistence amendments are still unresolved, and several individuals associated with the failures and successes described in the dissertation are still active in environmental policy. As a result, confidentiality was seen as an essential condition for information sharing. On the few occasions where interviewees are identified, there was no promise of confidentiality and their consent was granted at the time of the interview.

The structure of the dissertation

The dissertation has three parts, composed of seven chapters. The first two chapters set the theoretical framework while the following five chapters provide an empirical analysis of the politics regarding Aboriginal peoples' relationship to the U.S.-Canada Migratory Birds Convention. The three chapters of the second part investigate various aspects of the history and politics of the subsistence rights controversy. They provide important information for understanding the problem at the heart of the politics of amendment. The last two chapters provide an analysis of the politics associated with the two consecutive attempts to amend the Convention. It

is in these two chapters that the hypotheses developed in chapters one and two are applied to the empirical case.

The first chapter places the study in the context of the literature on international environmental regimes. After presenting a synthesis of regime theory, I show that this theoretical approach has under-investigated the role of non-state actors in world politics and that, while this may have represented a short-coming in the past, the contemporary processes associated with globalization reinforce the case for their inclusion at this stage. I argue that, for both empirical and theoretical reasons, an adequate understanding of the politics of international regime change necessitates that greater analytical importance be given to domestic political conditions potentially underlying regime change, to the domestic institutional environment structuring treaty-making, and to transnational politics involving non-state and sub-national state actors that may affect regime change. On the basis of the exploratory framework proposed in the chapter, I then identify two sets of hypotheses that will guide my analysis of the Migratory Birds Convention's recent history.

In order to move closer to a theoretical framework that would be appropriate for the North American context, the second chapter examines in some detail the nature and evolution of the constitutional procedures in the United States and Canada with regard to treaty-making. Building on the idea that the influence and strategies of organized interests are partly determined by domestic political institutions, I argue that constitutional rules for treaty-making in Canada and the United States establish different parameters for transnational actors active in the two countries.

Moreover, a closer examination of the legal intricacies and the historical evolution of constitutional treaty powers in both countries reveals a more complex picture of their institutional structure than the one generally presented by comparative neoinstitutionalism. Depending on whether the policy issue considered falls within provincial jurisdiction, Canadian institutions may reveal themselves to be more permeable than American institutions. However, as far as the Migratory Birds Convention is concerned, I argue that the American Congress, especially the U.S. Senate, is likely to become the main focus of political activities for actors in both countries.

Chapter three then provides an analysis of the historical roots of the indigenous subsistence rights controversy in North America. It explains the origins and nature of the U.S.-Canada Migratory Birds Convention and how it came to disregard the needs of people living a subsistence way-of-life in the northern part of the continent. The chapter shows how the Convention did not only come out of the necessity to extend protective measures over the resource's migratory range but it also came out of the necessity to establish federal constitutional jurisdiction over migratory birds through the treaty powers of both federal governments. In the context of the battle that ensued over the protection of bird populations, which involved a complex array of sport hunters, market hunters, conservationists, state governments, scientists and hunting equipment manufacturers, the needs of a northern constituency that was largely disorganized and politically unimportant were taken into account only marginally. In contrast to prevailing explanations found in the literature and official documents, I argue that it is ultimately in this political context, rather than in the ignorance,

oversight or prejudice of treaty negotiators, that we find the historical roots of the subsistence rights problem.

In order to provide for a fuller understanding of the political controversy associated with the amendment of the Migratory Birds Convention in the latter part of the last century, chapter four then explores the political economy of the Aboriginal subsistence rights issue with regard to waterfowl harvesting. I show that, while representing a small percentage of the annual waterfowl harvest in North America, the Aboriginal subsistence spring harvest has great nutritional, social and cultural significance for Aboriginal peoples in the North. As such, demands for the legalization of the spring harvest have been intimately associated with struggles for self-determination. However, by claiming a better access to the resource during the closed season, subsistence users nevertheless raise concerns about the sustainability of the resource and the impact of their demands on the relative share of other users. As a result, they come up against competing stakeholders, such as environmentalists and sport hunters, who also value the resource and who represent resourceful and organized constituencies in the field of conservation policy. By examining the interests at stake, this chapter explains the make-up of the coalitions of groups involved in the politics of the MBC.

Chapter five examines the discourse of the coalitions of organized interests involved in the debate over the recognition of Aboriginal peoples' right to harvest waterfowl during the spring season. Its objective is to probe deeper than the recognition of divergent economic interests to get at some of the underlying reasons

for disagreement over the nature of Aboriginal subsistence rights. I show that, without denying the obvious material interests associated with the allocation of a limited resource, the subsistence debate has largely evolved as an issue of justice for Aboriginal peoples and, as such, it has become intimately associated with larger struggles for political autonomy and cultural survival. But in claiming, as a matter of rights, greater access and control over waterfowl resources in order to protect their traditional livelihood, Aboriginal peoples have encountered sport hunting associations and environmentalists that hold divergent views of contemporary resource management. To the indigenous peoples' conception of the spring subsistence harvest based on historical group rights and Aboriginal self-regulation, these groups have generally opposed a conception of wildlife management founded on a liberal version of individual equality rights and scientific resource management and state regulation.

Chapter six examines the period ranging from 1978 to 1987 and it explains the failure of the 1979 Protocol amending the Migratory Birds Convention. As sketched out above, I argue that the sudden impetus for seeking an amendment to the Convention is intimately related to domestic political developments and, in particular, to the negotiation of settlements to northern Aboriginal land claims in both Canada and the United States. I also argue that the 1979 Protocol was defeated by a transnational coalition of environmentalists, recreational hunters and sub-national wildlife state agencies who gathered sufficient support to stall the Protocol's approval in the American Senate.

Chapter seven finally covers the events leading to the successful ratification of the 1995 Protocol amending the Migratory Birds Convention and it attempts to explain its relative success by exploring its differences from the first attempt at policy change. I argue that, as in the 1979 case, the main impetus for a renewed attempt at regime change came from domestic developments. The importance of a series of court cases, including the Canadian *Flett*, *Arcand* and *Sparrow* decisions, on the politics of regime amendment is demonstrated. The chapter also shows how the strategy of national state actors, and particularly Canadian wildlife authorities, for gaining the ratification of the 1995 Protocol was strikingly different from the one employed for the 1979 Protocol. In order to overcome previous obstacles to the amendment in the United States, the Canadian authorities were forced to modify their behaviour abroad and at home, opening the terms of the amendment at home and engaging in political advocacy in the United States.

Part I

The Theoretical Framework

Chapter 1

INTERNATIONAL ENVIRONMENTAL GOVERNANCE AND TRANSNATIONAL POLITICS

Over the last twenty years, the concept of international regimes has become an important theoretical tool for the analysis of supranational governance.[3] The necessity to coordinate the behaviour of state and non-state actors in order to manage problems of interdependency in the absence of a supranational sovereign authority led to the formation and development of bodies of rules and organisations providing frameworks for cooperation and decision-making in many areas of international public policy. Among those policy areas where regimes are a prevalent occurrence, the management of environmental problems, ranging from the allocation of international common-pool resources to the protection of endangered species, stand as an important focus of research. Consequently, regime analysis has been prominent in the study of international environmental governance.

Despite a growing body of literature, regime theorists have generally neglected the importance of domestic politics and non-state actors in the formation and the evolution of international regimes for the protection and the management of environmental resources. Preoccupied by the respective role of military and economic power, styles of interstate negotiations, the role of international organisations, and the respect of social norms in the realm of relations among national states, debates over regime building, regime change and regime effectiveness have paid less attention to

the linkages between domestic politics and international governance. Consequently, they may have neglected significant variables in the evolution of international environmental regimes: the transnational political activities of non-state and sub-national state actors and the mediating influence of domestic political institutions. In this chapter, I argue that our understanding of international regimes could be improved by paying more attention to these factors. I also propose an exploratory framework for including some of these variables into our explanations of regime change by focusing on domestic political conditions, constitutional rules about treaty-making and the influence of transnational coalitions of non-state and sub-national state actors.

The chapter begins with a consideration of the concepts of international governance and environmental regime. In the second section, we examine some of the theoretical and empirical reasons underpinning the need for a greater consideration of non-state actors and domestic politics in regime analysis. The final section concludes by outlining an alternative approach to conceptualising regime change, giving greater importance to the structure of domestic political institutions and transnational coalitions of sub-national state and non-state actors.

International regimes and environmental governance

Since the 1940s, the growth in interdependency among national societies has brought greater attention on the nature and conditions of governance at the international level. The impossibility of isolating oneself from many turbulences occurring in the world economy or from the adverse consequences of unsustainable

ecological practices in foreign countries serve to remind us of the need to find ways to coordinate and regulate social practices crossing national boundaries. And, while practitioners have gone about the task of finding ways to produce such international governance in the real world, international relations scholars have been studying the conditions that make it possible and the impact that it may have on the diversity of people populating the world scene.

Over the last twenty years, this examination of specific occurrences of international governance in specific issue areas has led many scholars to leave behind the image of an anarchical international society that has characterized the study of international relations for so long.[4] With the development of a more extensive treaty system, national states, it has been noted, are increasingly developing rules-based governance arrangements[5] that serve to stabilize mutual expectations and coordinate collective behaviour in areas where such coordination is required to attain some mutually desired objectives.[6] These "sets of rules, decision-making procedures, and/or programs that give rise to social practices, assign roles to the participants in these practices, and govern their interactions", constitute international regimes.[7]

It is now generally acknowledged that regimes are increasingly prevalent across a wide range of policy areas, ranging from monetary relations to population migrations. And international environmental politics is no exception. In fact, the interdependencies created by environmental externalities and "tragedies of the commons" represent typical cooperation problems that regimes are supposed to solve. Unsurprisingly, since the 1970s, a large number of international regimes have

emerged to deal explicitly with problems in many areas of natural resources and environmental protection, ranging from the protection of the ozone layer to the protection of migrant or endangered species, and to avoid the depletion of common-pool resources.[8] In this context, regime theory has also become the main approach to the study of international environmental governance.

Authors generally treat regimes as functionally and spatially-defined. While it can make sense to talk of a general international regime for economic relations, regimes are generally more narrowly defined and issue-focused, especially in the environmental area. Thus, conceptually, while governance refers to a form of social regulation through the generation of social institutions, regimes are issue-specific and geographically-defined. They refer to *particular sets of rules, procedures and norms* dealing with the regulation of conflicts *over specific issues*. And while these norms, rules and procedures are generally codified and expressed through international treaties, they may incorporate informal elements.[9]

For greater clarity, the regime literature has also stressed the distinction between institutions and organisations in the analysis of international politics. While international organisations refer to the existence of "material entities" with a legal personality and the command of power resources (e.g. information, human and financial resources, legal authority, etc.), the notion of institutions associated with regimes refers more broadly to established social practices attributing rights and obligations to policy actors and establishing rules constraining their behaviour for managing common problems.[10] Consequently, while some organizations

(international secretariats or international dispute resolution bodies, for example) can be attached to a regime, it does not need to be the case.

To understand how international regimes are created and how they can evolve over time, it is necessary to rely on some theory of the relationship between states and international norms. While regimes emerge to address specific collective problems, they can not be simply explained as a functional response to these problems. While they embody rules that influence the strategic behaviour of actors and independently affect political outcomes, they are themselves the product of political struggles. Similarly, while the fundamental *raison-d'être* of regimes is to affect the behaviour of social actors, they do not solely determine such behaviour. In sum, to account for the role of agency in social change, an explanation of the development and the impact of international regimes must provide some understanding of the relation between international institutions and other variables explaining social outcomes.

Power, interests and institutions in regime theory

What exactly is the nature of the relationship between state power and international regimes? How do international norms affect state behaviour? How do regimes relate to the utilitarian self-interest of their members? These questions have occupied much of the theoretical debates about regime formation. A brief consideration of these debates will allow us to better understand how the main schools of thought see international regimes and will provide an essential background for understanding the main hypotheses seeking to explain regime change in the next section.

Under a prevalent interpretation, regimes are the outcome of a mutually beneficial negotiation among states. According to this view, regimes emerge to solve collective action problems, when, for example, the strict rational pursuit of short-term self-interest would prevent states from capturing potential mutual social benefits or lead to the destruction of currently available benefits (such as the depletion of unrestricted common-pool resources).[11] In the absence of a solution imposed by a central authority, cooperation for the development of mutually agreed rules to restrict and guide the behaviour of actors for the capture of mutual gains (or the avoidance of mutual harm) become essential to overcome collective action problems.[12]

This "collective action problem" approach seems to reflect a classical liberal bias in regime theory, emphasising utilitarian concerns and rational welfare-maximizing assumptions by participating states. National states agree to co-operate, consequently foregoing some of their autonomy or sovereignty, for the purpose of improving their welfare. While it should be noted that the existence of an international regime does not imply the socially optimal allocation of resources or equitable results (differentials in power and negotiation skills, as well as imperfect information, among others, typically resulting in sub-optimal and inequitable results),[13] regime theory does tend to rely on liberal-utilitarian notions of contracting for mutual benefits.

This utilitarian bias has generated severe criticism from traditional international relations scholars. As Strange forcefully points out, the existence of a dense institutional environment in international politics is not rendering irrelevant the

nature of power distribution among state actors and cannot be conceived as emerging in a power vacuum.[14] In fact, for some structural realists, international rules tend to be the mere product of power relationships and would generally reflect the domination of some states rather than the outcome of a mutually beneficial negotiation.[15] For example, an extreme, yet often quoted, theoretical statement associated with this view claims that the presence of a hegemonic state is a necessary condition for international cooperation.[16] In this perspective, only a hegemonic state possesses the resources to produce international rules and to enforce them in an anarchical society.[17]

This is a point partly conceded by regime theorists, even by some of the most dedicated advocates of neoinstitutionalism.[18] Oran R. Young, for example, concedes that the presence of a dominant power may at times be determinant in the emergence of some regimes. However, it is not the case for all regimes. Consequently, while structural power remains a significant variable, it cannot be considered the sole or even the most important factor. Empirical investigations have revealed that several international regimes emerge in the absence of hegemonic states and that, in many cases, structural power alone fails to explain the timing and substance of regimes.[19] When it plays a significant role in regime formation, it often operates in more subtle ways, most notably through leadership.[20]

Moreover, logically, the fact that the institutional environment is affected by the distribution of power in international society hardly constitutes a reason for dismissing its effect on policy outcomes and on the strategic behaviour of

international actors. International social institutions cannot be easily dismissed or modified, even by dominant state actors, without being subjected to important economic and social costs.[21] As such, the spread of international regimes in the last thirty years has been associated with a growing interdependence which "increased the capacity of all relevant actors to injure each other".[22] As a result, even when a regime provision forbids a utility-improving behaviour in the short term, self-interest can still be a motivation for compliance if parties understand that established norms, rules and principles serve their long-term interest by limiting short-term beneficial behaviour that may have destructive long-term implications.[23]

Too much emphasis on the concept of structural power also masks the fact that an environment of incomplete information and uncertainty of outcomes makes the formation of preferences, and the making of strategic choices reflecting those preferences, a messy business for state actors. Pure power and interest theories of international relations tend to assume that state can easily identify their preferences, the action goals that would serve these preferences better, and the strategic instrumental actions that would result in the attainment of these goals. However, the growing complexity of social problems, and of the international system itself, makes these assumptions problematic. In many instances, state actors must make decisions in an environment of uncertainty about the goals that would best maximize their preferences and about the result of different courses of action. Adequately assessing all possible courses of action is simply impossible.[24]

Moreover, social complexity does not only make it harder for dominant actors to impose order on the international system, it also forces all actors to rely increasingly on social norms to guide their behaviour.[25] Or, as social constructivists would argue, participation in social institutions will have an effect on how parties understand their identities and frame their interests. In other words, social institutions are partly constitutive of members' interests.[26] Social institutions help to guide the behaviour of actors, responding to the constraints placed on their strategic behaviour by incomplete information and the shortcomings of rationality.

In sum, while readily recognising the importance of preference configurations (interests) and the distribution of power resources in shaping outcomes, regime theory suggests that, in situations of complex interdependence, the development of social institutions to guide social interactions is a typical outcome. The development of such institutions generally flows from a complex process of bargaining where cognitive processes, procedural constraints, and dependence on collective action are all likely to limit the sheer exercise of structural power. As a result, regime theory is really regime theories. It provides a broad tent that can accommodate, to some extent, a variety of explanations for the creation and operation of regimes.

This is illustrated by even a cursory survey of studies of regime formation, which emphasize a wide range of causal explanations. Some authors stress a necessary symmetry in the distribution of power, others the presence of a hegemonic state. Some authors point to the necessary inclusion of all relevant stakeholders, others the availability of compliance mechanisms. Some underscore the need for

some salient solution to focus the negotiation process, others emphasize common scientific values and shared understandings.[27] From this plurality of causal explanations, empirical research has yet to clearly identify the more cogent hypotheses and this is even more the case for explanations of regime change.

Explanations of regime change

The explanation of changes in international regimes remains a poorly explored area of regime theory. However, in so far as there have been explicit attempts to explain regime change, they have reflected the variety of social explanations outlined in the previous section. Some authors have argued that changes in the underlying distribution of economic power lead to changes in international regimes. These shifts can themselves be the result of the technical evolution of important economic processes or of other broad changes in the world economy. Other authors have focused on cognitive factors affecting international negotiations, such as the impact of bounded rationality on outcomes or broad shifts in values and world views. As Oran Young points out, we are far from an integrated theory of international regime change.[28]

In his recent attempt at developing a research agenda on the topic, Young argues that we can usefully classify available hypotheses in two categories: endogenous and exogenous sources of regime change.[29] As table 1.1 illustrates, a wide series of explanations can already be proposed despite the relative paucity of case studies currently available. Among the endogenous sources of regime change, Young draws attention to changes in the membership of regimes. The evolution of the

international regime for the regulation of whaling, which shifted from a primarily commercial regime to one dedicated to the conservation of whale species after a number of non-whaling states joined the International Whaling Commission, serves to illustrates the importance of this factor. However, cognitive sources of change can also be imagined. For example, the progressive shift from a scientific paradigm valuing maximum sustainable yield to one advocating ecosystem management could explain some of the changes that have occurred in some wildlife regimes.

Table 1.1: Explanations of international regime change

Endogenous factors	Exogenous factors
Disappearance of the problem to be solved or serious shortcomings in performance	Changes in technology affecting the problem or the distribution of structural power
Internal institutional contradictions	Interactions among related regimes
Social learning derived from experience or new knowledge about resolving the problem	Broad shifts in social values or worldviews
Changes in regime membership	Changes in international organisations affecting relations among states
Shifts in members' interests as a result of regime operation	Broad shifts in the overarching structure of power (e.g. decline of hegemonic state)

Source: Created from O. Young (1999) Governance in World Affairs, Ithaca, Cornell University Press, 147-155.

Among exogenous sources of change, Young suggests that broad technological innovations can affect the social and material environment of regimes and bring about some modification of their provisions. For example, the development of high-capacity industrial trawlers probably brought about the modification of some international fisheries regimes. Similarly, overarching changes in the world economy can impact the distribution of structural power among states and change both their

capacity to influence other parties or modify their own interests. In these cases, such systemic changes could lead to changes in specific regimes.

While Young's classification helps map the range of available hypotheses, it remains true to a general limitation of current regime theory: it is exclusively focused on the capacities, interests and behaviour of national states. Whether they are endogenous or exogenous in nature, all of the proposed explanations of international regime change focus on their impact on the behaviour of national states. For example, technological, economic or cognitive changes affect the power or interests of state actors, who in turn seek to modify the substantive provisions of regimes. Similarly, the internal dynamics of regimes lead to a change in the distribution of power among parties, which will then affect the outcomes of on-going negotiations among participating states actors and lead to regime change. Domestic politics and non-state actors shine by their absence. Like explanations of regime formation, emerging explanations of regime change implicitly rely on a billiard-ball conception of international politics. They rely on the premise that national states are the sole significant actors of regime formation and change.

Global Governance and Transnational Politics

Regime theory rests firmly on ontological premises that place sovereign states at the centre of explanations of world politics. Following an overwhelmingly predominant approach in the field of international relations, regime scholars conceive of world politics as a reality constituted by the interaction of state-as-actors, which are themselves conceptualised as unitary entities. Whether they follow a neorealist

logic (maximization of power differentials) or a neoliberal one (maximization of utility, wealth, etc.), states-as-actors are thought to embody a unitary conception of their preferences and strategy in advancing their interest in the international system. Moreover, sovereign states are generally considered the only constitutive actors of world politics. As a consequence of this position, regime theory has entrenched two significant ontological choices: the firm separation of international politics from domestic politics and the relative disregard for transnational and global non-state actors.[30] The remainder of this chapter advocates a reconsideration of these choices, first on theoretical grounds and then drawing on more empirical evidence. Having made the case for reconsidering the role of domestic politics and non-state actors in regime theory, I will then propose a theoretical framework to explore their role in international regime change.

International regimes and state-centric assumptions

While many influential neorealist scholars have firmly resisted calls to expand the ontological horizons of their field of inquiry,[31] several scholars have already called for granting greater analytical attention to non-state actors.[32] In this context, this dissertation is simply situated in a wider theoretical trend acknowledging the need to account for these actors in our analysis of international regimes. However, despite these explicit calls for more openness, the practice of regime analysis has remained mostly state-centric. In the words of Vogler:

> "While most commentators on international environmental politics stress the particular significance of non-governmental organisations and, in line with the liberal-internationalist tradition, the 'rising influence of international public opinion' (Mathews 1991: 32), their focus of analysis

> remains resolutely fixed upon the interaction between nation states. International cooperation is, in effect, regarded as inter-state or intergovernmental cooperation."[33]

Martin List and Volker Rittberger provide a good example of the typically dismissive attitudes of regime scholars toward non-state actors. In a review of regime theory and international environmental management, the authors point out that many analyses of economic regimes in the 1970s had predicted that the new complex interdependence would mean that the problems of international relations would no longer be limited to inter-state relations but would also include relations among social forces (transnational relations). Taking stock of world affairs in the early 1990s, they conclude that states have proven resilient to economic interdependence and that, consequently, the interesting question for international relations is not what will replace the state but how states can collectively manage interdependence.[34]

This argument illustrates an either-or tendency that may prove detrimental to effectively theorizing regime formation and change. The mere resilience of states as important actors in international society offers no argument for excluding non-state actors from our ontological framework. It does not preclude the co-existence of state-as-actors and non-state actors in the realm of global politics: the mere influence of the former does not exclude the potential influence of the latter. In fact, imported into the realm of domestic politics, this position would lead us to exclude societal actors from political explanations that recognise the existence (and resilience) of state power! This shortcoming is increasingly considered problematic by scholars studying international relations. For example, recognizing the limitations of the current focus on national states, Olav Stokke and other authors have recently argued that regime

analysis, and international relation theory more generally, need to consider a larger set of social actors in their causal explanations of international governance.[35]

The reconsideration of an exclusive focus on states-as-actor can take many forms. Non-state actors can be considered as global actors alongside national states in world affairs. Many international non-governmental organizations and multinational private companies attempt to influence the operation of international regimes by participating directly at the international level. The influence of environmental groups in the endangered wildlife trade regime and the role of the insurance companies in international maritime regulations are typical examples.[36] In some cases, authors are even speaking of "transnational" or "private" regimes primarily involving non-state actors without the prominent participation of state actors.[37] In other cases, non-state actors' participation in regime has even been institutionalized by international organisations.[38] In these cases, non-state actors are seen as additional actors populating the world scene. No reference is made to domestic politics.

However, a more comprehensive consideration of the role of non-state actors in international governance can also lead to the reconsideration of the traditional division between domestic and international politics. Non-state actors interested in world affairs have no reason to confine their political actions to the world scene. Their desire to influence the negotiation of international regimes will lead them to engage in the domestic politics that may influence international developments. At home, they will undoubtedly engage in the domestic process for formulating foreign

policy. But the potential impact of direct transnational action by non-state actors on the political processes of foreign countries must also be considered.

Transnational politics will matter to international politics because state actors can not neglect the domestic impacts of their international engagement. Governments must still account for their international actions in the domestic realm of democratic politics and, consequently, they are likely to pay attention to domestic pressures when they enter into international negotiations. Moreover, they will also need to implement at home the rights and obligations created by international regimes.[39] Therefore, it seems unlikely that no attention would be paid to domestic opposition and constraints before, during and after the negotiation of international governance institutions. Finally, the formal constitutional requirement faced by many states for the domestic approval of international treaties is an important source of motivation for paying attention to domestic politics.[40] In sum, the complexities and the constraints represented by domestic politics for state actors, and which likely to influence their behaviour and preferences, makes it hard to preserve an ontological division between international and domestic politics when considering the role of non-state actors in international governance.

Finally, once the convenient ontological premise of a clear and tight separation between the international and national is abandoned, the analyst is forced to think about the domestic realm of politics, and its relation to the international, in their more complex realities. Among these complex realities, we are forced to consider state preferences as the result of a political process instead of axiomatic positions easily

derived from its power or utilitarian interests. The national state is a complex web of relatively autonomous units with potentially conflicting preferences and these multiple units are themselves enmeshed in an entangled web of relations with organized interests composing the domestic and foreign political landscapes.[41] It seems hard to imagine that the fragmented nature of policy domains and the different forms of relations between state actors and organized interests would be considered crucial in the realm of domestic politics and would lose all relevance when the policy issues considered are international in nature.[42] As a result, any consideration of the linkages between domestic politics and international governance should also account for some of the complexity of domestic political systems, including its institutional make-up.

While the above justifications could be considered sufficient in themselves to explore further the role of non-state actors and domestic politics in the development of international regimes, the evolution of politics in the last decades provides even more incentives. Processes of globalization are particularly important in drawing our attention to the changing dynamics of international politics. And according to many authors, irrespective of whether or not past regime theory has erred in neglecting non-state actors and domestic politics, the changing nature of world politics certainly requires such a broadening of its ontological foundations. It is to these arguments that we now turn.

Globalization and the Domestic-International Divide

Globalization refers to a series of processes, most notably the internationalisation of production and finance as well as the expansion of international transportation and communication, that are having a significant impact on the structure of politics by undermining one of the main pillars of political organisation since the 17th century: the principle of state sovereignty. As Camilleri and others have demonstrated, state sovereignty is essentially an historical claim about the organisation of political life - one resting on the ability of state bureaucracies to legitimately control the activities of social actors within their territories, by resorting to the use of legitimate coercion if necessary, thereby establishing a secular order conducive to the development of an orderly social life.[43]

However, by their very nature, historical claims are liable to become less compelling over time as the changing historical context undermines their relevance and credibility or undercuts the instrumental effectiveness that made their real-world implementation possible. As such, the interactive duo of capitalist expansionism and technological innovation appears to be progressively undercutting state sovereignty as the determinant principle of political organisation. It is certainly not rendering the state irrelevant but it is calling for a re-examination of its prominent position and its role in the organisation of political life. At least, the role of the state appears to be changing.

In this perspective, while prominent characterizations of globalization tend to stress almost exclusively the dual internationalisation of production and finance,[44] the processes of integration and fragmentation that we associate with globalization derive

essentially from a more profound structural change in social systems: the nature and pace of technological innovation. As Strange points out, it is this fundamental structural change that made the globalization of production and finance possible and which, through the explosion of cheap and better transnational communication and transportation, contributed to the rise in awareness of many citizens in previously more isolated regions and to the growth in citizens' activism on the world stage.[45]

In effect these technological innovations have led to some fundamental changes in the nature of world and domestic politics, not solely altering the power relationship between national states and transnational firms but also leading many citizens to redefine their previous conceptions of political community and the boundaries of their political engagement.[46] In this sense, globalization is not solely about the erosion of state sovereignty and rising influence of global businesses but it is also partly constitutive of a more intense transnational politics corresponding to a growing integration of domestic and international politics.[47] In this respect, at least two fundamental developments are worth highlighting.

Globalization, political space and communities of meaning

Firstly, globalization is leading people to reconsider the horizons of their political thinking and the boundaries of their involvement in politics. In particular, the practical effects of globalization trends force many people to consider anew the impact of foreign and global events on the lives of their own local communities. In doing so, many people are also reconsidering the boundaries of their political

communities, adhering to communities that often extend beyond national boundaries and that can sustain transnational political activism.

Globalization is creating a deeper interdependence among countries and communities, which is forcing a redefinition of many crucial policy problems and challenging old ways of dealing with them. The increased mobility of capital and production has weakened the capacity (or will) of national states to deal with thorny local problems of environmental pollution or unemployment. New global networks of communication, such as the Internet or satellite links, are challenging communities' ability to uphold local standards of morality. The synergy between these communication networks and the liberalisation of trade are posing challenges to the capacity of national states to protect local cultures. To deal effectively with these issues will require international cooperation. Old local and national solutions are increasingly ineffective and, while some of the processes at the source of these difficulties (i.e. liberalisation of trade and financial flows) could be somewhat reversed, others (i.e. global communication networks) are here to stay.

At the same time, the growing awareness and severity of environmental problems that are truly global in nature, such as global warming or the thinning of the ozone layer, are calling for new global solutions. On these issues, even in the unlikely event of the retrenchment of globalization processes, local communities and national states can not do it alone. Cumulative local decisions about refrigeration in China or about driving in Los Angeles have real consequences for skin cancer levels in Iceland or the B.C. salmon fishery. Planetary (or regional) problems call for planetary (or

regional) solutions but these solutions will require locally-tailored interventions to effectively modify the local behaviours that are constitutive of these global problems.

Moreover, as human beings are coming to terms with the finite nature of our world, the emerging ethic of an environmentally-conscious public is calling into question the sovereignty of states entrusted with the care of unique ecosystems that are considered part of common heritage. The case of the world-wide public movement to save the Brazilian rainforest offers an interesting example of this emerging worldview, where the desire to protect a common world heritage and the principle of national sovereignty often clash.[48] Across several issues, people are increasingly recognising that their fate is intimately related to the fate of others (and the ecological systems supporting life) and they are expressing their sense of belonging to a larger humanity by getting involved in issues previously considered out of their legitimate reach, making claims about the predominance of common interest over the sovereign control of local activities.[49]

In sum, international politics and transnational activities increasingly have direct consequences for domestic political choices and adequately addressing domestic problems increasingly necessitates international cooperation.[50] The domestic and the global are increasingly integrated. These developments have had a significant impact on the role of states in a globalized world,[51] but they have equally affected citizens and other non-state actors. Because the local is increasingly global (local decisions have extraterritorial or global consequences) and the global increasingly local (global economic and communication systems affect domestic

political and social choices), many citizens, often through well-organized groups, are finding it necessary to redefine the boundaries of their political activism, reaching to the global in the hope of having some influence on the international developments that increasingly affect their local conditions.

This growing realisation of the global nature of problems and social dynamics affecting local lives feeds into the broader cultural effects of globalization. Many authors have already noted, often critically, the global spread of a culture of global capitalism. For example, Benjamin Barber's depiction of the conquests of the "McWorld" provides vivid illustrations of the global spread of Western or American commercial culture.[52] Robert Cox paints a similar picture when he argues that the globalization of production accompanies "a process of cultural homogenisation - emanating from the centres of world power, spread by the world media, and sustained by a convergence in modes of thought and practices among business and political elites".[53] The synergy between the spread of global capitalism and the development of global communication networks has permitted the spread of a hegemonic discourse of globalization, a dominant worldview, particularly prevalent in the main circles of economic and state power.

But the influence of this dominant worldview should not mask the concomitant presence of alternative discourses developed and diffused with some success by many citizens and non-governmental organisations. These alternative worldviews take many forms and gain adherents in varying numbers. They can be both particularistic and cosmopolitan in nature. In this perspective, globalization appears to be

simultaneously engendering fragmentation and integration processes.[54] The fragmentation of identities and loyalties in modern societies is a phenomena that has been well documented. Faced with growing social complexity, declining effectiveness of state controls, and the erosion of dominant cultural and moral referents, individuals are reconsidering the hierarchy of their loyalties and re-examining their sense of belonging to alternative communities. Much like the decline of loyalty to the state, the rise of new social movements, the fragmentation of national communities, and the salience of identity politics are all testimonies of this cultural and political fragmentation.

As part of these developments, an emerging global "civil society" is populated by non-state actors that are driven by the realisation of projects representing their alternative view of the world.[55] The broad ethics that are characteristic of many of these environmental, human rights and development non-governmental organisations can be considered as underpinning "counter-hegemonic discourses". For example, through their struggles to alter the allocation of environmental resources and to further environmental protection, transnational non-state actors are *de facto* engaging in the mutual construction of an alternative intersubjective conception of world problems, which seeks to redefine the essential meaning of human-nature relationships.[56] Similar examples can be found in the realm of human rights.[57] In this perspective, transnational non-state actors are also bearers of worldviews, contributing to the articulation and the diffusion of global ethics that stand in sharp contrast to those proposed by the agents of economic globalization. And these

alternative worldviews can sustain their political involvement in a world that is no longer considered to be confined to national boundaries.

It is not my intention to argue that these alternative discourses are about to supplant the hegemonic discourse of global capitalism. But to negate or downplay their existence is to blind ourselves to an important development in contemporary politics. The globalized world is not simply the purview of the hegemonic discourse of global capitalism; it is also the domain of counter-hegemonic discourses articulated by transnational non-state actors.

Transnational activism and organisational capacities

The globalization of communications contributes significantly to the explosion in the number and activism of non-state actors. The growing ability to communicate cheaply and rapidly across national boundaries has helped citizens and non-governmental organisations to mobilize in response to local and global events. Global communication networks are diffusing more effectively information about world events, improving citizens' understanding of the social trends that shape their world and providing examples of alternative forms of social organisation that can be emulated locally. These developments in global communication contribute to what Rosenau calls the "skills revolution".[58] These trends are thought to improve the individual political efficacy of many citizens in world politics.[59] But they also improve the capacity of local actors to organize for international and transnational action.

One indicator of the growing organizational capacity of non-state actors in world politics is simply the growing number of international non-governmental organisations. According to data from the Union of International Associations, the number of international non-governmental organizations dedicated to social change has increased from 110 in 1953 to 631 in 1993.[60] Among these, international environmental non-governmental organizations have grown the most in both relative and absolute terms.

However, even these numbers underestimate the increase in activism because many domestic non-governmental organizations will also engage in transnational political activities, either by themselves or in coalitions and coalitions with other groups. Many national environmental groups have active international programs.[61] Transnational lobbying is now a common strategy for many organisations seeking to influence policy developments at home and abroad. The international campaigns, led by Greenpeace and Friends of the Earth, against clear-cut logging in British Columbia and the Malaysian tropical forests are well-publicized examples but there are many other cases.[62]

At the same time, environmental non-governmental organizations have made used of cheaper long-distance communication and travel to multiply their contacts with other similar organizations. According to Keck and Sikkink, there are now hundreds of environmental networks using these contacts and loose organizational connections to mount specific advocacy campaigns across borders.[63] This growing international activism has also heightened significantly the profile and influence of

non-state actors in both international and domestic politics. For example, the multiplication of parallel non-governmental summits, now accompanying most important international policy conferences, has allowed them to gain unprecedented visibility at these (increasingly numerous) gatherings.

While the growth of these activities by non-state actors has intensified transnational relations and rendered national and world politics more complex, state capacities to effectively control these relations have not kept pace.[64] State bureaucracies' resources, ranging from knowledge to legislative authority, are increasingly inept at managing the new complex social environment and state actors are often scrambling to meet the new challenges.[65] While the old international diplomacy granted national states a clearly dominant position in world affairs, the new transnational political landscape, progressively emerging since the 1970s, provides state actors with a less advantageous terrain: one where they must contend with a larger number of better informed, more skilful and resourceful transnational actors.

The preceding analysis does not lead one to argue for the disappearance or irrelevance of the state-as-actor in the realm of world politics. The claim of national sovereignty has been and remains the most effective claim to ground the legitimate exercise of authority both at the domestic and international levels. Consequently, states remain central actors in world politics, even in this era of globalization. But the technological and social processes undermining the traditional effectiveness of this claim, by weakening the state's ability to control social behaviour within its borders

and by weakening its pretension of effectively representing its citizenry, have empowered other actors to act within and across national boundaries. Transnational actors are no longer insignificant players on the world stage and, by themselves and through transnational coalitions, they increasingly pursue their objectives by acting beyond their traditional boundaries.

In many ways, there are no longer two distinct yet related politics, the international and the domestic, but a series of integrated political spaces, enmeshing the global and the domestic in multiple ways, and which boundaries are drawn by actors themselves as they cognitively frame the issues facing them and define themselves the spatial and conceptual realm of their political action. States, even if they remain crucial agents in shaping international governance regimes, are not the sole significant agents shaping the multiple orders that structure the behaviour of state and non-state actors in different policy areas.

To account for the integrated nature of this politics, scholars need to think across disciplinary divisions between international relations and domestic politics and they need to rely on an ontology of global politics that better accounts for the multiplicity of actors acting within these domestic-international spaces. There will be, obviously, multiple ways of doing this. By their very nature, ontologies can encompass a large number of theoretical approaches. The last section of this chapter presents one approach for starting to bridge the divide between the study of domestic and international politics and for accordingly conceptualizing regime change.

Domestic Institutions and Non-State Actors in Global Governance

In previous years, there have been a few attempts to account for the influence of domestic factors in changes in international governance. Among those attempts, the two-levels game theory proposed by Robert Putnam and the epistemic communities approach developed by Peter Haas have been the most noted in the academic literature focusing on the formation and evolution of international regimes.[66] However, they both suffer from important shortcomings. Putnam succeeds in bridging domestic and international politics by stressing the strategic implications of the domestic environment for diplomats.[67] But, at the same time, he essentially retains the ontological division between the two-levels, failing to account for any direct transnational actions by non-state actors.[68] The epistemic communities approach, and some related studies, focuses on the cognitive influence of transnational networks of scientists and decision-makers.[69] However, it fails to account for the institutional complexity of domestic political systems and non-cognitive sources of influence seem to be under-estimated.[70] It has also met with limited empirical success.[71] In this section, I provide an alternative framework more resolutely focused on the transnational actions of domestic actors and the structuring impact of domestic institutions.

The recent work of Thomas Risse-Kappen and others suggests that a more fruitful approach to the study of transnational politics could be to focus on the role of transnational coalitions of domestic actors and on the institutional environment that mediate their access to domestic policy processes.[72] But while their framework provides considerable progress in accounting for the complexity of domestic political

systems, it relies on an imprecise concept of domestic political structures and lacks a clear focus on treaty-making. This dissertation extends the framework by a more detailed and contextualized consideration of the domestic institutional environment of treaty-making and relies on a narrower conceptualization of domestic institutions.[73] This approach also has the advantage of combining a consideration of domestic institutions with a more direct focus on the influence of transnational coalitions of state and non-state actors on the strategic context of international negotiations.

The Theoretical Framework

Transnational politics can be usefully interpreted as a series of strategic interactions among state and non-state actors which occurs within a unified political space, i.e. one where policy actors can cross national boundaries and where claims of sovereignty no longer serve as determining categories as much as represent privileged power resources in the hands of state actors. Within the context of these politics, political actors are still constrained by social institutions present both in international and domestic societies. Within the constraints of these institutions, policy actors seek to influence political outcomes by deploying strategically the resources that they can mobilize, such as legitimacy, money, command of infrastructures, or information. In this perspective, the theoretical framework retained for the dissertation focuses on the interplay among transnational coalitions of state and non-state actors and the veto and access points created by domestic institutions.

Transnational coalitions

The emerging literature on transnational relations offers different approaches to conceptualizing the actors involved. In the work of Risse-Kappen and his collaborators, the concept of transnational coalitions refers to sets of non-state and/or state actors "sharing political values and policy concepts" seeking to achieve "specific political goals in the 'target' state of their activities"[74]. They can involve two types of actors: those promoting instrumental (generally economic) gains and those promoting principled ideas. The concept is meant to be inclusive of a variety of cases and encompasses a number of different social formations. Among these, the authors use transgovernmental coalitions to refer to coalitions of state actors pursuing a common agenda that differs from official national state preferences. Epistemic communities – informal networks of scientists sharing a common understanding of problems and solutions – are also considered a specific type of coalition. Finally, multinational corporations and international non-governmental organizations are also considered highly institutionalized forms of transnational coalitions.

The scope of this definition of transnational coalitions has the advantage of covering most possible occurrences of transnational relations. However, by including under the same banner a well-integrated multinational corporation furthering its material interests by lobbying foreign governments, loose networks of professionals exchanging information, and well-coordinated coalitions of social activists promoting their cause, it can also create analytical difficulties. For example, it seems plausible that the constraints represented by national institutions would differ for a single

corporation seeking government access and for a coalition of bureaucrats seeking to further their agenda.

In contrast, Keck and Sikkink use the more precise concept of transnational advocacy networks. The concept excludes state actors, with the possible exception of some parliamentarians and bureaucrats from international organizations, and it is limited to broad, loosely connected networks of activists seeking social change. These activists seek social change by promoting causes and share principled ideas and values. Individual networks give rise to specific advocacy campaigns involving only a sub-set of members. They will typically rely on information as a key source of power, using strategies such as appealing to public opinion or revealing information to shame target governments.[75]

The concept of transnational coalition retained for this dissertation offers a somewhat different approach. Transnational coalitions are defined as temporary coalitions of actors sharing common political objectives who cooperate to seek mutually-desired policy changes. They can comprise both state and non-state actors. Coalitions are time-limited and issue- or campaign-specific. Consequently, they do not necessarily involve sustained, on-going interactions and collaboration over time. They are drawn together by common political objectives, which does not imply that they desire these objectives for the same reasons. In other words, transnational coalitions do not necessarily share principled ideas. For example, multinational pharmaceutical companies, women's groups and environmentalists may collaborate

on a campaign to promote more liberal contraception policies without sharing the same motives.

We also see no reasons to limit coalitions to specific political strategies. The bargaining of material resources, appeals to public opinion and the voting public, and attempts at redefining the dominant framing of problems can all be combined to influence policy outcomes. Then the effectiveness of transnational coalitions is associated with their ability to assemble a winning coalition of actors to persuade decision-makers to support the desired changes in policy.

States as strategic and fragmented actors

This conception of transnational coalitions also implies a recognition of the fragmentation of national states. The claim of national sovereignty remains a crucial foundation of legitimate authority and, on the basis of this claim and of the important resources still at their disposal, national state actors continue to constitute crucial actors. But, in a framework where domestic politics matter, national state actors will also respond to the interplay of political forces at home and their strategic behaviour will also reflect their considerations of domestic institutional constraints on the ratification and implementation of international regimes.[76] Moreover, in a world of more intense transnational relations and contested authority, national state actors may also enter into alliances of convenience with other state and non-state actors in the hope of strengthening their position at home and abroad.

We have also seen that, once the domestic environment of politics is recognized, national states can no longer be considered unitary actors. State

bureaucracies are complex and fragmented organisations and their constitutive units are often pursuing contradictory goals both within and outside the organisational environment of the state. Moreover, many states, federations in particular, contain sub-national units that are increasingly active internationally. These sub-national state actors can influence the development and implementation of a national foreign policy. In pursuing this objective, they can also enter into coalitions with other actors to act across borders or to influence the domestic conditions likely to affect international negotiations. For example, in some federal regimes, the threat of not cooperating with the implementation of international measures in their areas of jurisdiction can influence the evolution of international negotiations. In sum, sub-national state actors should be recognized as potentially influential actors in our framework of analysis.

Domestic institutions as intervening variables

Bargaining strategies of state actors engaged in international negotiations as well as lobbying strategies developed by transnational coalitions of non-state actors depend on an adequate evaluation of the institutional environment constraining the choices of actors. The greater role of transnational coalitions and the more fragile position of state actors domestically and abroad means that the institutional context mediating domestic politics is increasingly relevant for understanding a globalized politics. Since transnational coalitions penetrate national borders, the domestic institutional context of the "target" country becomes a relevant strategic element.

In particular, domestic institutional procedures for the ratification of international treaties affect the strategies and influence of both state and non-state actors. More restrictive ratification procedures would tend to restrain the manoeuvring room of state actors and enhance the influence of non-state actors.[77] But, even more generally, the specific institutional configuration of domestic institutions (number and position of institutional veto points in the policy process) partly determines the access and influence of non-state actors to the policy process of each country. As comparative neoinstitutionalists have established, more fragmented institutions provide more access points to interest groups to influence decisions and voice ideas as well as more opportunities for vetoing policy proposals than more centralized institutions.[78] As such, it would appear that countries with more fragmented domestic institutions would be more vulnerable to the influence of transnational coalitions.

Institutional fragmentation comes in many forms. For example, the separation of powers in Congressional systems leads to a system where the executive exercises less control over the legislative portion of the policy process, thereby creating more opportunities for legislative actors (and the interest groups working through them) to veto policy proposals. These systems can also provide a greater number of meaningful access points to the policy process to advocacy and interest groups seeking influence. This general constitutional structure is deemed to make for more open and fragmented institutions than what is the case in Westminster parliamentary systems where executive control over the legislature eliminates most veto and access points. However, political institutions can be fragmented in other ways. Federalism

can also be associated with a greater number of veto and access points in some policy areas. Many systems also have constitutional procedures providing for direct democracy mechanisms, such as referendums and legislative initiatives, and resulting in a more fragmented system.[79]

It should also be clear that, in this perspective, domestic institutions are considered as intervening variables in social explanations. By structuring the policy process, institutional configurations create access and veto points that influence policy actors' strategic behaviour and partly determine their respective influence on policy outcomes. As such, while they constitute important variables shaping the nature of outcomes of political struggles, they do not replace state and non-state actors as the basic units of analysis.[80] However, they allow for a more contextualized analysis of power relations, especially in a comparative setting. Given similar political preferences and resources of organized actors, differences in political institutions can help explain variations in the policy influence of actors.[81]

Working hypotheses

This exploratory framework leads us to a set of working hypotheses about international regime change in the context of a global transnational politics. Firstly, we should recognize the potential influence of changes in the domestic conditions affecting the legitimacy and operation of international regimes. Shifts in the relative influence of transnational coalitions supporting or opposing changes may alter the preferences of national state actors who are parties to international regimes. When a single regime member is sufficiently influential or its cooperation necessary for

regime effectiveness, success of a transnational coalition in this single country could be sufficient to achieve regime change. In many cases however, it seems more plausible that a successful transnational coalition would have to influence a key group of regime members to succeed in bringing about regime change. The nature of this key group of countries must be determined on a case-by-case basis. However, generally, we can hypothesize that *transnational coalitions can bring about international regime change by creating domestic political conditions in key target countries that would render such changes desirable for their national state actors.*

We should also note that, under this scenario, a number of political strategies are opened to transnational coalitions. Successful strategies may involve appealing to public opinion in key target countries to make the implementation of existing regime provisions unpalatable in electoral terms and to elicit public support for the desired changes. They could also include an attempt to foster change by convincing key decision-makers in the target countries of the necessity to redefine the terms of the problem, and associated solutions, addressed by the international regime.

However, we must recognize that changes in the domestic conditions affecting international regimes, and that may lead to regime change, can not be exclusively related to the efforts of transnational coalitions. Purely domestic changes may affect the desirability or effectiveness of international regimes and create pressures for regime change. If these conditions are met in a required sub-set of regime members, regime change will result from changes in domestic variables without the involvement of transnational coalitions. While this variation on our first hypothesis

would not require attributing causal importance to transnational relations per se, it would nevertheless represent a valuable addition to the existing set of explanations of regime change offered so far by the regime theory literature by recognizing domestic sources of change.

A second set of hypotheses can be derived from the importance that my framework attributes to domestic institutions. Generally speaking, the more fragmented domestic institutions are, the easier it should be for transnational coalitions to get access to the policy process of a targeted country and, consequently, to further their objectives in this country. This situation has different implications whether one seeks to promote or to prevent policy change. In particular, institutions with more veto points suggest that policy change is made more difficult by the multiplication of actors that have access to institutional vetoes in the policy process. However, in those political systems, the ability to influence national state decision-makers should also translate in a higher probability of policy change. In other words, once state decision-makers decide to pursue policy change, there is less likelihood that opposing groups can get access to an institutional veto and prevent the desired policy change.

This situation seems to propose two related hypotheses. The first hypothesis focuses on the relation between institutions and the ability to effect change. Since differences in the number and location of veto points create varying degrees of difficulty for coalitions in influencing policy decisions, the size and nature of the "winning coalition" of actors required for achieving policy changes should be

determined by these institutional parameters of the policy process. Domestic institutions with a greater number of veto points will require a broader and better organized transnational coalition for achieving policy change because, in such settings, it is easier for specific groups to play on veto points and block changes. For this reason, I make the hypothesis that *the more fragmented the domestic political institutions, the broader and better organized the transnational coalition must be to achieve policy change in the target country.*

The second hypothesis conversely focuses on the relation between institutions and the ability to block changes. It states that, *given similar political preferences and resources of organized actors, differences in the domestic institutions determine the variation in the policy influence of transnational coalitions. The more fragmented the domestic institutions, the more successful transnational coalitions will be in blocking change.*

These last two hypotheses necessitate a careful contextualized analysis of the constitutional arrangements of the countries involved to be operationalized. As a rule-of-thumb, we might expect that countries with Congressional systems of government would have a larger number of institutional veto points. Consequently, they would be natural targets for coalitions attempting to veto regime change and those seeking to promote changes would need to assemble more influential and better organized coalitions to do so. However, while this may effectively be the case, the complexity of domestic institutional realities advocates more caution in drawing such conclusions. For example, in some federations, the approval of sub-national

governments may be required for the implementation of regime provisions in some issue areas. In these cases, sub-national governments may, for all practical purposes, hold a veto over possible changes.

Moreover, most national constitutions contain specific provisions regarding the approval of international treaties. In some countries, treaty-making may be a prerogative of the executive, consequently limiting the number of vetoes. In other countries, one or both legislative chambers may hold a complete or suspensive veto over these agreements. In sum, a detailed examination of constitutional procedures, especially regarding treaty-making, is warranted. The next chapter is dedicated to such a detailed analysis with regards to the Canada and the United States (the only two countries involved in my case study).

Conclusion

Ecologists have long recognised the importance of understanding transnational activities for making sense of the ecology of the hemisphere. But in contrast, most regime scholars, more than diplomats, have clung to the convenient assumption of a tight membrane separating the national realms of social relations in order to make sense of the politics of the hemisphere. This chapter argued that, while the persistence of the domestic-international distinction may always have been conceptually unwarranted, the recent social trends associated with globalization certainly make it all the more imperative to recognise the importance of transnational politics for international governance and make a greater effort at integrating them in our analysis of international regimes. As regime theory slowly turns to the study of regime

change, it is important that we try to take into account to a greater extent the role of domestic factors and transnational political activities for the evolution of regimes.

This dissertation proposes to contribute to this effort by focusing on the role of transnational coalitions and domestic institutions in shaping the evolution of international regimes. While this early effort is necessarily exploratory in nature, the set of hypotheses derived from the theoretical framework will allow me to shed some light on the politics that shaped the evolution of the U.S.-Canada Migratory Birds Convention since the early 1970s. It will also provide some insights on the consequences of transnational relations for international environmental politics and confirm the need to push further the investigation of the role of domestic institutions and transnational coalitions for understanding international regime change. However, before undertaking my empirical investigation, I need to offer a more sophisticated and detailed analysis of the domestic institutional environments, especially constitutional procedures, that will structure transnational politics regarding continental treaty-making in North America. The next chapter is dedicated to this task.

Chapter 2

CONSTITUTIONS AND CONTINENTAL POLICY CHANGE

> While the ship of state now sails on larger ventures and into foreign waters she still retains the water-tight compartments which are an essential part of her original structure.
>
> - Lord Atkin, of the Judiciary Committee of the Privy Council, in deciding the *Labour Conventions Case*, 1937.

> For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.
>
> - U.S. Supreme Court Justice Field in deciding the *Chinese Exclusion Case*, 1890.

National constitutions constitute important incentive structures for the making of national policies, both imposing constraints on strategic behaviour and providing opportunities for the advancement of interests by policy actors. However, while this important insight is the object of a growing body of research in the realm of policy studies focusing on the national level, it remains relatively unexplored in the area of international and transnational politics. As I have shown in the previous chapter, a serious investigation of transnational politics in an era of globalized politics requires a closer and more substantive consideration of the institutional structure of national states. This is particularly the case for constitutional procedures affecting international treaty-making and how they may influence international regime change.

This chapter seeks to offer an original examination of this problem in the context of Canada-U.S. treaty-making. As such, it offers a more focused and detailed

discussion of the issue than what has been provided to this date by the few scholars who have investigated similar issues.[82] It investigates the significance of constitutional differences, especially as they relate to constitutional authority for treaty making and implementation, for the analysis of continental transnational policy-making in North America. I argue that the constitutional law and practices of Canada and the United States produce distinctive institutional veto configurations for the politics of treaty-making, which are susceptible to influence the transnational dynamics of the politics surrounding bilateral regime change by the two countries. More specifically, I will show that American constitutional processes, with some exceptions, offer a more fragmented institutional configuration and that, as a result, American legislative institutions are more likely to become the focus of the political activities by transnational coalitions seeking to influence continental policy change.

The chapter begins with a general discussion of the concept of veto points and of the consequences of constitutional differences for the making of public policy. I then turn to an historical and comparative examination of the more precise constitutional rules providing a framework for the making and the implementation of international treaties in Canada and the United States. Particular emphasis is placed on the nature of the relationship between the legislative and executive branches of the state and on the treaty role and prerogatives of sub-national states in the context of federal systems. In the third section, I draw some conclusions about the implications of those constitutional treaty rules for the transnational politics of continental policy change and discuss how these conclusions allow us to specify the hypotheses outlined in the previous chapter.

Constitutions, Veto Points and Policy-making

In different theoretical approaches to political science, institutions have been "rediscovered" as important variables shaping the nature of outcomes of political struggles.[83] With some exceptions, institutions are generally considered as intervening variables in social explanations.[84] They are not replacing resource theories of group politics, or class as the central unit of analysis, but rather they are strengthening these forms of explanations by revealing the impact of the institutional context on group preferences, strategies, and interactions with other actors. Institutions matter for policy choices but they do not solely determine them.

While institutions can be defined in multiple ways, the formal institutions of politics, as defined by constitutional law and practices and by the internal structures of legislative, executive and judicial bodies, still represents the main group of institutional features affecting the decision-making process of political systems. In this perspective, without denying the importance of other institutional features, such as the distinctive norms of legal regimes or prevalent norms of social organisations,[85] formal political institutions seem to offer a necessary starting point for an inquiry into the effect of institutions on the dynamics of political choice. In this context, many comparative and historical neoinstitutionalists have indeed begun to develop general theoretical statements about this relationship across different institutional systems.

Inquiry into the relationship between formal institutional structures and political choices has generated a wide range of insights and perspectives. Amongst the better known, Sartori's classic work on comparative constitutionalism, and his case for an

intermittent presidentialism as the best institutional system for achieving a working combination of strong parliamentary control and efficient government performance, stands out as a particularly comprehensive statement of this approach.[86] Linz's much debated argument that presidentialism causes regime instability in Latin America offers another well-known example.[87] Moe and Caldwell's argument that Congressional institutions are more prone than parliamentary systems to set up arm's-length bureaucracies with detailed legislative parameters as a way to isolate them from excessive executive meddling constitutes another prominent application of this theoretical perspective.[88]

In the realm of policy studies, Pierson and Weaver have argued that, because of more effective control of the legislative branch by the executive, parliamentary systems have a greater capacity for policy innovation as well as for imposing losses on powerful constituencies. However, they have fewer opportunities for avoiding blame for failed or unpopular policies.[89] Stressing different institutional features, such as particular committee structures, Hall, Skocpol and Weir have reached similar conclusions about the relation between policy innovation and formal institutions in the context of economic policy-making in England, Sweden and the United States.[90] Studying the evolution of tax policies across countries, Steinmo has argued that the American Congressional system is less able to adopt policies advancing a collective conception of the public good than parliamentary regimes and that it tends to generate particularistic policies responding to individual group interests. In contrast, majority parliamentary systems like the British system, while adopting more collectivist policies, would tend to generate incoherent patterns of policy swings due to the

alternating partisan governing majorities that these systems produce.[91] All of the above examples share a common concern about the relation between the formal institutional features of political systems, political dynamics and policy choices. While drawing from different methodological and theoretical approaches, they all represent formal institutions as complex systems of incentives, opportunities and constraints for state and non-state political actors.

While varying in their terminology and their degree of formality, most of them have come to rely on similar concepts of veto points and institutional configurations as some of the cornerstones of comparative institutional analysis.[92] In this perspective, veto points can be defined as the set of actors whose formal approval has been made essential, by the institutional context, for the adoption of public policy.[93] They are "areas of institutional vulnerability, that is, points in the policy process where the mobilization of opposition can thwart policy innovation".[94] Accordingly, they may be represented, for example, by government cabinets, presidential offices, legislative chambers, parliamentary committees, the voting public in a referendum or in an initiative ballot, or sub-national governments in federal systems. Or, as Tsebelis points out, they could also be more partisan in nature, such as key parliamentary parties in the context of government coalitions or minority governments.[95]

Different political systems can be understood to include different sets of veto players. As a result, they offer different institutional configurations for policy change. These cross-national differences in institutional configurations offer different sets of opportunities and incentives to interest groups and state actors seeking to influence

policy decisions.[96] institutional veto points sometimes provide opportunities for policy actors to intervene directly in the political process to submit proposals, make their claims about the benefits and pitfalls of considered alternatives, or block the adoption of a considered policy change. More often, they designate policy players that have the formal authority to block a policy change and who can be lobbied and influenced by interest groups working outside the formal institutional arenas.

Generally, we can identify three categories of influences institutional vetoes may have on politics: 1) institutional vetoes provide to some institutional actors the ability to block and, consequently, disproportionately influence policy choices; 2) they provide different and unequal opportunities to interest groups to penetrate the policy process to affect policy choices; and 3) they also partly shape (or constrain) the strategies and discourse (claims making) of policy actors who seek to advance their interest in the most favourable way in the context of the institutional framework that they face. As such, it is important to note that institutions do not only affect the *outcomes of political struggles*, they also contribute to shape the *dynamics of political interactions*. In Hall's terms, they have a "relational character".[97]

The formal authority to block a policy change by imposing an institutional veto offers the most obvious form of influence on policy outcomes. Institutional players occupying positions entrusted with *de jure* institutional privileges to initiate, alter or block policy proposals are in an advantageous position to further their own interests and those of their supporters. The well-known power of Congressional committees and their chairpersons within the framework of American legislative institutions

represents an outstanding example of this form of influence. Key legislators can exercise disproportionate influence on collective choices, not necessarily as a consequence of rallying greater support in public opinion or powerful constituencies, but as a result of their privileged position within the institutional arena. "*De jure* rules of institutional design provide procedural advantages and impediments for translating political power into concrete policies."[98]

Moreover, the number and accessibility of veto points in the decision-making process tend to affect the frequency and difficulty of achieving policy change itself. As Tsebelis has shown, generally speaking, the greater the number of veto points, the less likely the success, and the lower the frequency, of policy change. Given similar political preferences and resources of organized actors, differences in political institutions determine the variation in the success of interest groups and state actors in stopping changes. As a result, the more fragmented and open the political institutions, the less likely the success of policy change.[99]

Secondly, and more generally, these rules of institutional design also affect the dynamics of interest groups politics. Most obviously, differential access to veto points and veto players will result in inequalities of influence. For example, if adoption of a policy change requires the approval of a specific legislative committee, interest groups who bear particular relevance to the members of this committee, be it for electoral or other reasons, have a privileged opportunity for imposing a veto or demanding modifications of the proposed policy. As such, different institutional configurations will likely grant different chances to different interest groups to

influence policy changes. Differences in power resources available to groups (money, membership, expertise, etc.) are insufficient for understanding policy outcomes because these resources must be deployed in an institutional environment that do not offer an undifferentiated set of opportunities and constraints to the different actors.

By providing "points of vulnerability" in the policy process or entry points to provide input on proposals, veto points structure the dynamics of political interactions. Conscious of the institutional parameters of the decision-making process, interest groups learn to adapt their political strategies by targeting their activities and their message to the key institutional players. As Immergut argues, without an understanding of the institutional environment, it is difficult to make sense of these actors' activities since the institutional environment is "the frame of reference for their actions".[100] For example, as she herself as shown with respect to Swiss health politics, it would be impossible in a comparative perspective to make sense of the evolution of the Swiss health care system without understanding the role that the potential access to a national referendum played in the strategy and discourse of the country's medical organisations.[101] In effect, in a cross-national perspective, even in the presence of identical preferences of key interests, different institutional configurations affect the choices of political strategies and impact on policy outcomes.

In some respects, the institutional environment of politics partly also shapes the understanding that policy actors have of their own interests and their selection of goals. For example, as Weir argued in her study of the evolution of American

employment policy, institutions can narrow the range of policy options available (and consequently practically desired) and consequently help shape the meaning of group preferences and social choices.[102] Similarly, often by specifying the default alternative of particular choice situations, the institutional environment can affect the goals selected by actors. By structuring policy choice situations, the institutional environment affects the selection of goals and preferences of actors who must reach an understanding of their interest in a real-world environment where problems pose themselves in specific terms and options are often limited among some alternatives.[103]

In sum, by structuring political interactions and choice situations, the institutional environment of policy-making affects the dynamics of political change and indirectly influences the outcomes of policy choices. It helps to explain the nature of these choices as well as the very presence (or absence) of policy change itself. Overall, these insights provided by neoinstitutional theory explain the importance of paying attention to the institutional environment of politics. Even in a transnational context, we should expect the nature and availability of veto points to affect the strategies and influence of transnational coalitions. For example, with regards to regime change, we should expect regime members with more fragmented institutions to become easier targets for transnational coalitions seeking to block changes. Accordingly, the transnational politics of regime change should become focused on achieving the required conditions to overcome the more significant institutional barriers existing in these countries. The nature of specific veto points preventing change could impact on the strategies and discourses adopted by coalitions. For

example, if a specific veto point, such as a legislative committee, is more vulnerable to a particular group or constituency, coalitions seeking influence would naturally focus their strategies and discourses on winning over these constituencies.

Constitutions and Treaty-making in North America

How can we bring this theoretical perspective to bear on the problem of international regime change and transnational politics in North America? Neoinstitutionalists generally argue that the more open institutions of the U.S. Congressional system require the formation of broader winning coalitions of political actors than what is necessitated by the more centralized political institutions of Canadian cabinet government for achieving policy change. The multiplicity of veto points, most notably Congressional floors and committees, means that interest groups and state actors have more possibilities of stopping undesired policy changes. In the Canadian case, policy change will be determined to a greater extent by the policy preferences of executive state actors, who, given the control of a majority of parliamentary seats, can isolate themselves better from societal pressures through the relative scarcity of veto points. However, a number of reasons argue for a closer examination of the institutional environment of both countries.

Firstly, past a very general level of institutional design, particular rules of decision-making that, for example, shape the interaction between executive and legislative branches or determine the nature of executive prerogatives vary sufficiently to warn against relying on a generic characterization of institutional systems. For example, whether a second chamber has a suspensive or a full veto or

whether a conference procedure exists to reconcile opposing views on legislation will affect the relative power of institutional actors. Moreover, the institutional requirements of decision-making may vary according to the type of issue under consideration. For example, whether the policy is likely to affect federalism will determine whether the approval of the Bundesrat is required for the adoption of legislation under the German system. As a result, the number of vetoes varies depending on the issue. In order to account for these institutional intricacies, issue-specific analysis of the institutional environment is similarly required.

With regard to treaty-making, the traditional distinction between American Congressional government and Canadian cabinet government takes an added dimension. The countries' respective constitutions provide differently for the making and approval of international agreements than for ordinary legislation. These differences may create sets of institutional vetoes that differ from those existing for the more generic process of law-making. While the general characterization of American institutions as being more permeable and fragmented than Canadian ones remains essentially accurate, the constitutional procedures pertinent to treaty-making in both countries provide for a more complex picture. Moreover, in keeping with the "living" nature of both constitutional texts, the constitutional frameworks of both countries have evolved significantly since their origins, introducing historical differences that remain important for the analysis of the politics of treaty-making. In the remainder of this chapter, I provide an account of the nature and historical evolution of the constitutional rules of treaty-making in both countries in order to

sketch the institutional context that will structure the transnational politics of regime change in North America.

Treaty-Making in American Constitutional Law

From the emergence of the Westphalian state system in the 17th century to the late 18th century, the conduct of international affairs, and hence the making of treaties, remained exclusively in the executive domain in all modern states. While French Kings occasionally submitted treaties to their *États Généraux*, they did it as a result of political necessity or strategy but they were not obligated to do so by constitutional practices. In the emerging international law, the doctrine of *ius repraesentationis omnimodae*, that the monarch as the personal embodiment of the state was its sole external representative, constituted the rule.[104]

The Issue of Congressional Veto

In this context, the American Constitution adopted in 1787 by the Constitutional Convention stood out against recognised international practices. For the first time, a Head of State could not enter alone into international treaties.[105] Article II, section 2 of the constitutional document stated that the President has the "power, by Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur".[106] Consequently, from the beginning of the Republic, the Senate was a crucial actor in the making of international treaties in the United States. And, in this regard, the powers of the Senate over treaties are very important, including their amendment and their outright rejection.

There is evidence that the Framers of the Constitution had anticipated that the Senate would be making international treaties ***with*** the President, i.e. that its role would not be limited to an ex post approval but that it would include the offer of continuing advice and discussion with the executive on the negotiation of treaties.[107] In essence, the Senate would act as an executive council, co-operating closely with the President.[108] However, very early on, evolving constitutional practices conferred the Senate a more limited and sequential role in the approval of treaties. Following an ill-fated attempt by President Washington to work with the Senate on the negotiation of treaties with Aboriginal peoples in 1789, the Presidency resisted relying on the Senate for advice during treaty negotiations.[109] Since then, the role of the Senate has been clearly limited to an ex post consideration of the treaties transmitted by the Presidency. The President does not seek or need the approval of Congress before entering into negotiations or concluding an agreement. However, Senate approval of treaties is constitutionally required before their ratification by the executive.[110]

In considering the approval of international treaties, the Senate proceeds almost as if the treaty were an ordinary bill. The treaty is first transmitted to the Committee on Foreign Relations, which can reject it, approve it, amend it, express reservations or simply let it die on the order paper of the committee. Once (and if) the committee reports on it, the floor can examine it article by article, including potential amendments or reservations, before taking a vote. Given the less stringent procedures of the Senate, it remains relatively easy for minorities of members to delay extensively the process by multiplying propositions of amendments. While a simple majority will suffice to add amendments or reservations to the final approval motion,

the final vote, according to constitutional requirements, necessitates a two-third majority for approval. If the Senate adopts any amendments, the executive will need to re-negotiate the treaty. If it only attaches reservations or expresses a specific understanding of the treaty with its approval, the executive is required to include them in its instruments of ratification.[111]

In practical terms, use of the Senate veto does not necessarily entail defeat on the floor or in committee. As in the case of most institutional vetoes, its importance lies as much in the influence that the threat of vetoing a measure confers on the veto player(s) as in its actual exercise to kill projects. Moreover, in the context of parliamentary institutions, the control of the agenda by key institutional players often gives them the opportunity to kill undesired projects by tabling them indefinitely. As Wildhaber points out regarding the U.S. Senate:

> "Modern figures show that the days of spectacular defeats of treaties are over. Unwelcome treaties such as the ILO Conventions and the Genocide Convention are no longer briskly voted down; they are either pigeonholed in the Senate Committee on Foreign Relations or are withdrawn by the President. Often the Senate does not demand the formal amendment of a treaty as a condition of approval; but it continues to attach reservations and to express understandings. By delaying actions and voicing objections, it has, moreover, repeatedly achieved a reopening of the negotiations and - as a result thereof - the subsequent deletion of a particular clause thought to be objectionable."[112]

Of course, delay tactics and vocal opposition are the very heart of the power of parliamentary bodies in most democracies; and the exceptional power of the U.S. Congress as a law-making body does not deprive it of these more subtle forms of political action.

The treaty-making record of the Senate reveals that it does not hesitate to use its veto, amendment and reservation powers over international treaties but that, quantitatively, it has not defeated a large proportion of treaties. Data on the period for 1789 to the 1970s reveal that about 16% of submitted treaties were amended and that about 11% were rejected or left to die on the order paper.[113] While the number of treaties rejected has declined over time, Senate detractors still point out that, notwithstanding the numbers, many important treaties, such as the Treaty of Versailles or the 1934 St. Lawrence Waterway Treaty, were killed by the Senate and that the international policy of the U.S. has suffered as a result of its actions.[114] As we pointed out earlier, from the perspective of institutional politics, the very existence of the veto and amendment power may also have equally influenced the negotiation of many other treaties, as the executive may develop its negotiating position by anticipation of the Senate's preferences. As such, the sheer number of veto and amendment resolutions passed does not reveal the full political significance of the Senate power in the realm of treaty-making.

Notwithstanding its continuing, undisputed influence over treaties, the modern development of treaty-making practices in the United States has nevertheless undermined the privileged institutional position of the Senate in the realm of international policy. In particular, the development, and increasingly dominant use, of another form of international agreements, namely congressional-executive agreements, has provided tools to the Presidency to circumscribe or weaken Senate control over American international policy.[115]

Congressional-executive agreements essentially substitute the majority consent of both Congressional chambers for the Senate two-third majority required in the case of traditional treaties. Under modern practices, the President conducts international negotiations and reaches an agreement. The agreement must then be approved by a majority vote in both the Senate and the House of Representatives before it can be ratified by the Presidency. For all practical and legal purposes, congressional-executive agreements are as valid and binding as traditional treaties. They become the supreme law of the land and they override any previous federal and state legislation. In effect, they are fully interchangeable with traditional treaties; and, in political terms, they offer the executive the choice between seeking the consent of two-thirds of the senators or seeking a simple majority in both houses. In other words, they offer the executive a choice of veto configuration.

This form of international agreement is not explicitly provided for in the American Constitution. As with many constitutional matters, the doctrine of interchangeability between treaties and congressional-executive agreements became a part of the living constitution as result of a progressive evolution in practices, much legal creativity, significant changes in public opinion, and hard-won political battles.[116] The necessity of adapting the traditional treaty-making procedures to the new conditions of an international order marked by deepening interdependence and the necessity to respond with more complex and rapid changes was a central imperative driving this process.

While there is some debate about the desirability of this procedure,[117] from our perspective, it is now obvious that congressional-executive agreements currently offer a second constitutional track for the approval of international agreements. It seems that the choice of procedure provides more leeway to the executive, which can now choose its institutional arena depending on the preferences of legislators and influence of interest groups on the respective chambers on individual issues. Congress remains a crucial institutional veto point but, when legislators are more divided on the issue, a majority in both chambers could be less difficult to gain than a two-third vote in the Senate. Notwithstanding this greater flexibility for the Presidency and the undeniable rise in influence by the House reflected by the new process, we should note that, if a majority of senators still find that an agreement should be handled through the traditional procedure, it can still block its ratification under the new procedure. The Senate has not lost its veto.

State Rights and International Treaties

In addition to executive-legislative relations, federations, such as the United States and Canada, face another constitutional dilemma in the conduct of their international relations. The division of powers between two levels of government raises the question of the role of sub-national governments in the making and the implementation of international treaties. From a political standpoint, the possibility of sub-national vetoes on the ratification of treaties suggests an added level of institutional complexity that would arguably result in greater leverage for interest groups and sub-national state actors in the formation and change of international

regimes. It also raises the spectre of domestic stalemate and paralysis in the conduct of international relations.

In framing the American Constitution, the Convention addressed this question directly by explicitly prohibiting States from entering into treaties and alliances[118] and by stating that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"[119]. These definitive statements, while the subject of much debate and criticism by American States in the early history of the U.S., have come to represent federal supremacy in the making and implementation of treaties. American States are not only forbidden to enter into treaties on their own; upon their ratification, international treaties also become the "supreme law of the land", superseding other federal legislation and taking precedence over all state laws that may conflict. In effect, the American Constitution explicitly denies State governments and legislatures a veto on the making of international treaties and on their domestic implementation. While found in other federations,[120] the significance of this federal supremacy over State legislation will be most apparent when, later in this chapter, it is contrasted with the Canadian situation in the post-Statute of Westminster era.

The Framers' decision to grant such extensive and categorical treaty powers to the federal government was not a consensual one[121] and, early on, defenders of states' rights challenged the federal treaty power using other provisions of the

constitution.[122] And while the early case law was generally favourable to the federal government, the issue remained contentious for decades. In the American constitutional history, two events stand out by their political and legal significance regarding the treaty implementation power: the *Missouri v. Holland* decision of 1920 and the defeat of the Bricker constitutional amendment in the early 1950s.

The *Missouri v. Holland* decision provided a landmark and definitive legal statement on the constitutionality of treaties and federal treaty implementation legislation encroaching on areas of State jurisdictions. In the decision, the Supreme Court effectively endorsed an interpretation of the treaty supremacy clause that confers upon the federal government a nearly limitless authority to make laws for the implementation of treaties within areas of State jurisdiction.[123]

Oddly enough in the context of this dissertation, the case itself dealt with the constitutionality of the Migratory Bird Treaty Law, which implements domestically the provisions of the 1916 Migratory Birds Convention. While American lower courts had twice found invalid a 1913 statute protecting migratory birds on the rationale that protecting wildlife was not an enumerated power of Congress and consequently fell within State authority under the terms of the residual clause (i.e. the Tenth Amendment), Justice Holmes in *Missouri v. Holland* found that the statute that was invalid in absence of the 1916 treaty was now within the constitutional authority of Congress as a necessary consequence of its treaty power. The Supreme Court confirmed in a definitive manner that the Tenth Amendment did not place constraints on the federal treaty supremacy clause. In effect, matters left to the States by the

residual clause are subject to be overtaken by the federal government if it should decide to make a treaty about them.[124] The decision still stands as an expression of constitutional doctrine.[125]

The reversal of this doctrine through political means was essentially the objective of the unsuccessful Bricker amendment. Approved by the Senate Judiciary Committee in June 1953, the amendment read in part: "A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty".[126] The amendment, championed by Senator Bricker[127], surfaced in the context of the consideration of several treaties concluded under the auspices of the United Nation in the aftermath of the war, such as the Draft Covenants on Human Rights and some of the treaties of the International Labour Organisation. Bricker and his supporters mainly sought to prevent the federal government from overriding racially discriminatory state laws by ratifying international human rights treaties.[128] The amendment met strong opposition from the Eisenhower administration and, while generating intense controversy and coming close to success, it was defeated in Congress.[129]

The debate surrounding the Bricker amendment was complex and intertwined with fears about loss of national sovereignty, fears of communism, hostility towards human rights, and political infighting about the respective prerogatives of Congress and the Presidency.[130] As a result, interpreting its meaning with certainty is difficult. Nevertheless, the debate clearly revealed the subsistence of serious concerns about the scope of the federal treaty supremacy clause and about its consequences for the

principles of federalism. The doctrine espoused by the Supreme Court in *Missouri v. Holland* was severely criticized as disregarding state rights and even domestic constitutional law.[131] Opponents of the amendment raised the same arguments as those expressed in earlier debates: the necessity of speaking with a single, credible and authoritative voice in international affairs, especially at a time in history when the nation faced a world of greater interdependence, and the effectiveness of existing institutions in assuring state representation through the Senate.[132]

However, in the end, both the defeat of the Bricker Amendment and the *Missouri v. Holland* decision have confirmed the authoritative nature of the treaty supremacy clause. Consequently, the American federal constitutional structure does not offer formal veto points at the state level, even on those issues that would normally fall within the realm of state jurisdiction. And while it has become a regular practice for the federal government to consult and inform state governments on international policy issues that would concern them, the constitutional structure of the United States does not offer the states, and indirectly interest groups that could influence them, a formal institutional veto point in the policy process for the implementation of international treaties.

Treaty-Making in Canadian Constitutional Law

The Canadian constitutional framework for treaty-making is a clear testimony to the country's constitutional heritage. At the time of Confederation, Great Britain effectively conducted all of Canadian foreign policy, including the making of international treaties.[133] Canada reached full independence as a member of the

international community only as a result of a progressive evolution which led her to slowly affirm her status of independent state on the world stage.[134] The constitutional and political history of this transfer of control over foreign policy, including treaty-making, is long and complex. The first efforts of the Canadian executive to assert control over treaty-making date back to the mid 19th century and were generally circumscribed to trade policy. And while it met some resistance from the British government,[135] it did slowly result in Canadian politicians playing a greater role in the negotiation and signature of treaties alongside the imperial authorities.[136]

However, it is the Great War, and its aftermath, that provided the greatest impetus toward independence in foreign policy. The country's participation in the war helped to strengthen the national sentiment and the desire for autonomy. But it also led to concrete demands for more legal independence and a greater say in the formulation of the Empire's foreign policy.[137] The fact that Canada signed the Treaty of Versailles separately is significant in this regard. In fact, by the end of the war in 1918, the trend toward international juridical independence seemed irreversible. In the 1920s, the Canadian government began naming its own official representatives abroad[138] and it signed its first international agreement without the co-signature of British authorities.[139]

When the Statute of Westminster of 1931 finally officially affirmed the British colonies' equal and autonomous status in all aspects of their international affairs,[140] it only constituted the official end to a long progressive political evolution,[141] where practice had often preceded the official legal changes. In the words of the Supreme

Court of Canada, Canadian sovereignty had been acquired sometime "in the period between its separate signature of the Treaty of Versailles in 1919 and the Statute of Westminster, 1931."[142]

This summary account of the evolution of Canadian practices in treaty-making serves to emphasise the progressive nature of the transfer of authority regarding treaty-making powers from London to Ottawa and it is important for an adequate understanding of the constitutional framework still affecting the politics of treaty-making. More precisely, it is this historical context that serves to explain the two central institutional features affecting the conclusion of international agreements in Canada: a clear executive dominance over the legislative branch regarding the negotiation, signature and ratification of international treaties and the weaker and more ambiguous position of the federal government vis-à-vis the provincial governments with respect to the domestic implementation of these international treaties.

Executive Dominance in Treaty-Making

In the historical process sketched above, the treaty-making prerogatives of the British Crown were progressively transferred from the Imperial Crown in London to the Crown in the right of Canada. In the absence of a more revolutionary foundation, Canadian constitutional practices remained closely aligned with British traditions and Canadian treaty-making practices were no different.

In keeping with British constitutional practice, Canadian treaty-making powers essentially constitute Crown prerogatives[143] and, under the common law, they are to

be solely exercised by the Sovereign.[144] As such, the negotiation, signature and ratification of international treaties are strictly executive functions and they do not depend on parliamentary approval.[145] Today, the treaty prerogative rights of the executive with respect to international treaties are not seriously disputed and grant the Canadian government a great deal of discretion in the conduct of international affairs.

In keeping with the nature of prerogative powers, treaty-making powers are not explicitly addressed in the Constitution Act, 1867. The only article that makes explicit mention of international treaties is article 132, the Empire treaty clause, which states that:

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

In essence, article 132 constitutes a *treaty implementation* clause assuring the British government that the federal legislature of its Canadian dominion would have all the necessary powers to live up to the international obligations it still contracted abroad on its behalf. While article 132 would come to play an important role in defining the respective powers of the federal and provincial governments in the implementation of treaties, it has nothing to offer to elucidate the respective responsibilities of Parliament and cabinet in the negotiations and conclusion of treaties.

Notwithstanding the apparent clarity of the law on this point, Canadian treaty-making practices have historically granted more influence to Parliament. On numerous occasions, governments have tabled treaties in the House of Commons and

sought the approval of parliamentarians, whether or not the particular treaty required the subsequent adoption of implementing legislation. This practice of seeking a parliamentary resolution of approval before the ratification of treaties began in 1919 when Prime Minister Borden refused to ratify the Treaty of Versailles before gaining parliamentary assent. In stating his position on the matter, Borden said in the House of Commons:

> ".., it seems to us that there is considerable doubt whether under the modern constitutional practice the King should ratify without first obtaining the approval of Parliament. We think that in accordance with recent practice and authorities such approval should be obtained in the case of treaties imposing any burden on the people, or involving any change in the law of the land, or requiring legislative action to make them effective or affecting the free exercise of the legislative power, or affecting territorial rights."[146]

In insisting on the need for parliamentary approval, Borden proved to be prescient as Canadian constitutional practice preceded the introduction of the more modest "Ponsonby Rule" in England.[147]

The practice introduced by Borden was further extended and formalised by a resolution submitted by Prime Minister Mackenzie King and unanimously approved by Parliament in 1926.[148] The resolution required the government to obtain the parliamentary approval of "important treaties" prior to their ratification. However, in the absence of more precision on what distinguished important from non-important treaties, the resolution failed to provide specific procedural guidelines on the matter. A few years later, in the context of a debate on the approval of the International Sanitary Convention, King clarified his position on the scope of parliamentary control

over international treaties. In response to questions from the Opposition, he stated that:

> "[He] would not confine parliamentary approval only to those matters which involve military sanctions and the like. [..] parliamentary approval should apply where there are involved matters of large expenditure or political considerations of a far-reaching character. [..] this is a wise doctrine to follow in regard to all treaties irrespective of their particular character wherever they involve large national obligations."[149]

This statement helped to clarify Canadian practices with respect to the parliamentary approval of international treaties.

After examining the Canadian precedents on the subject, Alan Gotlieb concluded that the treaties submitted for parliamentary approval essentially fall into four categories: 1) military or economic sanctions; 2) large public expenditures or important economic implications; 3) political consideration of far-reaching character; or 4) obligations affecting private rights.[150] While some exceptions could easily be found, the list of categories nevertheless shows that parliamentary control remains limited and never extended to all treaties. The Canadian executive retains substantial discretion in determining if a treaty is significant enough to require *ex post* approval by the legislature.

Moreover, notwithstanding these informal practices, the fact remains that there is no legal obligation for the Canadian cabinet to submit international treaties to the House of Commons before their ratification. As R. MacGregor Dawson put it:

> "Parliament may be consulted and even asked to approve international agreements and treaties, but this is largely a matter of convenience and political strategy; the actual ratification is *purely an executive act.*"[151]

The Government of Canada has stated the same position before the United Nations[152] and the Supreme Court of Canada has also confirmed this view[153]. In essence, the informal practice outlined by Borden and Mackenzie King has failed to pass into the realm of unwritten constitutional conventions that could be upheld by the courts as unavoidable obligations imposed on the executive and affecting the constitutionality of international treaties.

Of course, some treaties will require the adoption of legislation to secure their implementation. Unlike American constitutional law, Canadian constitutional law does not provide for the automatic translation of international law into enforceable domestic legal provisions. International treaties do not become the "law of the land" and they often require the adoption of the appropriate acts by Parliament to be implemented. In such cases, the approval of Parliament *de facto* becomes a necessity. In these circumstances, we could argue that the legislature essentially benefits from a policy veto.

However, the effectiveness of this potential veto is nullified or severely diminished by two factors. Firstly, many international treaties do not require legislation for implementation. Administrative measures and regulations taken under existing acts can serve to fulfil the terms of the treaty.

Secondly, the norm of majority government in the Canadian parliamentary system renders this parliamentary check a much less effective tool for the control of treaty-making by the executive. Moreover, in addition to the traditional methods of executive control over the legislature under majority conditions, the international law

of treaties creates decision conditions that appear to be in favour of the executive. Since the ratification of international treaties does not legally require parliamentary approval, the adoption of implementing legislation does not constitute a pre-requisite for their ratification. In addition, the state of international law is that international commitments remain binding on contracting states even when these states are not in a constitutional position to assure their implementation at home.[154] As such, legal sanctions can be imposed in the event of default on these obligations. This institutional environment places Parliament in the position of adopting implementing legislation to live up to the commitments of the executive or to let the country default on its international obligations and suffer the consequences. Such stringent default conditions arguably strengthen the hand of the cabinet over the legislature.

More serious for the influence of the Parliament of Canada on international and treaty policy is the indisputable trend towards the use of less formal and simplified agreements instead of traditional international treaties for the establishment of international legal regimes. As we have already seen, there exist many forms of international agreements among states. These different forms of agreements, while generating similarly binding agreements for the parties, are not subject to the same procedures for negotiation or ratification. More precisely, unlike Head-of-State agreements, the ratification of government agreements does not require any act by the personal representative of the Crown but is accomplished solely through the adoption of an order-in-council empowering the Secretary of State to "execute and issue" an instrument of ratification to the other contracting party. Even more important is the difference between formal agreements (such as traditional treaties) and informal

agreements[155] (such as exchange-of-notes). While formal agreements undoubtedly require ratification, informal agreements can come into effect on the day of the signature and do not require any formal act of ratification. In Canada, as in much of the rest of the world, there has been a double shift away from Head-of-State agreements and towards informal executive agreements. Both trends tend to undermine the already limited influence of the legislative branch in the making of international agreements.

In practice, Canada has not entered in treaties concluded in Head-of-State form since 1944.[156] The country also manifested a clear preference for informal agreements in the conduct of its treaty policy early after it gained its international juridical independence. In the ten years that followed the first treaty signed without Great Britain in 1926, no more than 13% of bilateral agreements were formal agreements, subject to ratification.[157] Alan Gotlieb also notes that, in the period between the end of the Second World War and 1968, approximately 70% of all bilateral agreements with foreign nations took the form of exchange-of-notes, which under Canadian practice are never subject to ratification and thus never submitted for approval by Parliament.[158] Almost 50% of all treaties over the same period, including multilateral ones, were also exchange-of-notes.[159]

Keeping in mind that only a portion of the formal treaties signed by Canada are submitted to Parliament for approval (only those deemed important by the executive) and that there is no legal obligation to do so, it appears hard to avoid the conclusion that the control of Parliament over the government with respect to treaty-making is

very limited and that its ability to act as an institutional veto point in the process of international policy-making, at least under conditions of majority government, is almost non-existent.

Treaty Implementation and the Division of Powers

As in the United States, the question of provincial rights concerning international treaties has historically constituted an important constitutional question in Canada. To use Justice Bora Laskin's formulation, the question is again "whether a federal state must be governed in its international relationships by the distributive character of its constitutional organisation".[160] In Canada, the answer to this question is politically contentious. Provincial governments have traditionally been protective of their prerogatives vis-à-vis the federal government and, especially since the 1960s, have sought to expend their jurisdiction over international relations. The resolution that emerged in constitutional law has been a mixed blessing for both levels of government: while the treaty-making power has been upheld as an exclusive federal prerogative, the implementation of treaties, with some exceptions, must accommodate the division of powers.

From a juridical standpoint, the question of the provincial powers with respect to the making of international treaties has found a clear answer. The progressive transfer of prerogative rights from the Imperial Crown to the Crown in the right of Canada is seen as confining treaty powers solely to the Governor General of Canada and thus, indirectly, the federal government has been invested with the responsibility to speak alone on behalf of Canada, and its constituent parts, on the world stage. In

this perspective, the Supreme Court of Canada found both in this progressive transfer of imperial authority and in the Canadian constitutional division of powers, which does not explicitly address treaty powers but grants residual powers to the federal government, a rationale for affirming clearly the sole authority of the federal government in the making of international agreements.[161] While often controversial at home,[162] this state of affairs seems well in accordance with the practice of other federal states[163] and with the presumption in international law that federal states are represented externally by a single authoritative voice.[164]

While the conclusion and ratification of international treaties remains firmly under the control of the federal executive, the domestic implementation of these treaties is another matter. The executive treaty-making prerogative does not dispense with the necessity of enacting legislation to implement international obligations when a change in domestic law is required. Unlike American constitutional practices, international treaties do not become automatically the "law of the land" in Canada. While this constitutional necessity may not create significant political difficulties within the confines of federal jurisdiction, the enactment of implementing legislation within provincial domains raises important constitutional issues. The crucial question arises: does the federal government have the power to implement international treaties dealing with subjects that normally fall within provincial responsibilities?

The constitutional validity of federal treaty implementing legislation that would otherwise fall within the realm of provincial jurisdiction was first confirmed in 1924 by the judicial committee of the Privy Council in *A.-G. of British-Columbia v.*

A.-G. of Canada.[165] In this case, the government of British-Columbia was challenging a federal law implementing the Japanese Treaty, signed in 1911 between Great Britain and Japan, prohibiting commercial discrimination against Japanese citizens. In its decision, the Judicial Committee of the Privy Council invalidated the provincial law that prohibited the employment of Chinese or Japanese subjects or citizens in connection with certain contracts. In its ruling, the Committee found that section 132 of the British North America Act, 1867 (discussed in the previous section) provided a foundation for federal legislation enacted specifically for implementing international treaties contracted by the Empire, even when these agreements fell into provincial areas of jurisdiction.[166] This interpretation of the federal treaty implementation power was latter reiterated in the 1932 *Aeronautics* decision.[167]

While these decisions had served to strengthen the position of the federal government in international treaty-making by confirming the meaning of section 132, the Judicial Committee of the Privy Council's decisions in two other landmark cases in the 1930s profoundly modified the constitutional framework for treaty implementation in the context of Canada's newly-found international independence.

The Judicial Committee first revisited the issue in the 1932 *Radio Communication* case.[168] In the case, the British Lordships had to decide whether the federal legislation enacted to implement the 1927 International Radiotelegraph Convention was *intra vires* despite the fact that it appeared to fall within the purview of provincial powers. In a decision that was criticized by both advocates and foes of federal encroachment over provincial jurisdictions, the Judicial Committee upheld the

constitutionality of the federal law under the rationale that radio communication was covered by the residual power of the federal Parliament.[169] The main rationale underlying the decision related to the relationship between communication and existing heads of power under the constitution. Federal treaty implementation powers were a secondary concern. However, the decision nevertheless foreshadowed things to come regarding treaty implementation as it began to address the relevance of section 132 in the context of Canada's international juridical independence.

In explaining their decision, the Lordships had explicitly rejected the pertinence of section 132 with respect to the International Radiotelegraph Convention because it had been signed and ratified by Canada on its own. As a result, the Lordships held, the convention could not be properly considered to be an Empire treaty. While in writing the decision Viscount Dunedin had hinted that the Privy Council might extend the federal treaty implementation powers to treaties signed and ratified by Canada alone,[170] the fact that the judgement had been rendered more clearly on the basis of an interpretation of the residual power had not allowed for a clear settlement of the treaty question.[171] But the Lordships had created doubts about federal powers regarding treaty implementation. And as it turned out, in the years to follow, the Judicial Committee indeed reverted to a more narrow reading of federal treaty powers.

In the 1937 *Labour Conventions* case, the Privy Council declared *ultra vires* a federal statute implementing some of the conventions of the International Labour Organisation because it encroached on the "property and civil rights" jurisdiction

attributed to the provinces by section 92 of the Constitution Act, 1867.[172] The labour conventions had been ratified in 1935 by Canada as a separate international person and not as a member of the British Empire and, in assessing the constitutionality of the federal legislation, the Judicial Committee of the Privy Council decided that Parliament did not have unlimited powers to enact legislation to implement a Canadian treaty as opposed to an Empire treaty.

In explaining the decision, Lord Atkin of the Judicial Committee of the Privy Council wrote that the federal government has:

> "the task of obtaining legislative assent not of the one Parliament to whom [it] may be responsible, but possibly of several Parliaments to whom [it stands] in no direct relation. .. it follows from what has been said that no further legislative competence is obtained by the Dominion from its accession to international status, and the consequent increase in the scope of its executive functions."[173]

In justifying its decision, Lord Atkin further explained that:

> "It would be remarkable that while the Dominion could not initiate legislation, however desirable, which affected civil rights in the Provinces, yet its Government not responsible to the Provinces or controlled by Provincial Parliaments need only agree with a foreign country to enact such legislation, and its Parliament would be forthwith clothed with authority to affect Provincial rights to the full extent of such agreement. Such a result would appear to undermine the constitutional safeguards of Provincial constitutional autonomy."[174]

It seems ironic that, by the very moves that were strengthening the independence of Canada abroad in the period from 1919 to 1931, consecutive Canadian governments were significantly weakening the position of the federal government at home and consequently undermining the country's ability to implement domestically some of its future international commitments.

The consequences of Canada's constitutional framework for reconciling federalism and international relations are difficult to assess. With regard to its practical impact, most commentators have been critical of the Labour Conventions decision,[175] fearing irremediable damages may have been made to Canada's foreign policy.[176] For our purposes, it seems clear that the *Labour Conventions* decision introduces elements of complexity in the institutional framework for the negotiation and ratification of treaties. We must first be conscious of an important historical division between treaties ratified prior and those ratified after 1931. Before the 1931 Statute of Westminster, state and non-state actors would be facing a very centralized system with few veto points. The Canadian executive would not require the approval of Parliament or the provinces.

However, for treaties addressing substantive matters that fall within provincial jurisdiction and that have been ratified after 1931, the federal government would be obligated to obtain provincial cooperation to ensure their domestic implementation. To the extent that effective implementation is a requirement for international credibility and regime effectiveness, key groups of provincial governments could be said to benefit from a *de facto* veto over regime change.[177] And as a result, these governments would become likely targets for transnational coalitions seeking to prevent or support international regime change through Canada.

This latter case of policy issues requiring provincial participation necessitates further qualifications. The constitutional necessity to bring provincial governments to adopt legislative measures for the implementation of international agreements, as

confirmed by the *Labour Conventions* case, requires that we count provincial cabinets as formal veto points in the process for making international policy. However, this choice denotes the fact that we consider policy change to take place only when policy choices are implemented and that policy change cannot be limited to the formal creation of international commitments through treaties. Moreover, even with such understanding, one should note that effective implementation may not require the participation of all provinces. For example, meeting international commitments on acid rain reductions may only require the cooperation of a limited number of provinces with important coal-based industries. In this case, not all provinces would benefit from an effective veto and the federal government could secure an effective implementation plan by brokering a deal with a sub-set of provincial jurisdictions.

To complicate matters further, the analysis must take account of the fact that the division of powers is usually murky. Because of this reality, the requirement for provincial cooperation may not be self-evident but would result instead from a political decision. For example, a reluctant federal government may insist that it will need provincial legislation to implement biodiversity and endangered species policies because it hesitates to try to legislate on the basis of its "peace, order and good government" power for fear of triggering federal-provincial battles. Similarly, a federal government may want to gain provincial cooperation to implement climate change commitments but, failing to succeed, make the international commitments nevertheless and fall back on the use of policy instruments that fall under its controls (e.g. fuel taxes and industrial abatement subsidies).

These qualifying considerations suggest that provincial implementation vetoes may be considered of a less stringent nature than the ones exercised by American legislative chambers, which can simply prevent ratification. While they undoubtedly constitute "points of vulnerability" which could allow provincial state actors, and interest groups that can influence them, to affect the making of international policy, they may be less decisive for the outcome of policy-making depending on the nature of the issue at hand (and how it relates to the state of constitutional law), the alternative options available to the federal government, and the ability of provincial governments to present a common front to veto federal action.

Conclusion

How are these constitutional characteristics and differences likely to affect the transnational politics of treaty-making in North America? What general hypotheses and conclusions can we draw from the preceding discussion to inform our analysis of regime change on the continent?

Firstly, our examination of treaty powers in both countries has revealed a more complex picture of the institutional configurations created by constitutional rules than what might have been expected. In the U.S., state and non-state actors face either a two veto configuration (the Presidency and the Senate two-thirds majority) or a three veto configuration (the Presidency and a majority in both chambers) depending on whether the executive decides to use a traditional treaty or to use a congressional-executive agreement.[178] In Canada, in the pre-1931 Statute of Westminster era, Canadian state and non-state actors faced a clear one veto configuration.[179] The

federal cabinet, given a majority government, effectively exercised sole control over treaty-making and treaty-implementing functions. In the post-1931 Statute of Westminster era, the same state and non-state actors would face either a one veto configuration or an uneven and complex eleven veto configuration depending on whether the issue at hand would fall within federal or provincial jurisdiction.[180]

This general characterization of the institutional framework for treaty-making partly corresponds the prevalent understanding of the difference between these political systems. But it also clearly showed the need for some significant qualifications. While the general characterization of American institutions as more fragmented and permeable than Canadian institutions remains generally accurate, a better appreciation of provincial constitutional jurisdiction over the implementation of treaties falling within the realm of their responsibilities allows for the possibility that Canada can actually have more veto points and be considered a more fragmented and permeable institutional configuration than the U.S.

Furthermore, my historical examination of the special case of international policy-making through treaties revealed an institutional context that can differ from the general institutional parameters of domestic law-making. For example, the need for a two-third senatorial majority for treaties in the U.S. is prone to generate a different political dynamic than the traditional Congressional legislative process. Moreover, even the most attentive reader of American constitutional documents would have failed to note the growing use of congressional-executive agreements in lieu of treaties. Similarly, the fall into disuse of the Empire treaty clause and the

emergence of the provincial vetoes in the post-*Labour Conventions* period in Canada is only revealed through a contextualized analysis of the evolving institutional parameters of policy-making. The preceding analysis consequently underscores the necessity of using an historical, sector and country-specific approach to the study of institutional effects on public policy-making.

What can we say about the likely effect of the constitutional frameworks of treaty-making on the transnational politics of regime change in North America? It should be expected that the making and the amendment of continental treaties will be more difficult in the U.S. than in Canada, with the potential exception of when an issue requires the legislative cooperation of Canadian provincial governments. The formal veto that can be exercised by a Senate's minority or by a majority of one of the Congressional chambers, coupled with the fragmented and permeable nature of the American Congress for organized interests, assuredly makes it a point of vulnerability in the treaty-making process in this country.

In contrast, under the normal conditions of a majority government and for issues falling within federal jurisdiction, the constitutional parameters of the treaty-making process allows the federal cabinet to isolate itself from external pressures much more effectively than the American executive. As a result, lobbying activities are likely to focus on the cabinet but the making and the amendment of continental treaties should be easier. When issues fall within provincial jurisdiction, international policy change should be more arduous and we should expect organized interests to

use provincial vetoes by lobbying provincial governments and couching their claims in regional terms.

In any case, given the more permeable nature of the American Congress and the greater stringency of its vetoes, it should be expected that it will become the most important "point of vulnerability" in a transnational context and that it will be the target of domestic and transnational lobbying by organized interests seeking to block policy changes or influence the nature of the policy adopted. Paradoxically, from a Canadian perspective, continental treaty-making actually opens up new institutional veto opportunities in the policy process and offers new avenues for exercising influence over policy outcomes for Canadian non-state actors willing and able to engage in political lobbying in the United States. In addition to a new opportunity for stopping unwanted changes, the opportunity to jeopardise the adoption of international treaties wanted by the Canadian government by influencing the U.S. Congress could also strengthen their case at home for gaining modifications. The success of this transnational lobbying strategy rests however on the ability of these groups to couch their objections and demands in terms that make sense politically for U.S. members of Congress. For this purpose, we may also expect Canadian non-state actors to seek the creation of coalitions and alliances with American non-state actors as a way to gain easier access to American legislators.

From the point of view of American groups, the transnationalisation of policy-making appears less significant. While theoretically American interest groups do gain access to an additional veto in the required approval by the Canadian cabinet, the less

accessible nature of the veto point (smaller membership, more unified through cabinet solidarity and party discipline, secretive decision-making, etc.) would seem to make it less appealing for American lobby groups to focus its activities and resources on its influence. The more permeable nature of the American Congress offers again a more advantageous entry point, a point of greater vulnerability. When treaty issues fall within provincial jurisdiction in Canada, American interests would find a more open structure. In this case, they may seek to establish objective alliances with provincial governments by highlighting areas of common interests with the provinces, thereby undermining the chances of success of policy change by bringing provinces to threaten withholding implementing legislation or affecting the content of the international agreement by supporting the provinces' demands for amendments in return of cooperation for implementation.

Constitutions and the Migratory Birds Convention

With regard to the following examination of the politics of amending the Migratory Birds Convention, I am also now in a position to reformulate some of my hypotheses with greater precision. In terms of legal form, the Migratory Birds Convention is an international treaty signed in 1916 between Canada and the United States. These characteristics have two major consequences for my analytical framework. First, because it is not a congressional-executive agreement, it focuses our attention on the Senate as the sole legislative veto applicable in this case in the U.S. Secondly, in Canada, its pre-Statute of Westminster status means that it is still considered an Empire Treaty covered by section 132 of the Constitution Act, 1867. As a result, its constitutional status strengthens the hand of the federal government

vis-à-vis the provinces. While Canadian provinces have important constitutional responsibilities regarding wildlife policy, the federal government nevertheless has the constitutional authority to implement the provisions of the Migratory Birds Convention across the land. For all practical purposes, the possibility of provincial vetoes is discarded.

It is then now possible to return to the last hypotheses outlined at the end of chapter one. Firstly, we had hypothesized that, *the more fragmented the domestic political institutions, the broader and better organized the transnational coalition would have to be to achieve policy change in this country.* In our case, the more fragmented and permeable institutions are American. Correspondingly, it should be expected that the transnational politics associated with influencing the U.S. Senate will require the formation of broader winning coalitions than what is necessitated by the more centralized Canadian parliamentary institutions. In the Canadian case, policy outcomes should be determined to a greater extent by the policy preferences of executive state actors, who can isolate themselves better from societal pressures through the relative scarcity of veto points.

Secondly, we had also postulated that given similar political preferences and resources of organized actors, differences in the domestic institutions would determine the variation in the policy influence of transnational coalitions. The more fragmented the domestic institutions, the more successful transnational coalitions would be in blocking change. In our case, transnational actors should have a greater impact on the nature, and the ratification, of international policy change by working

through the more fragmented political institutions of the United States than by lobbying through Canadian institutions. The relatively more fragmented nature of American institutions, exemplified by the easier access to the veto exercised by the Senate over international treaties by transnational actors, should help us offer credible explanations for differences in outcome between the two countries. Similarly, we should expect the lobbying activities of transnational coalitions to focus on the American domestic institutions, especially the Senate, as opposed to Canadian institutions.

Chapters 6 and 7 will provide a first test of these hypotheses by analysing the politics of amending the Migratory Birds Convention between 1975 and 1997. But before this analysis is possible, we must first provide some important background about the Migratory Birds Convention and aboriginal subsistence hunting. The next chapter provides a complete account of the formation of the Migratory Birds Convention and it offers an explanation of the problem at the heart of the recent amendment efforts. Chapters 4 and 5 will then provide a detailed analysis of the contemporary subsistence controversy. These chapters will allow us to understand the nature of the issue and the different meanings that it holds for the coalitions of groups involved in its politics, including their differences in values and material interests.

Part II

Aboriginal rights and the Migratory Birds Convention

Chapter 3

THE MIGRATORY BIRDS CONVENTION AND NORTHERN SUBSISTENCE RIGHTS: THE HISTORICAL ROOTS OF DISCONTENT

> The conclusion of this convention constitutes the most important and far-reaching measure ever taken in the history of bird protection.
>
> - Dr. C. Gordon Hewitt, Dominion's Entomologist and consulting zoologist, on the Migratory Birds Convention in his book The Conservation of Wild Life in Canada, 1921.

> I find, however, that the societies in the East have no knowledge of the North and cannot see why we deserve very much consideration.
>
> - The Governor of Alaska complaining about the Migratory Birds Convention in a letter to the Gold Commissioner of the Yukon Territory on 27 June 1919.

> As you undoubtedly know, the abrogation of treaty rights by the Migratory Birds Convention Act is one of the longest standing and most symbolic grievances of the Indian people against the Federal Government and a continuing source of mistrust and evidence of bad faith.
>
> - Minister of Indian and Northern Affairs, Jake Epp, writing to the Minister of State for the Environment, John Fraser, on December 12, 1979.

The Aboriginal subsistence rights controversy associated with the Migratory Birds Convention finds its roots in an instance of historical neglect. When the international treaty protecting migratory birds on the continent was framed, negotiators in both countries apparently failed to fully recognise the particular needs of northern inhabitants in Alaska and the Canadian north who lived a subsistence life-style, counting on the passing birds to sustain themselves and sometimes meet their spiritual needs. As a result of this unfortunate disregard for northern realities, the conservation treaty essentially outlawed the traditional, and economically important,

subsistence spring harvest of waterfowl by northern (and mainly Aboriginal) inhabitants of the continent. Over time, this historical diplomatic shortcoming would become a significant source of grievances for northern Aboriginal inhabitants and create important tensions among indigenous communities, their non-indigenous neighbours, and government authorities. Sixty years into the treaty's history, it would also become the object of bilateral efforts between Canada and the U.S. to rectify the roots of this Aboriginal discontent.

In order to acquire a broader understanding of the nature of the problem that will occupy these diplomatic efforts from the mid-1970s to the mid-1990s, it is important to examine in some details the historical movement that led to the Migratory Birds Convention's negotiation. The concerns of the conservationists leading this movement, and the nature of the political opposition which they met along the way, shaped the terms of the Convention in important ways. But in addition to providing this important historical context for the dissertation, the chapter also offers the opportunity to investigate the roots of this historical injustice. In our opinion, the roots of the contemporary subsistence problem are to be found in the terms of this early century debate and in the political dynamics that led to the Convention's conclusion. The hypothesis presented in this chapter is that the detrimental measures for northern communities in the Migratory Birds Convention are the indirect result of the battle between conservationists and the mid-west sportsmen on the key question of the spring harvest. Rather than being the result of sheer ignorance, oversight or prejudice (as the prevalent hypotheses suggest), the Convention does not contain an exception for northern communities because granting

one would have "unnecessarily" complicated the terms of the international compromise for negotiators and would have weakened the chances of reaching an acceptable compromise. It is their lack of political clout that led to the neglect of northern communities in the Convention of 1916.

The chapter begins with an overview of the terms of the Migratory Birds Convention and the nature of the subsistence problem. We then probe the reasons for the disregard of northern needs in the original agreement. In order to assess the value of alternative explanations, the bulk of the chapter is devoted to an analysis of the political events leading to the Convention's adoption by Canada and the United States in the early part of this century. In the last section, we then discuss the prevalent hypotheses offered in the literature to explain the source of this historical injustice. We conclude that, in view of the treaty's historical origins, these prevalent hypotheses are not entirely convincing. An alternative explanation, based on the politics that underpinned the framing of the Convention, can help better ascertain the original causes of the problem.

The Migratory Birds Convention and the subsistence problem

The 1916 Migratory Birds Convention between Canada and the U.S. is part of a landmark series of international environmental treaties negotiated early in the century. In addition to the 1908 Inland Fisheries Treaty, the Boundary Waters Treaty of 1909, and the North Pacific Fur Seal Convention of 1911, the Migratory Birds Convention essentially marked the beginning of international environmental diplomacy on the continent.[181] While the Inland Fisheries Treaty turned out to be a

failure, the other conventions were generally successful in establishing management regimes for the conservation of shared environmental resources in North America and, in conservation circles, the Migratory Birds Convention is widely regarded as a model of successful international environmental cooperation.

The nature of the Migratory Birds Convention

The *Convention between the United States and Great Britain for the Protection of Migratory Birds*[182] is itself a rather simple document. After some introductory remarks about the objectives pursued by the agreement, it contains only nine articles providing the framework of a management regime for the conservation of migratory birds populations shared by the two countries. The Convention essentially establishes the backbone of a continental legal framework that severely limits the killing of migratory birds.

The treaty divides migratory birds in three categories, encompassing most species of migratory birds: migratory game birds, migratory insectivorous birds, and other migratory non-game birds (art. I).[183] The killing of migratory insectivorous birds is prohibited in both countries throughout the year (art. II (2)). The killing of other migratory non-game birds is also prohibited throughout the year; but a minor exception is made for "Eskimos and Indians" who can take certain seabirds for food and clothing (art. II (3)). The taking of eggs, an important cultural and subsistence practice for many Aboriginal communities, is completely prohibited for all three categories of migratory birds (art. V).

With regards to migratory game birds, the Convention establishes a closed season between March 10 and September 1 in both countries, during which hunting is prohibited (art. II (1)). This complete ban on spring hunting is meant to protect the birds during their reproductive season, a crucial period to assure the maintenance of healthy population levels.[184] In the period going from September 1 to March 10, each country can allow a regulated harvest but the hunting season cannot exceed three-and-a-half months. Again, a minor exception concerns "Indians" who can take scoters for food throughout the year.[185] The establishment of a closed season has become the cornerstone of the continental management regime for migratory game birds and, while the conservation of insectivorous birds played an important part in establishing the 1916 Convention, the regulation of recreational and subsistence hunting of waterfowl has generally been the most contentious component of the continental agreement.

In an indication of the sense of urgency prevalent at the time of negotiations, the Convention also imposed a ten-year moratorium for the harvest of several species of migratory game birds (art. III), such as swans and cranes, and called for additional temporary conservation measures for wood ducks and eider ducks (art. IV). As a mean of strengthening enforcement measures, it also rendered illegal the shipment or export among states, provinces or countries during the closed seasons (art. VI). In addition to the exceptions for Aboriginal Peoples described above, the Migratory Birds Convention also contains some exceptions to the taking of birds, under special permits, for scientific purposes. Both governments can also issue temporary and exceptional permits for the harvest of any bird population that is considered

"seriously injurious to the agricultural or other interests in any particular community" (art. VI).

The Migratory Birds Convention is resolutely an early twentieth century development, embodying an utilitarian approach to the conservation of nature. Despite the fact that many supporters of the agreement were concerned about birds for their own sake, the preamble to the Convention suggests mainly an utilitarian rationale for the their protection. It underscores the fact that "these species are of great value as a source of food or in destroying insects which are injurious to forests and forage plants on the public domain, as well as to agricultural crops". While the Convention states that it seeks to assure the preservation of birds that are "either useful to man or are harmless", its text is completely silent on the existence value that these species may have, on essential functions that they might perform for ecosystems, or on an inherent right to life that they might bear.

Disregard for northern realities

The structure of the regulatory framework put in place by the Convention turned out to be injurious for northern inhabitants of the continent. While the complete ban on insectivorous and non-game birds was not problematic, the ban on the spring harvest of game birds, essentially waterfowl such as ducks and geese, created major difficulties for northern inhabitants in many respects. First, the timing of migrations did not fit well with the timing of the closed season. Birds often arrived in the North after the ban started on March 10 and they left for their wintering grounds before the hunting season could begin on September 1st. As a result, the

Migratory Birds Convention seemed to impose an inequitable allocation of the waterfowl resources by hindering its legitimate access for northern inhabitants.

Moreover, the restrictions on spring hunting had a disproportionate impact on many northern inhabitants, especially Aboriginal peoples, who depended on waterfowl for nutritional and cultural needs. Unlike southern hunters who generally hunt waterfowl for recreational reasons, many northern harvesters depend on the taking of waterfowl in the spring for their subsistence. At the end of the harsh winters of Alaska and the Canadian North, stocks of country foods and financial means are often at a low point. Waterfowl provide an important access to fresh food and a significant source of proteins. For many northern inhabitants, especially in isolated regions, the taking of waterfowl in the spring is considered a matter of livelihood and subsistence.[186]

The situation is even more complex for Aboriginal subsistence users. Aboriginal Peoples have a different relationship to wildlife than non-Aboriginal society. In most Aboriginal cultures and traditional religions, wildlife occupies an important place in their cosmological and cultural understanding of their lives. The hunting of wildlife, including waterfowl, and the use of animal parts are often important cultural and spiritual practices. The sharing of the harvest also plays a role in the social structure and reproduction of Aboriginal communities.[187] In this context, legal restrictions on the taking of waterfowl are often perceived as evidence of cultural imperialism and violations of fundamental religious and cultural rights.

In cases where the continuing use of wildlife had been guaranteed by the treaties signed between Aboriginal nations and the colonial powers, disregard for the Aboriginal spring subsistence harvest on ancestral lands was also considered a violation of Aboriginal peoples' trust and a betrayal of the promises made by state authorities. Even in the absence of formal treaties, most Aboriginal nations refused to believe that they had somehow agreed to abandon their ancestral hunting practices or to make them conditional on the approval of colonial authorities.

But at the time of the Convention's negotiation, both national governments, with the minor exceptions noted above, apparently paid little attention to the needs of northern and Aboriginal populations. The ban on a spring harvest became the cornerstone of the new continental management regime and it suffered few exceptions. Grievances did not take much time to arise after the implementation of the Convention. As early as the summer of 1919, barely a year after the regulations implementing the treaty were adopted in Canada, the governments of the Yukon Territory and Alaska complained about the spring hunting measures.[188] And while enforcement might have been most resisted and dangerous in the recalcitrant American mid-west states,[189] questions about whether the spring hunting restrictions should apply to Aboriginal Peoples were also prominent from the early years.[190]

So why were Aboriginal Peoples and northern subsistence hunters not exempted from the initial terms of the Migratory Birds Convention? The question remains poorly investigated but it has been the object of some scholarship. Prevalent explanations tend to rely either on prejudicial attitudes towards Aboriginal Peoples,

scientific and ethnological ignorance regarding northern lifestyles, or pleas of simple oversight. However, before further examining the value of these arguments, it is worth recounting in some detail the events that led to the conclusion of the international agreement in the first half of the 1910s. These events should provide some background against which it will be easier the assess the nature of the Convention's disregard of northern interests.

The Origins of the 1916 Migratory Birds Convention

The Migratory Birds Convention largely finds its origins in the birth of the conservation movement. Long before the explosion of environmentalism in the 1960s, the late nineteenth century saw the creation of civic organisations dedicated to nature appreciation and bird watching. Among the better known groups, the Audubon Society was created in 1886 and the Sierra Club was established in 1892 in the U.S.[191] These organisations were clearly dedicated to improving the appreciation for birds of the North American public and they played a crucial role in the diffusion of a new conservation ethic. But their creation was also reflective of a broader movement in favour of the scientific study of wildlife and the biological world; a scientific movement driven both by the search of knowledge for its own sake and by the growing evidence that birds played an important role in controlling populations of insects damaging to agriculture. The American Ornithologists' Union was formed in New York in 1883 and it played an important part in the formation of a new Division of Economic Ornithology and Mammalogy (later to become the Fish and Wildlife Service) in the U.S. Department of Interior in 1886.[192]

In Canada, the late nineteenth century and early twentieth century were also a time of profound changes in public attitudes and government policy toward nature and wildlife. However, in the absence of strong national organisations like the Audubon Society, the development of conservation followed a different path. Like in other aspects of its national life, the origins of Canada's first conservation policies derive more from the work of state officials than from civic organisations. Howard Douglas (first commissioner of Canada's first national park - Rocky Mountain Park in 1897), Robert Campbell (head of the Forestry Branch of the Department of Interior), and Gordon Hewitt (the Dominion's Entomologist in the 1910s), and not the Sierra Club or the Audubon Society, were the country's leading advocates for a new approach to wildlife management.[193] Their privileged fields of action were professional networks and privileged access to political leaders and they often used their administrative discretion to further their objectives.

While the two countries followed different paths to the new conservation ethic, they nevertheless shared a same direction and underlying philosophies. They were both inspired by the writings of pioneers like John Muir, Gifford Pinchot and Aldo Leopold.[194] They frequently exchanged views and information through their transnational professional networks. And while the American movement was more vocal and turbulent, the Canadian approach was not necessarily less effective. While Americans led the way in the creation of national parks, Canada may have had better conservation laws than the U.S. by the early twentieth century, at least with regards to the protection of birds, and Canadian provinces did not suffer as much as American states of a reputation for laxness.[195] The first Upper Canadian game law protecting

game birds was passed as early as 1832 and it was later extended to fur-bearing animals (1856) and insectivorous birds (1864).[196] By the time the Migratory Birds Convention came along, the country already had a reasonable set of provincial laws protecting wildlife.

It is against this backdrop of expanding scientific knowledge and socio-cultural change that the Migratory Birds Convention was born. But had it counted solely on changes in cultural attitudes toward nature, it may have never seen the light of day. The Convention was also the direct product of a long sustained effort of political lobbying and intergovernmental negotiations. While a comprehensive analysis of the events leading to the ratification of the 1916 Migratory Birds Convention is beyond the scope of this study, it is nevertheless useful for understanding the terms of the agreement, its political context, and the nature of the Aboriginal subsistence rights problem to review briefly the political dynamics that led to the original deal.

The birth of the conservation ethic

The end of the nineteenth century was the end of the "myth of superabundance".[197] The frontier mythology was slowly being shaken by the evidence of over-exploitation of natural resources and the decline of many wildlife populations. Under the combined pressures of development and over-harvesting, some highly visible and popular species were also being decimated. The plains bison and wood buffalo, mythical figures of the north-west, were brought to the brink of extinction. The wapiti, the great auk, the wood and Labrador ducks, the whooping crane, and the trumpeter swans were all endangered species by 1900. The wild turkey

did not survive the end of the century and the passenger pigeon, once the most numerous birds in history with a population in the hundreds of millions, had been hunted to extinction by the early twentieth century.[198] This alarming evidence showed the finite character of wildlife resources and contributed to the rise of the conservation movement among bird lovers. But it also triggered into action a large number of sportsmen's organisations suddenly concerned with the protection of their lifestyle and a sustainable provision of their game.

The major threats to bird populations were found both in development and urbanisation, which resulted in losses of habitat, and in over-harvesting. The drainage of prairie wetlands to make way for agriculture in western Canada was undoubtedly a major contributor to the decline of waterfowl populations, a factor that might not have been well understood at the time.[199] In contrast, the taking of birds by hunters was not only easier to see, and to control, but it was also an important source of mortality. Mass killings were driven by economics. There existed an significant market for wildfowl in the restaurants of North American cities. But in the late nineteenth century, the main pressure for over-harvesting came from the expanding consumption of plumage by the millinery industry. Wearing bird feathers, body parts or even whole bodies on your hat was in fashion for society women. Seeing a demand to be filled, market hunters, often poor Americans, were engaging in the industrial slaughter of birds in order to make a living.[200]

For maximum effectiveness, these hunters resorted to techniques of dubious sportsmanship, which attracted the harsh criticism of many sport hunters who saw

their sport as being guided by a moral code. But the techniques were effective, sometimes filling entire freight cars with dead bodies, and populations were suffering. Moreover, progress in scientific understanding of bird ecology and the results of the first banding studies in the late 1890s revealed just how much the birds were endangered by spring shooting. It became clear that shooting bird flocks on their way to their northern nesting grounds had severe repercussions on their future number. As a result, the ban on spring shooting quickly became a crucial issue.

The search for federal legislation in the U.S.

Canadian authorities recognised the importance of banning spring shooting of game birds more readily than American authorities. Ontario banned the practice in 1873 and most of the other provinces followed suit to some degree.[201] Some of the bans excluded particular species, differences in provincial regulations created a patchwork of protection, and enforcement was generally ineffective but the foundations of a protection regime were nevertheless in place. As a whole, American states were not as eager to impose restrictions on their citizens or to ban a practice highly valued by many hunters, especially private hunting clubs in the mid-west.[202] As a result, spring shooting in the United States was widely perceived as a major threat to the continental resource.[203] Eventually, in the context of the fight for bird protection, the spring shooting of game birds would become amalgamated with the broader struggle for the protection of all migratory birds, including insectivorous and song birds. Only then, and not without surmounting important obstacles, would the spring harvest fall to the hands of the conservation movement.

The American conservationists' fight for bird conservation was originally entirely focused on the domestic front. The Audubon Society, the leading organisation of the movement, placed great emphasis on the need to generate public sympathy for the birds and their efforts were largely targeted on education. In doing so, the organisation, with the help of talented writers like Charles Burroughs or Mabel Osgood Wright, were shamelessly anthropomorphic in their appeal to sentiment. They targeted school children and affluent urban populations with their political message and their stories about our loveable winged friends. The early conservationists were skilled, media-savvy communicators. Tabling on the public's outrage at the damages done by the millenary trade, they pushed for state laws protecting birds and, with the help of the Committee on Bird Protection of the American Ornithologists' Union, they obtained some victories, particularly in north-eastern jurisdictions.[204]

However, despite these victories, achieving a uniform level of protection state by state may have been an impossible challenge. It was quickly recognised that pushing for federal intervention would alleviate the costs and difficulties of mounting lobbying campaigns in dozens of different states. As a result, the political efforts of conservationists quickly turned to Washington. However, in the U.S. as in Canada, wildlife management was clearly a matter of state jurisdiction. If the federal government was to enter the bird protection business, some constitutional creativity was required. The first federal victory came with the adoption of the 1900 Lacey Act, which tried to control market hunting by regulating interstate commerce in bird parts.

While a significant step, the Lacey Act was of doubtful effectiveness and conservationists were looking for a better legal framework.[205]

A potential solution lay in the fact that birds migrate across political jurisdictions. In 1904, George Shiras III, a senator from Pennsylvania, tabled a bill to establish federal jurisdiction over migratory birds by arguing that, because migratory game birds cross state boundaries, they can not be considered to be effectively falling under their jurisdiction. According to a broader reading of the interstate commerce clause of the constitution, migratory game birds were, Shiras argued, the responsibility of the U.S. Congress. The Shiras bill was not received with equal enthusiasm. In addition to market hunters who saw their livelihood threatened, most state governments condemned it as a telling example of federal encroachment on state jurisdiction. Even many federal politicians who liked the bill were reluctant to trample on the states' constitutional territory. As a result, after many years of circulating on Capitol Hill, the Shiras bill never made it to a vote.

The Weeks-McLean Act

But while the Shiras bill could not garner sufficient support in Congress, its constitutional logic was smart and seductive. If it could potentially work for migratory game birds, it could also potentially justify federal protection of non-game birds. In a show of pragmatism and political acumen, American naturalists ceased the constitutional argument and attempted to broaden its political appeal by turning also to economics. Knowing that they could count on their traditional supporters, the Audubon Society and its allies turned their energies to convincing farmers of the

value of insectivorous birds for the control of the insects damaging their crops. The benefit of these birds for agricultural production was becoming clearer as scientific evidence accumulated and, in the 1910s, North American farmers were suffering increasing crop losses. Supporting federal legislation was a logical, self-interested decision for them.

The conservationists quickly found support in Congress. In particular, Senator George McLean from Connecticut and Rep. John Weeks from Massachusetts had been instrumental in keeping the Shiras game bill alive in the legislature. In 1912, McLean and Weeks teamed up with the conservationists to draft and introduce in Congress a new version of the bill that would incorporate all migratory birds. The new bill essentially banned the killing of migratory non-game birds and outlawed the spring harvest of game birds. The Weeks-McLean bill quickly received unexpected but crucial support from an influential group of sport hunters. The American shotgun and ammunition industry had become concerned that the decline of migratory game birds populations would threaten its prosperity. In reaction, the major manufacturers formed the American Game Protective and Propagation Association (AGPPA) to lobby for federal management of the resource.[206]

As a result of these development, the prospects for federal protection of migratory birds had radically improved by the early 1910s. It now benefited from a credible constitutional logic and its value could be associated with the agricultural interests of the nation.[207] When the gun manufacturers formed a coalition with the

naturalists, the coalition's resources expanded significantly, allowing conservationists to focus more exclusively and with more vigour on lobbying Congress.

In contrast, the market hunters formed a poor political match. They were generally poor immigrant or Black Americans, politically disorganized, with few resources, and easy preys to prejudice. Moreover, they were a modest economic constituency compared to their business opponents. The constitutional opposition of state governments was the last significant hurdle. But when the Weeks-McLean bill was attached as a rider to an agricultural appropriation bill, it received legislative approval. While President Taft, in the last days of his presidency at the time, had vowed to veto it on constitutional grounds, he did not. As a result, on 4 March 1913, the Federal Migratory Bird Law was enacted, giving the United States its first effective federal law protecting migratory birds.

The need for a treaty

The victory represented by the Federal Migratory Bird Law was short-lived. Unable to prevent its adoption in Congress, state governments resisted the application of the law. Questions were raised about its constitutional validity. The attorney general of New York declared publicly that the law was unconstitutional. His opinion was apparently shared by the legal community, even by the lawyers of the U.S. Department of Agriculture entrusted with enforcement.[208] While there were opponents in every state, Missouri became the heart of the opposition movement. Its political leadership at home and in Congress criticised the statute and the Missourian sport hunters formed the Interstate Sportsmen's Protective Association (ISPA) to act

as a counterweight to the AGPPA. In both cases, they also condemned the legislation as unconstitutional. Even before the bill had been enacted, it became obvious that a constitutional challenge would be imminent. To maintain their hard-fought victory, conservationists needed an alternative constitutional approach.

The migratory character of the resource would again hold the key to the constitutional puzzle. Treaty-making, it was argued, was clearly a federal jurisdiction. If a treaty on migratory birds could be secured with a neighbouring state, the treaty power could provide the federal government with the constitutional authority needed for protecting them. Even if the Weeks-McLean Act was eventually found *ultra vires*, the treaty would secure the federal government's role in bird management. The need for an international treaty with Canada had already been raised in 1913 on both sides of the border. In the U.S., Senate motions were adopted in April and July 1913, urging the Wilson Administration to seek the negotiation of treaties with other countries for the protection of migratory birds.[209] The latter resolution asked the President "to propose to the governments of other countries the negotiation of a convention for the protection of birds".[210] As it turned out, Wilson was favourable to the negotiation of a treaty with Canada. However, the opposition of states and mid-western sportsmen created pressures for a rapid international resolution.

As expected, legal challenges to the Weeks-McLean Act were numerous in the few years following its enactment. The most serious challenge came from Arkansas where Harvey Shauver had been arrested for taking coots during the closed season. Seeking to create a test case, the state game warden persuaded Shauver to challenge

the legislation and even paid his legal fees. In May of 1914, a federal court declared the Federal Migratory Bird Law unconstitutional.[211] With the initiation of the appeal process, the race for saving the American bird protection law through an international treaty got underway.

These early American developments are important in order to understand the original impetus leading to the Migratory Birds Convention. The idea of the convention originated in the U.S. and, at the time, it was clearly conceived as a way to extend abroad American domestic protective measures for birds.[212] Once a domestic commitment was made to the protection of this resource, the ecology of migratory birds, which require an extensive geographical range that crosses political boundaries, made international agreements an essential component of any effective management regime. But more importantly, the constitutional limitations on the federal power over wildlife resources in the United States made an international treaty necessary.

The Canadian reaction

The proposal for an international convention to protect migratory birds shared with the U.S. was generally well received by the Canadian government and conservationists. Canadians had followed closely the recent legislative developments in the U.S. and interest in developing similar federal legislation to protect migratory birds in Canada was expressed both within and outside the Parks' Commissioner's office.[213] The reasons used to call for an international treaty in Canada were essentially the same as in the United States. Canadians shared the American

conservationists' concern with declining populations, both in terms of sustained yield of the resource and for preserving the aesthetics value of birds. The early promoters of the treaty also borrowed, and adapted to Canadian circumstances, the American conservationists' arguments about the economic value of insectivorous birds for agriculture.[214]

As in the United States, an international treaty was seen as a means to replace the patchwork of provincial regulations (and unequal enforcement) with a federal law protecting migratory birds on the basis of shared continental norms. As Walter Jones, consultant to the Canadian Commission of Conservation, put it:

> "Of what use would provincial authority be when one hundred and fifty-four species of insect-eating game birds are being legally slaughtered, and when most of these nest in Canadian territory, and winter in the United States, Mexico, and other parts of America? [..] Migratory birds should come under the authority of the jurisdiction of the Federal authority for the same reasons that foreign commerce is administered by the Federal Government."[215]

Percy Taverner, one of Canada's leading ornithologists at the turn of the century, shared Jones' views and pointed out that the North American protection regime faced an important deficiency in the fact that spring shooting was outlawed in Ontario but still a popular activity in Michigan.[216] In this context, the signature of an international agreement on migratory birds, something falling clearly within federal jurisdiction, would certainly help strengthen the federal role in the protection of wildlife and bring about uniform norms.

Despite some regional opposition to an international treaty, the Canadian opponents were fewer and weaker. While there were some market hunters in southern

Ontario, the commercial harvest was never as important in Canada as it was in the United States.[217] Moreover, sports hunters' associations accepted more readily the necessity of controlling the spring harvest to ensure a sustainable yield of waterfowl. Combined with the fact that many provinces already had some form of protection for game birds, these factors meant that the idea of an international treaty was not as hard a sell in Canada as in the United States.

The negotiation of a U.S.-Canada convention on migratory birds quickly made it on the diplomatic agenda as a result of the collaboration of American and Canadian advocates in pushing the issue in Canada. Early promoters of the idea, such as James Harkin of the Parks Branch, communicated with the AGPPA early in the process to bolster their set of arguments and to solicit transnational collaboration to promote the issue.[218] At the end of 1913, the North American Fish and Game Protective Association, a transnational organisation of sportsmen and wildlife managers, adopted a resolution calling on Canadian provinces to pressure Ottawa in negotiating an international treaty for the protection of migratory birds.[219] In the spring of 1914, Gordon C. Hewitt, the Dominion's Chief Entomologist, made an informal trip to Washington to discuss the possibility of an international agreement to protect migratory birds.[220] Hewitt, who eventually became the prime negotiator of the treaty for Canada, established a close relationship with U.S. federal wildlife officials which would become crucial in the following years.

The following year, the Commission on Conservation, a prominent advisory body on conservation policy at the time, announced its support for a migratory birds

treaty. In 1913, the Commission had followed with interest the adoption of the Weeks-McLean Act in the U.S. Congress and it had favourably made mention of it in its annual report.[221] In considering the matter of an international treaty at its fifth annual meeting, the Commission invited the legal counsel of the AGPPA to come from Washington to discuss the issue. At this meeting, the AGPPA made the point that the signature of a treaty would not only help Canada directly but would also be instrumental in saving the American efforts to protect the resource at home.[222] At the same meeting, Hewitt also appeared before the Commission to stress the agriculture benefits associated with bird protection. At the end, the Commission adopted a resolution that urged provincial governments "to solicit the good offices of the Dominion Government in obtaining the negotiation of a convention for a treaty between Great Britain and the United States, for the purpose of securing more effective protection for the birds which pass from one country to another".[223]

These efforts successfully established a favourable attitude toward a continental treaty on migratory birds protection. As a result, when the U.S. Secretary of State wrote to the British Ambassador to the U.S. officially proposing the signature of the convention on 16 February 1914, he found Canadian authorities favourably disposed toward the idea.[224]

Negotiating the Convention

The negotiation of the Convention encountered two hurdles: the opposition of some recalcitrant provinces and a resurgence of mid-western opposition in the U.S. There was no difficulty in arriving at a first draft. Conservationists on both sides of

the borders largely shared the same understanding of the problem. When they officially raise the issue for the first time with Canadian authorities, American officials included a first draft that was closely modelled on the Weeks-McLean Act. Canadian federal officials found no major objections and the draft was sent directly to provincial bureaucrats.

The reaction of the Canadian government to the U.S. proposal to negotiate a convention on migratory birds was indicative of its weak constitutional position regarding wildlife management. Quite conscious of constitutional sensitivities, it sought provincial approval before concluding the proposed treaty on migratory birds and, to improve its chances for gaining provincial approval, federal bureaucrats relied on provincial wildlife officials who had already expressed their support for such an international endeavour. The federal government itself clearly considered the protection of wildlife as a provincial matter[225] and, while it was sympathetic to the American rationale for bringing migratory birds under federal control, the Canadian government was obviously reluctant to force its views on the provinces.[226]

In their response, most provinces expressed their support for the proposed international convention.[227] Most of them were emphatic about their support for the principle of the Convention and many pointed out that their statutes were already compatible with the treaty's provisions.[228] In fact, only Nova Scotia and British Columbia expressed some serious objections to the proposed agreement. Nova Scotia's objection centred on the departure of shorebirds from the province's coasts before the hunting season was allowed to open on September 1st.[229] The province felt

that its geographical circumstances warranted an exception allowing it to open the hunting season a few weeks earlier in the summer. The request was deemed reasonable and, given that some American states on the Atlantic coast had been granted similar exemptions under the terms of the Weeks-McLean Act, Nova Scotia was easily accommodated.[230]

Accommodating British Columbia was another matter. The province had a long tradition of spring shooting and an active and vocal constituency of sportsmen. As a result, the province was unwilling to agree to the Convention's closed season for waterfowl.[231] Moreover, the Migratory Birds Convention planned a complete five to ten years ban on some endangered species prized on the west coast, such as the wood duck or swans. These temporary bans were also considered unacceptable to British Columbian authorities.[232] In order to alleviate the province's objections, the draft treaty was substantially amended. The province was allowed to kill, under special permits, waterfowl thought to be injurious to agriculture (an exception partly aimed at allowing some spring shooting). It was also exempted from the five-year bans on the condition that it set up alternative conservation measures aimed at the same species (e.g. restoring habitats). Finally, it was simply exempted from the ten-year bans on taking swans, cranes and other endangered birds. These exceptions were significant. While they did not satisfy B.C. authorities, they also tested the limits of the support of American conservationists. Further compromise was not possible without threatening the treaty's adoption by the U.S. Congress. In the end, Canadian negotiators recommended the approval of the convention to Cabinet in spite of B.C.'s opposition.[233]

However, before the deal could be signed, another major concession would need to be made to gain Congressional approval in the U.S. After month of lobbying in Washington, states and sportsmen for the Mississippi Valley had assembled a group of fifty-two Congressmen willing to effectively kill the international agreement by denying it sufficient appropriations for its implementation unless some concessions were made on an extended spring shooting season.[234] American negotiators were also concerned that the Congressmen could assemble the thirty-three senators required to block the treaty's approval in the Senate, an endeavour that would have been facilitated by the fact that the chairman of the Senate's Foreign Relation Committee, William J. Stone, was from Missouri.[235] Fearing a defeat in the legislature, American authorities had agreed to push back the interdiction on spring shooting from February 1st to March 10th. The change was an important concession (and more than what B.C. authorities had been granted) and it infuriated Canadian negotiators.[236] But the political calculus in the U.S. legislature made it necessary and the Americans were inflexible.

By early 1916, the terms of the compromise had been set: Canadian authorities would have to agree to them without the full support of British Columbia or there would be no international agreement. After a final appeal to the Canadian Minister of Agriculture (and B.C.'s representative in cabinet) by Canadian negotiators and the director of the AGPPA, the agreement was approved by the government. The *Convention between the United States and Great Britain for the Protection of Migratory Birds* was signed in Washington on August 16, 1916 by Robert Lansing, the U.S. Secretary of State, and Sir Cecil Spring-Rice, the British ambassador in

Washington. The Convention was then quickly approved by the Senate and instruments of ratification were later exchanged in Washington.[237]

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It is worth highlighting some features emerging from this historical account of the origins of the Migratory Birds Convention. First, the impetus for the international convention clearly stemmed from the successes of the conservation movement in the United States. While Canadian wildlife officials were favourable to the idea of the Convention, the agreement emerged more directly as an extension to Canada of the Weeks-McLean Act. Concerns for the constitutional validity of the American law were certainly as important in driving the deal as the logical necessity of extending the system of protection a shared resource across the continent.[238]

The years following ratification would confirm the fears of Canadian and American conservationists regarding the necessity of the treaty to maintain federal jurisdiction over migratory birds. While the U.S. Supreme Court never handed down a decision on the *Shauver* case,[239] an American Court found in 1919 that, in the absence of an international treaty, wildlife management remained an exclusive state jurisdiction.[240] Then, in 1920, court decisions in both countries established that the Migratory Birds Convention allowed the federal government to supersede state laws. In the United States, as we saw in the previous chapter, *Missouri v. Holland* constituted a landmark ruling on the constitutional framework regarding international treaties. But, in rejecting Missouri's claim of an unconstitutional application of the treaty in state jurisdiction, Supreme Court Justice Holmes also clearly established the

validity of the federal migratory birds protection regime. The same year in Canada, in a less controversial and memorable case, the Prince Edward Island Supreme Court also reversed a lower court decision and upheld the constitutionality of the Migratory Birds Convention Act, quoting Justice Holmes' decision and citing the federal treaty power.[241]

It is also worth noting that, in order to secure an agreement, conservationists needed to draw upon a large coalition of interests. Tabling on the political support of naturalists and bird-watchers was not enough. To establish a broader coalition of interests, it first proved essential to broaden the appeal for bird conservation by stressing the economic benefits allegedly generated for agricultural production. It was also necessary to associate the preservation of non-game birds to the need for management of waterfowl in order to win the support of sportsmen and hunting equipment manufacturers concerned about ensuring a sustained yield of their resource.

There is also strong historical evidence that transnational relations among conservationists played an important part in initiating the negotiations and bringing them to a close. Transnational exchanges were important sources of information and arguments and there were several instances of direct lobbying by American organisations in Canada. These exchanges occurred throughout the entire period, ranging from the initial efforts to get the treaty onto the diplomatic agenda to arguing for the approval of the final deal at the end of the process. Transnational relations also took both the form of frequent exchanges among professionals at a lower level of the

federal and provincial bureaucracies (an example of epistemic communities at work) and of specific instances of lobbying at the higher levels of the political system (e.g. meeting between the AGPPA and the minister of Agriculture).

Finally, throughout the entire period, the main opposition came from the state officials and the sportsmen of mid-western American states and British Columbia. The central points of contention were the expansion of federal power over areas of state jurisdiction and the curtailment of the spring harvest. While the opposing forces in the U.S. could not prevent the treaty's ratification, they successfully claimed, using their allies in the U.S. Senate to threaten the use of the institution's veto, a significant shortening of the spring hunting ban. Considering that, with respect to game birds, the central measure for conservationists was precisely the closing of the spring harvest, this gain was an important one. British Columbia also obtained significant concessions regarding the taking of game birds under special permits as well as some exceptions on endangered species.

The roots of the controversy

In this context, what are we to make of the Convention's disregard of northern subsistence needs? Were Aboriginal Peoples and northern subsistence hunters ignored? Or were they simply overlooked? What did the framers of the Convention know and think of the impact of northern subsistence practices on waterfowl populations? The historical record on this early period does not offer a clear answer on this issue. But historians, ethnologists, and wildlife managers who have touched on the problem have ventured different explanations. In this section, we contrast these

explanations with the evidence gathered on the political dynamics that have led to the Convention's ratification.

An act of ignorance and omission

The standard explanation of the disregard of northern subsistence needs in the Migratory Birds Convention claims a mix of ignorance and omission. The U.S. Fish and Wildlife Service, for example, states that:

> "There is no evidence that the framers of the Convention were anything more than ignorant of the true dependence of northern peoples on the migratory bird resource for subsistence purposes, especially in the spring-summer period."[242]

In an important lower court decision on the Migratory Birds Convention Act in 1964, a Canadian Judge argued that the federal government had probably overlooked its treaty obligations towards Aboriginal Peoples at the time of the treaty's negotiation. In his words, the disregard for Aboriginal rights was probably "a case of the left hand having forgotten what the right hand had done".[243] Historian Janet Foster, in her landmark Working for Wildlife: The Beginning of Preservation in Canada, qualifies the absence of consultation of the northern territories and of Aboriginal Peoples as "an unfortunate oversight".[244]

One element that is indeed striking in the preceding narrative about the development of the Migratory Birds Convention is the complete absence of Aboriginal and northern actors and voices during the entire process leading to the conclusion of the international agreement. At the time of negotiation, the governments of Yukon and the Northwest Territories were not consulted by Canadian

authorities. When the federal government wrote to all provincial governments to seek their approval to the term of the treaty, it simply ignored the political leaders of the northern territories. The archival records also suggest that Aboriginal peoples, Inuit and First Nations alike, were completely ignored by federal politicians and wildlife officials at the time.[245] Their approval or opinions were not sought; their political weight was not felt.

Nevertheless, it seems inaccurate to suggest that the U.S. and Canadian governments were ignorant of the needs of northern communities at the time of the negotiations. As noted at the beginning of the chapter, the Convention contains some exceptions meant to accommodate the needs of Aboriginal communities regarding some non-game seabirds. The limited Aboriginal exceptions were added to the treaty towards the end of the bilateral negotiations in 1916. They were considered to be minor changes in comparison to the modifications considered for British Columbia and the American mid-west states. The American negotiators first proposed to include an Aboriginal exception clause for seabirds in March of 1916. In their negotiation document, they pointed out that:

> "this proviso affects primarily the Territories of Alaska and the coastal provinces and Territories of Canada, where the Natives have been accustomed since time immemorial to utilize certain sea birds for food and clothing. The clause follows essentially certain provisions already contained in the laws of Alaska and some of the Provinces of Canada and is inserted merely to prevent any hardship on the Natives in these remote parts of the continent."[246]

Canadian negotiators followed a few months later with the suggestion to include a permission for Aboriginal hunters to take scoters.[247] While these exceptions were ill-

adapted and insufficient for the true needs of northern Aboriginal communities,[248] they indicate clearly that these needs were considered to some extent by the framers of the treaty.

Furthermore, the modifications granted to Nova Scotia and some American states during the negotiations responded directly to concerns about the ill-timing of the closed season in these regions. These compromises indicate that the treaty's negotiators were plainly aware that different jurisdictions would be impacted differently by the closed season according to their relation to the timing of migrations. To argue that, after recognising and debating this problem in relation to Nova Scotia and others, they would have simply not noted the negative impact on communities further north seems improbable.

The ignorance and omission hypothesis is also severely weakened by the personalities of the negotiators themselves. Dr. Edward W. Nelson, the chief of the U.S. Biological Survey who negotiated in the latter period for the Americans, was a noted biologist with an intimate knowledge of the Arctic ecology and culture. On assignment for the American government, he had worked in Alaska and written authoritative treatises on the Inuit culture and the Alaskan natural landscape.[249] On the Canadian side, Dr. C. Gordon Hewitt was a learned zoologist who had spoken in the same year before the Commission on Conservation on the hunting practices of northern Aboriginal Peoples.[250] He also played a determinant role in the 1917 modification of the Northwest Territories Game Act, which was already in progress and dealt directly with Aboriginal hunting.[251] It is virtually impossible that these men

would have been ignorant of the importance of waterfowl to northern subsistence users. It seems even less probable that, knowing and inscribing in the Convention that the Inuit Peoples were taking seabirds for food and clothing, they would have ignored their greater reliance on ducks and geese in the spring and summer seasons.

An act of prejudice

An alternative explanation is offered by Dan Gottesman in an article published in the Journal of Canadian Studies.[252] Examining the early history of the Convention and the writings of senior wildlife managers, he argues that the lack of attention paid to the true needs of northern Aboriginal communities was essentially rooted in prejudice. According to him,

> "from 1878 to 1920, Canadian policy-makers and law enforcement officials uniformly saw indigenous hunting as a 'wantonly destructive' threat to wildlife on the prairies, in the Rockies, and in the north. [..] These conservationists were conscious of the dependence of indigenous people on hunting for food and clothing; they were even aware of Indian hunting rights guaranteed by treaty. But, like many Canadians then and now, they thought they knew better than Indians themselves what policies were in Indians' best interest. They dismissed treaty rights casually and patronizingly, while subordinating indigenous hunting to broader wildlife conservation imperatives."[253]

In support of his thesis, Gottesman draws on a complex web of indirect evidence. Examining the speeches and writings of the early Canadian wildlife officials, he finds that their attitudes toward Aboriginal hunting practices were paternalistic. While claiming sympathy and respect for their traditional practices impregnated by a conservation ethic, they also believed that, as Aboriginal hunters were adopting modern technology and participating in the market system, they increasingly found themselves part of the problem. The author also points out that, in

the previous years, Canadian Parks authorities were increasingly promoting the infringement on indigenous hunting rights and their exclusion from the parks' areas. In this context, a conscious violation of treaty hunting rights by the Migratory Birds Convention would not have appeared to be unprecedented.

Finally, in an unsettling exercise of historical psycho-analysis, Gottesman argues that, in the eyes of conservationists, the indigenous hunter was "a self-reflecting mirror in which their own violent, self-indulgent, 'wantonly destructive' sins were writ large".[254] Looking to "civilise" mankind in its relation with Nature, conservationists needed to control the "indiscriminate slaughter of birds" by Aboriginal hunters as expressions of barbarism. Moreover, incapable of making the difference between starving Aboriginal hunters killing for food and the capitalist exploitation of wildlife by non-Aboriginal economic interests associated with a few Aboriginal allies, conservationists were unable to envisage regimes of exception. Less than founded on ecological concerns (Gottesman disputes that government reports of wasteful or excessive harvesting were indeed founded), the absence of exception for Aboriginal communities in the Migratory Birds Convention was the result of cultural prejudice. By relating to Aboriginal hunters as possessive individualists needed to be regulated in their relationship to the commons, the Migratory Birds Convention "covertly served the assimilationist goals of the Canadian government" and, in fact, "stands in the tradition of Canada's Indian Act as legislation of cultural deracination and disenfranchisement".[255]

While Gottesman's argument is more credible than a simple plea of ignorance, it also raises some questions. If Canadian officials perceived Aboriginal hunters as "wantonly destructive", why did they suggest and agree to an exemption to the spring hunting ban for scoters and other seabirds? And if they were so concerned about the impact of Aboriginal hunting on wildlife populations, why did they fail to significantly enforce the bird regulations until the late 1950s in these northern Aboriginal communities? These questions are not addressed by the author but it seems unlikely that, if simply rooted in prejudice, these policies would have been pursued.

It is also tempting to question Gottesman's reading of the Canadian conservationists attitudes towards Aboriginal hunting. There is no doubt that their attitudes towards Aboriginal culture was paternalistic and it is undisputed that Hewitt, amongst others, thought that Aboriginal traditional environmental practices were being transformed by the arrival of southern white hunters in the North. But an examination of archival records regarding their views on Aboriginal hunting tends to present a more equivocal picture than the one painted by Gottesman.

Starting in 1914, the Commission on Conservation sponsored and conducted research on the situation of wildlife in the North. There were growing concerns about population declines and unsustainable harvesting practices. The meetings at which these concerns and research results were discussed offer us a window on the beliefs of Hewitt and other wildlife officials at the time. At these hearings, Hewitt defended the practices of northern Aboriginal hunters, often in the face of significant

opposition by other speakers, and he repeatedly argued for regimes of exception. For example, on the issue of trapping, he argued that the decline in northern fur-bearers was not due to excessive and unsustainable harvests by Aboriginal trappers but rather to the invasion of their northern territories by southern white trappers, who did not limit themselves to specific trapping territories and used mass killing methods without regards to their long-term effect.[256]

Hewitt took a similar line of argument on the broader issue of hunting in the northern territories. In 1916, W. N. Millar, a professor at the Department of Forestry of the University of Toronto who had conducted research in the North, severely denounced Aboriginal communities for decimating several wildlife species. While pointing out the devastating impact of resource development on wildlife habitat, Millar also accused Aboriginal hunters, especially Stoney Indians, of carrying excessive killings of game, without regards for the age and the sex of animals or the time of the year. Aboriginal hunters, Millar claimed, were exterminating entire herds of wapitis and other mammals and were constantly harassing the wildlife.[257]

Before the Commission, Hewitt later severely denounced Millar's argument. He argued that Aboriginal hunting practices were far better than the hunting practices of southern hunters active in the North. Inuit and First Nations hunters, claimed Hewitt, practised wildlife conservation and were prudent to assure that they maintained sufficient resources for the future. Consequently, Hewitt argued for amendments to the Northwest Territories Game Act that would only restrict hunting for white hunters. These measures would contribute to restoring the game populations and

assure that Aboriginal could preserve their way-of-life. Hewitt's argument received the support of some federal officials, including the minister of Interior Arthur Meighen who stated that he was favourable to preserving the northern wildlife for the exclusive use of Aboriginal Peoples.[258]

The Northwest Territories Game Act was finally amended in 1917 to counter the threat to northern wildlife and Hewitt was influential in shaping the new measures. The amendments established a new system of licensing and hunting regulation for the North and declared a long-term ban on the taking of some endangered species. However, in line with what Hewitt had argued, exception measures were adopted for Aboriginal Peoples. Inuit and First Nations residing in the territories were exempted from the new measures, with the exception of the protective measures for the endangered wood buffalo, muskox and white pelican.[259] In this context, it seems hardly tenable to argue that federal policy-makers negotiating the Migratory Birds Convention were trapped by their own prejudice and incapable of entertaining the idea of an Aboriginal exception to the ban on spring hunting.

In fact, the resistance to special hunting regimes for Aboriginal Peoples does not seem to have come from federal officials but from provincial wildlife managers who doubted the possibility of maintaining an effective management system if Aboriginal hunters were excluded from it. At the hearings of the Commission on Conservation, provincial officials often blamed Aboriginal hunters for over-harvesting and opposed federal proposals for changes in game laws in order to accommodate the special subsistence needs of Aboriginal nations. Participants from

Saskatchewan, Quebec, Ontario, and British Columbia all referred to cases of wasteful practices by Aboriginal hunters or reported a growing number of complaints about them in the northern parts of their respective territories.[260]

So if the Migratory Birds Convention's negotiators were aware of Aboriginal reliance on waterfowl for subsistence in the North and were not philosophically opposed to inscribing Aboriginal exceptions in conservation laws, what are we to make of the Convention's disregard of northern subsistence needs?

An act of political expediency

An alternative explanation is that treaty negotiators willingly ignored the needs of northern communities in order to avoid opening a breach in the negotiations on the issue of spring hunting. We have seen that spring hunting quickly became the most important and contested issue in the negotiation, as the sportsmen of British Columbia and the American mid-west were fighting the termination of a practice that they considered their right and privilege. These actors were the predominant force of opposition, disposing of significant political support (including in Congress) and organisational resources. Since conservationists considered the end of the spring harvest as the cornerstone of the new bird protection regime, opposing the sportsmen on this issue was of central importance. For negotiators, arriving at an acceptable compromise on this issue was a determinant factor for closing the deal.

In this context, it is logical to suppose that the treaty negotiators would have hesitated to make an exception on the spring ban, especially since such an exception had not even been formally demanded and since it concerned a northern and

Aboriginal constituency that was politically poorly organized and much less influential than southern sportsmen. Formally entrenching an Aboriginal exception to the spring taking of waterfowl would no doubt have given an opportunity to southern spring hunters to demand a similar treatment. The northern exception may have been politically untenable in the face of southern hunters. As we have seen, given their general attitude toward Aboriginal hunters, Canadian provinces would probably have been opposed as well to an Aboriginal exception. At a time when federal treaty negotiators were seeking to gain their support despite the Convention's infringement on provincial jurisdiction, it is not likely that they would look favourably upon adding indigenous spring hunting to the potential sources of discord. Moreover, given that Aboriginal hunters were the easy targets of prejudices, it is not implausible that the measure would have similarly failed to gain the support of southern conservationists.

In contrast, the inclusion of an Aboriginal exception for seabirds and scoters was not as problematic because these species are not considered game birds and are not prized by the sportsmen. The limited exemptions afforded indigenous communities toward the end of the negotiations were probably meant to alleviate somewhat the anticipated subsistence problems of northern communities without providing an opening to southern hunters insisting on better spring shooting provisions for game birds. By their presence, they suggest that the negotiators wanted to accommodate the needs of Aboriginal subsistence users; but, by their obvious insufficiency, they also suggest that their options for doing so were limited.

Overall, the lack of significant political representation of northern Aboriginal interests and the general political climate surrounding the negotiations made the disregard of northern Aboriginal interests an act of political expediency for federal treaty negotiators. Whether they were aware of the full ramifications of trampling on Aboriginal treaty rights is doubtful; but, at the time of the treaty negotiations, this problem would probably have appeared to them as a small price to pay to secure an international treaty of such importance. Northern subsistence needs may have been left out of the Migratory Birds Convention as a result of political imperatives more than as the product of sheer ignorance or crass prejudice.

Moreover, the framers of the Migratory Birds Convention were well aware of the conditions prevailing in the remote areas of the northern territories and Alaska. It is certainly possible that they counted on their future administrative discretion to pursue a lenient enforcement policy in these Aboriginal and remote communities. As Ernest Gruening, a prominent Alaska representative in Congress, pointed out in 1961, given that Inuit and First Nations hunters have been taking waterfowl for food without prosecution since the Convention's ratification, can we not conclude that the framers of the treaty did not really intend it to apply to subsistence users in northern Alaska?[261]

Conclusion

The Aboriginal subsistence rights problem created with the Migratory Birds Convention resulted from the inability of the American and Canadian governments to provide a proper exception for the taking of waterfowl for food and cultural needs by

northern Aboriginal residents during the spring and summer seasons. Given the state of jurisprudence and contemporary views on Aboriginal issues, it is doubtful that wildlife managers could have anticipated that such an exception should necessarily derive from their Aboriginal treaty obligations at the time the Convention was negotiated. But they understood the traditional Aboriginal reliance on waterfowl for food, clothing and spiritual needs and they nevertheless failed to provide for necessary provisions under the emerging international governance regime for migratory birds. In so doing, they forced northern Aboriginal communities to violate the law to provide for their essential needs.

After eighty-five years, the reasons for this historical injustice are hard to establish. But we have tried to demonstrate that pleas of oversight, ignorance and prejudice fail to provide a convincing explanation. The early political history of the Migratory Birds Convention is one of a heated battle essentially defined by the ecology of migratory birds and the concerns of southern interests. In the transnational struggle that opposed the governments and sportsmen of American mid-west states and British Columbia as well as market hunters to a broad coalition of naturalists, sportsmen associations, wildlife scientists and hunting equipment manufacturers in both countries, the needs of a northern constituency that was absent from the debate were taken into account only marginally. As the debate between southern interests focused on banning the spring harvest in order to protect the birds at a key period of their reproductive cycle, ignoring northern needs with respect to waterfowl resources was a logical act of political expediency.

Notwithstanding the reasons that have actually led the Canadian and American governments to disregard northern subsistence needs in framing the Migratory Birds Convention in the early twentieth century, the decision has become the source of important tensions between Aboriginal Peoples and their respective national governments. Domestically, to deal with grievances, distrust and growing tensions within communities in the North, the Canadian and American governments had to develop and manage subsistence policies in order to alleviate the problem created by the Migratory Birds Convention. Some understanding of this evolution in domestic policies - and of the political dynamics that influenced their evolution - is important to grasp the context in which the subsistence rights issue will reach the international arena in the late 1970s. These domestic developments will be the object of the next chapter.

Chapter 4

THE MIGRATORY BIRDS CONVENTION AND THE POLITICAL ECONOMY OF ABORIGINAL SUBSISTENCE RIGHTS

> I don't know what you're going to do to us. I'm Indian. Athabaskan Indian. I live on indigenous foods. And if you shut down that subsistence, you just throw me in the river right now. You don't know what you are doing to old people like me.
>
> - Evelyn Alexander, a 74 years old woman from Minto, Alaska, speaking in anger to representatives of the National Rifle Association and the Alaska Outdoor Council in 1991.

> We have to hope that full citizenship for any group takes account of responsibilities as well as rights, and that keystones of conservation will not be compromised by a sense of guilt over past mistakes.
>
> - The Saskatchewan Natural History Society writing in 1982 to Environment Canada to argue against amending the Migratory Birds Convention to entrench an exception for Aboriginal subsistence hunting during the closed season.

Soon after the Migratory Birds Convention was signed and implementing legislation adopted in both countries in the late 1910s, northern interests began to complain about the closed season. While there is no evidence that indigenous peoples were direct vocal advocates of an amendment to the Convention in these early years, the northern administrations quickly made public their dissatisfaction with the new regulation which was thought to be "a most unfair provision" and one "unduly prejudicial" to northern residents.[262] However, as early as 1919, the Governor of Alaska complained that his demands for an amendment to the regulation were falling on deaf ears because "the societies in the East have no knowledge of the North and cannot see why [it would deserve] very much consideration".[263]

In fact, archival material from this period suggests that the national governments were somewhat sensitive to the hardship caused by their disregard of the particular conditions of northern and Aboriginal communities. In Canada, faced with northern complaints, the Dominion Parks Branch of the Department of the Interior sought legal opinions from the counsels of the Department of Indian Affairs regarding the status of Aboriginal peoples in relation to the Migratory Birds Convention and its regulations. When the Department of Indian Affairs confirmed that the Convention's provisions applied to Aboriginal peoples on and off reserves, the Parks Commissioner suggested to the Americans that the Migratory Birds Convention be amended to accommodate northern residents.[264]

However, American officials rejected such a course of action. They feared that, if the treaty was submitted to Congress for amendment, the pressures from sport hunting associations would be sufficiently strong to lead to more liberal harvesting conditions throughout the continent, thereby severely weakening the new management regime. They pointed out that, at this point in time, resentment against the new closed season was still very strong in parts of the country, making an easy and limited amendment for northern hunters improbable.[265] In sum, sport hunting interests and their supportive legislators were unlikely to accept granting special conditions to northern residents, at least not without receiving the same privileges.

This early opposition to a northern spring season amendment to the Migratory Birds Convention is illustrative of the long-standing opposition that Aboriginal and northern subsistence users have since faced in their demands for access to waterfowl

in the spring. The sport hunting and environmental lobbies represent organized and resourceful constituencies with an important stake in the management of waterfowl resources. In this context, they represent interests and policy actors that cannot be avoided in making significant policy decisions about the management regime for game birds in North America. This situation prevailed in the early part of the century and it is still prevalent today.

Throughout the period when national governments have attempted to amend the Convention (1975-1997), Aboriginal peoples' identification of the need for a northern spring harvesting exception have been questioned and opposed by these competing stakeholders. In order to provide for a better understanding of the interests at stake in the Migratory Birds Convention's amendment controversy, this chapter explores the respective interests of the actors involved. I show that, while Aboriginal peoples are minority users with an acute and unique need for the resource, the sport hunting and environmental organisations also represent powerful constituencies with a keen competing interest in its harvest and a privileged relationship to the existing management regime. They constitute the main organized interests in the policy community of waterfowl conservation. Consequently, while Aboriginal peoples' demands for the legalization of their spring subsistence harvest have gathered strength with the rise of indigenous militancy and the self-determination movement in the 1960s, they have encountered serious opposition from environmentalists and sport hunters concerned with the sustainability of the resource and the preservation of their relative share.

The chapter begins with a consideration of the actual size of the subsistence harvest in the context of the larger North American waterfowl harvest and a discussion of its potential environmental importance. I then explain the particular socio-economic importance of the spring subsistence harvest for northern Aboriginal communities. Finally, the following section examines the different uses and values that stakeholders attribute to waterfowl. We will see that these different uses make environmentalists and sport hunters important stakeholders in the management of waterfowl resources and that both groups constitute well-organized and resourceful lobbies on issues of conservation policy. In the context of the dissertation, the chapter explains the controversy over the acknowledgement of Aboriginal subsistence rights in the Migratory Birds Convention. It also helps to explain how the nature of the subsistence rights issue made possible an uneasy coalition of environmentalists and recreational hunters dedicated to blocking an amendment of Convention against the interests of indigenous peoples.

Before beginning our discussion, a caveat is in order. The chapter focuses on the nature of the competing interests at stake as well as on their relationship to the waterfowl management regime. However, while some of their apprehensions on the legalization of the Aboriginal spring harvest are discussed, the political discourses of these policy actors on the issue are not examined in full detail. This will be the object of the next chapter.

The size and ecological significance of the subsistence harvest

The ratification of the 1916 Migratory Birds Convention had the effect of rendering illegal the spring hunting of waterfowl. The illegality of the harvest has had an important impact on state wildlife agencies' ability to accurately monitor the importance of the on-going spring harvest. It is well known that subsistence hunters have continued to take waterfowl to fulfil their basic needs after the international ban came into effect. It is also well established that governments' enforcement efforts toward subsistence users have been intentionally spotty and have greatly varied in intensity over the century. But, despite on-going harvesting, the illegality of the practice has acted as a deterrent for wildlife agencies to keep accurate trend data on an activity officially forbidden.

For example, Canadian harvest information has been collected on an annual basis since 1967 through the means of a questionnaire measuring the effort and success rates of a sample of hunters. Additional surveys are also conducted to gather species-specific information. These harvest and species composition surveys are not only the main sources of information on annual harvests; they also constitute one of the main sources of data used to estimate population trends. However, the illegality of the subsistence harvest naturally precluded authorities from asking subsistence hunters to report on their seasonal takes, thereby excluding the use of this invaluable instrument of harvest monitoring. It has consequently weakened our ability to rely on an accurate picture of the subsistence harvest over time. As recently as 1997, population specialists of the Canadian Wildlife Service were writing that "we are currently unable to measure harvest by Aboriginal people".[266]

In the context of the spring subsistence harvest controversy, this deficiency in scientific data has contributed to the uncertainty regarding the environmental consequences of legalizing the Aboriginal harvest. Given already existing difficulties associated with keeping track of complex environmental indicators[267], the poor state of knowledge on subsistence harvesting has made it easy for sport hunters and environmentalists to question wildlife management authorities' capacity to accurately estimate the impact of legalizing the spring harvest on waterfowl populations' trends. Notwithstanding these difficulties, out of necessity, there have been some periodic efforts by wildlife biologists to estimate the size of the Aboriginal spring harvest in relation to the annual waterfowl harvest, mostly for northern communities.

The Size of the Spring Subsistence Harvest

In a recent synthesis paper, Thompson reported that the estimated total annual harvest of waterfowl by Canadian Aboriginal hunters is approximately 730 000 ducks and 470 000 geese, taken by an estimated 20 000 subsistence hunters. These estimates include only status Indian and Inuit peoples; estimates for Métis and non-status Indian hunters are not available. The estimated annual harvest of waterfowl in Alaska is 259 741 ducks and 84 608 geese, taken by an estimated 13 000 subsistence hunters.[268] According to those estimates, the total annual subsistence harvest by rural Alaskans and Canadian Aboriginal communities would then be estimated at 989 741 ducks and 554 608 geese, taken by approximately 33 000 subsistence hunters.[269]

Table 4.1: Estimated Size of Sport and Subsistence Waterfowl Harvest in North America, in number of ducks and geese

	Sport	Subsistence			Total
		Spring	Northern	Total	
Ducks	7 700 000	527 861	644 745	989 741	8 689 741
Geese	2 000 000	409 101	447 175	544 608	2 554 608
Total	9 700 000	936 962	1 091 920	1 544 349	11 244 349

Source: Developed from the data compiled in G. Thompson (1997) "Subsistence Hunting of the Arctic Anatidae in North America", Environment Canada, unpublished paper.

In contrast, the estimated 1.6 million non-Aboriginal waterfowl hunters in North America were killing approximately 7.7 million ducks and 2 million geese in the early 1990s. Based on these numbers, we can estimate that the annual North American subsistence harvest represents about 11% of the annual total harvest for ducks and 22% of the total annual harvest for geese. Subsistence hunters would represent approximately 2% of active hunters in North America.

Table 4.2: Estimated Size of Sport and Subsistence Waterfowl Harvest as a percentage of the Total North American Harvest

	Sport	Subsistence		
		Spring	Northern	Total
Ducks	69%	5%	6%	9%
Geese	18%	4%	4%	5%
Total	86%	8%	10%	14%

Source: Developed from the data compiled in G. Thompson (1997) "Subsistence Hunting of the Arctic Anatidae in North America", Environment Canada, unpublished paper.

Obviously, the subsistence harvest of waterfowl can not be attributed entirely to the illegal spring harvest. And, as pointed out above, estimating the magnitude of this harvest is particularly difficult. Nevertheless, the Canadian Wildlife Service, the United States Fish and Wildlife Service and the International Association of Fish and Wildlife Agencies have attempted to quantify the subsistence harvest occurring during the closed season. Estimates from the mid-1990s suggest that about 949 502 birds are taken in Alaska and Canada during this period. These numbers would mean that 61% of the subsistence harvest takes place during the illegal spring season and that the spring subsistence harvest consequently represents about 8% of the total North American waterfowl harvest.[270]

The ecological significance of legalizing the spring subsistence harvest

How significant is this spring subsistence harvest from an ecological viewpoint? It should be no surprise that concerns about the amendment of the Migratory Birds Convention to legalize spring subsistence hunting are associated to a significant extent to fears that increased harvesting will have detrimental effects on bird populations. Unfortunately, poor historical data on trends in spring hunting, Aboriginal harvesting practices and northern ecology of some species makes the already difficult task of predicting future trends even more difficult in this case. Similarly, uncertainties about the effect that the legalization will have on the behaviour of Aboriginal and non-Aboriginal hunters limit the possibility of accurate forecasting. Notwithstanding these uncertainties, in the context of the Migratory Birds Convention amendment process, both the American and the Canadian governments defended the view that the legalization of the spring harvest would have limited and acceptable ecological impacts on waterfowl populations.

In both countries, the arguments of wildlife authorities relied mostly on the fact that the Aboriginal subsistence harvest is already taking place in northern communities. As a result, contemplated changes would not significantly alter the overall annual harvest by Aboriginal subsistence hunters and, consequently, should not pose any threat to waterfowl populations. Moreover, the U.S. Department of the Interior estimated that, even if non-Aboriginal inhabitants were granted access to the spring subsistence harvest, such an amendment would only result in a maximum of 35 000 additional birds killed in Alaska (only about 0.3% of the total North American harvest).[271] In Canada, the Department of the Environment argued that, even if the

Northwest Territories non-Aboriginal residents were also granted access to the spring subsistence harvest, only a maximum of 4 748 additional birds would be taken annually by a maximum of 350 additional hunters.[272] In sum, in both countries, wildlife authorities based their case on the argument that history had proven that the spring subsistence harvest was sustainable; legalizing it would not change anything from an environmental standpoint. And even if non-Aboriginal subsistence harvesters were to be included, their potential number would be sufficiently limited to avoid endangering the sustainability of bird populations.

However, given uncertainties about both the current spring harvest and the future behaviour of subsistence users, several environmentalists and sport hunters harboured some scepticism about the potential ecological impacts of legalizing spring subsistence hunting. The killing of ducks and geese during the spring is considered to have a greater ecological impact on populations than the fall harvest because it reduces their breeding potential.[273] Moreover, the lack of information about the number of existing and potential Métis and non-status Indian hunters left doubts about the ultimate impact of the measure in terms of birds taken.[274] In the absence of close monitoring and regulation, an increased Aboriginal take of birds during the reproduction period could have negative repercussions on some populations, especially for species in decline.

While the status of overall populations of ducks and geese seems positive in the late 1990s, the current cautious optimism was not shared for all species or for all of the period spanned by the debates on legalizing the spring subsistence harvest (i.e. the

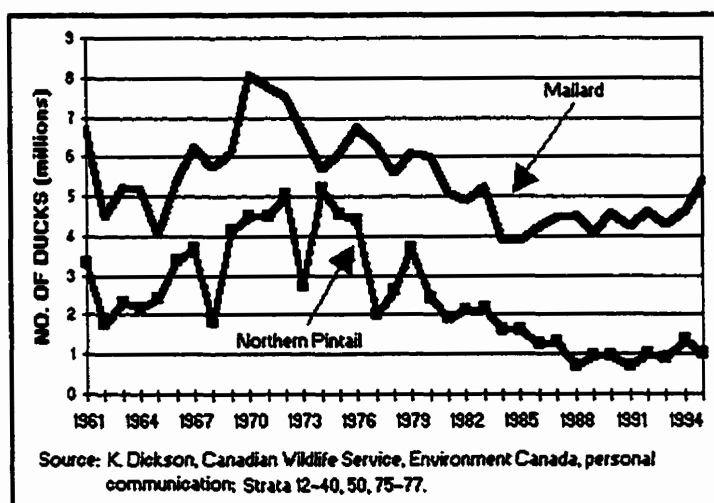
late 1970s to the mid-1990s). For example, while the status of overall geese populations was considered stable or increasing over much of this period,[275] some goose species have been sources of concerns over the last decades. Several of these declining species, such as the Emperor Goose population in Alaska or the southern populations of Canada geese in the James Bay area, are also harvested by Aboriginal subsistence users.

In the late 1970s, American waterfowl hunters were so concerned about this decline that the California Waterfowl Association sent its representatives to Bethel to plead with Aboriginal subsistence hunters to refrain from hunting the geese. In 1978 and 1984, trips of Yup'ik elders and hunters were arranged in the hope of building a bridge between recreational and subsistence hunters. These efforts ultimately led to the creation of the Yukon-Kuskokwim Delta Goose Management Plan in 1985 (preceded by the Hooper Bay Agreement of 1984), a primary example of multistakeholder co-management process for wildlife conservation, to attempt to revert the decline of geese populations.[276]

A similar situation prevailed for duck populations. While their overall number could be record-breaking at an estimated 105 million during the 1999 fall migration, some of the main species, such as the mallard or pintail have been declining over the long run. The 1980s even saw overall population trends reach some record historical lows. While the situation seemed better in the breeding areas of northern Canada and Alaska, overall populations were estimated to be declining in the traditional breeding areas of Canada over the 1980s.[277] Given the status of the Canadian prairies as the

"duck factory" of North America (alluding to the fact that a majority of the continent's ducks reproduce in this region), the decline seemed of particular concern. And several species of concern, such as the Prairie pintail and mallard, the black duck, and the Pacific brant, are known to be harvested by Aboriginal subsistence users.

Chart 4.1: Population Trends for Mallard and Northern Pintail Ducks, 1961-1992



Evidence of the intensity of these concerns for declining duck populations in the 1970s and 1980s is found in the fact that it is during this period that the most ambitious recovery plan of the post-war era was designed. The North American Waterfowl Management Plan (NAWMP) comprise over a dozen joint ventures (based on partnerships among governments, environmentalists, sport hunters, industry and land owners) aimed at restoring and protecting waterfowl habitats in an effort to stop waterfowl populations' decline and to restore them to their historic level. Although Canadian efforts to develop a national version began in 1979, the NAWMP was

signed in 1986 and promised to spend about $1.5 billion of new dollars over 15 years. The magnitude of the effort in political and financial terms is indicative of the level of concern about the future of duck populations.[278]

In this context, many environmentalists and sport hunters feared that an increased Aboriginal take in the spring could at least hurt some specific species of waterfowl. There is no doubt that the primary source of concern is the loss of habitat, especially in the south. Nevertheless, opening a spring season at this time appeared dangerous and illogical to many stakeholders. This opinion was especially strong given that sport hunters and environmentalists feared that an Aboriginal harvest would be ill-regulated or that regulations would not be properly enforced because of the sensitive nature of relations between government and Aboriginal peoples. The claims by many Aboriginal peoples that their hunting rights severely limit the right of government authorities to regulate Aboriginal hunting did not help to alleviate environmentalists' concerns. Moreover, Aboriginal claims that these rights also authorize the commercial exploitation of wildlife resources fuelled the fears of a significantly expanded spring harvest and dire ecological consequences.

Subsistence hunting and Aboriginal societies

In order to understand the debate surrounding the conflict between Aboriginal rights to hunt for subsistence and the closed season provisions of the Migratory Birds Convention, it is necessary to understand the role and importance of subsistence activities for many residents and communities of the north of the continent.[279] In this section, I examine the nature and importance of the subsistence activities for the

communities impacted by the provisions of the Migratory Birds Convention and explain how the nature of these activities links them to demands for recognition and self-determination by Aboriginal peoples.

The socio-economic importance of the subsistence harvest

While some Aboriginal peoples living in southern areas also engage in traditional hunting activities for subsistence purposes, the subsistence economy is more important in the northern part of the North American continent. In Canada, the 38 areas of waterfowl harvesting important to Aboriginal peoples are found across the entire country, including areas in Labrador, central and northern Quebec and Manitoba, northern Ontario, Saskatchewan and Alberta, as well as in all three territories.[280] However, dependency on the resource is most common in the small remote communities of the northern parts of the provinces and the territories.[281]

Aboriginal peoples represent approximately 16% of the Alaskan population. They constitute an ethnically diverse group of communities spread out over the territory of the State. While they are substantial minorities in the urban areas of the panhandle and "rail belt" regions of the State, they are a majority in the western and north-western coastal areas where they mostly live in remote villages.[282] These areas are precisely those where the subsistence consumption of waterfowl takes a heightened importance, especially in the Yup'ik communities of the Yukon-Kuskokwinn area, the Athabaskan communities of the Yukon-Koyukuk-Lower Tanana area, and the Inupiat-Yup'ik communities of the Peninsula-Norton sound

area.[283] Almost all of the spring harvest of migratory birds in Alaska is attributed to Aboriginal hunters.[284]

The traditional economy is still an important element of the economic systems of many Aboriginal communities in northern Canada and Alaska. For example, in his testimony before the Royal Commission on Aboriginal Peoples, a representative of the Omushkegowuk Harvesters Association estimated that 85 to 90% of his community's residents participate in the harvesting lifestyle to some degree, generating an equivalent of six million dollars per year in economic activity.[285] According to other studies, food derived from subsistence hunting and fishing can make up as much as 90% of the diet of indigenous peoples in some communities of western and northern Alaska.[286] While these may be extreme cases, there is no doubt that the traditional subsistence economy is still very important for the vast majority of Aboriginal communities in the North. For many of these, this traditional economy includes the harvesting of waterfowl.

Some communities, for reasons of tradition or location, are greater consumers of waterfowl than others. For example, the Cree of northern Quebec or the Yup'ik of the Yukon-Kuskokwinn region seem to have traditionally relied on waterfowl to a greater extent. A study done in the latter part of the 1970s showed that waterfowl consumption represented about 25% of the wild animal food eaten by the Cree of northern Quebec, reaching 44% of total consumption in some coastal communities. And despite higher household incomes due to the benefits of the *James Bay and Northern Quebec Agreement*, country food still represented the equivalent of

approximately 40% of total income for the average household.[287] Condon, Collings and Wenzel also found the consumption of waterfowl to be frequent in the spring in the Inuit community of Holman (north of the arctic circle) in the early 1990s.[288] The pattern in Holman is similar to that of all other Inuit communities.[289] For most communities, the subsistence harvest of waterfowl is an important, and sometimes fundamental, contributor to household income and welfare.

The hunting of migratory birds constitutes only a part of the subsistence practices of Aboriginal peoples in North America.[290] For example, the hunting of big game, especially caribou and moose, represents 23% of the subsistence harvest of wildlife in Alaska. Salmon fishing represents the principal subsistence activity with 42% of the total harvest. Alaska's Aboriginal peoples also have an exclusive right to hunt the State's marine mammal according to a federal statute and the taking of these animals constitutes 8.4% of the total harvest. As a result, migratory birds make up only 7.5% of the country food consumed in the state as a whole.[291] According to an environmental assessment of subsistence hunting done by the U.S. Department of Interior in 1980, migratory birds make up 5% to 10% of the yearly diet of people living in rural areas.[292] But, even in those areas where waterfowl do not represent the bulk of country food consumed, its consumption has a seasonal importance that is not well captured by their proportion of the wildlife eaten by Aboriginal communities.

In particular, the consumption of waterfowl in the spring plays a special nutritional role. Studies have shown that, due to the lack of availability of fresh meat at the end of the northern winters, waterfowl offers a particularly important source of

proteins and other nutrients at this time of the year.[293] Jim Bourque, a former deputy minister of Renewable Resources in the Northwest Territories and a Métis hunter, emphasises this point: "Spring harvest [of migratory birds] is crucial because it's an opportunity to get some valuable fresh protein when there's nothing else available at the time".[294] According to Scott, medical personnel also find that Crees who consume more bush food tend to have fewer health problems.[295] In sum, the consumption of waterfowl does not only constitute a matter of culinary preference; it provides essential nutritional food and supports the economy of northern communities.

In addition to the economic and nutritional significance, waterfowl subsistence harvesting also possesses a cultural and social significance for Aboriginal communities for which there is no parallel in non-Aboriginal communities. The subsistence harvest is embedded in a larger social and spiritual context. It is important for the reproduction of many social ties and for the fulfilment of spiritual needs. At a basic level, the non-edible parts of waterfowl are used for ceremonial purposes in many communities and for constructing clothing and bedding products. But even beyond the physical use of waterfowl for cultural artefacts, the practice of waterfowl hunting in itself contributes to the cultural reproduction of many Aboriginal communities.

As Scott noted in a study of the Cree of northern Quebec, the "all-important spring hunt is an annual renewal of the relationship between the Cree and the geese, a promise of abundance collectively shared, and the occasion for high-spirited celebration".[296] Embedded in a series of rituals, waterfowl hunting is closely

connected to community sharing and collaboration. The transmission of knowledge across generations, collaborative behaviour among hunters, the sharing of the harvest among households and the role of hunting as an important component of the Cree identity are all closely associated with waterfowl hunting and contribute to the development of social ties. The goose figures prominently in the symbolism of the Cree culture. It is associated with rituals of courtship, marriage and death. It plays an important role in initiation ceremonies, preferably held in the spring, during which children are welcomed into the Cree world. In sum, far from being relegated to an economic activity, goose hunting is an integral part of the cultural and spiritual lives of the Cree people.[297]

Huntington offers similar findings regarding Alaska, where "subsistence is vital to the self-perception of Indigenous people throughout [the State], for it is a tangible, communal part of the indigenous culture which can be shared and passed on".[298] Sharing the harvest is considered particularly important and, as Stairs and Wenzel note, generosity forms the cultural foundation of subsistence practices.[299] In subsistence hunting, a few proficient hunters will typically harvest most of the wildlife for subsistence-dependent communities and then distribute their take widely among households.[300] For example, in the North Slope communities of Alaska, studies have found that 77% of Inupiat households receive subsistence food from other households.

According to Kruse's examination of southwest Alaskan communities, sharing patterns connect households within villages, connect villages within the region, and

connect the region with individuals and families living outside the region.[301] Harvesting and sharing waterfowl reinforces the identity of subsistence communities and strengthens kinship ties among members. Condon, Collings and Wenzel report similar findings after studying an Inuit community of the Northwest Territories. They stress the importance subsistence practices as a "social integrator" in this community. Interviewees in their study often mentioned how they see subsistence hunting as a necessity for the continuation of their way-of-life and for re-establishing their ties with the land.[302]

At a time when the North is being transformed by the growth of the cash economy, the relocation of many people to urban centres, the erosion of extended families, and the penetration of the dominant Western culture, we could question the endurance of subsistence practices as cultural practices and social integrators. However, some studies suggest that, despite these changes, subsistence activities still play an important role in northern Aboriginal communities. In the study discussed above, Condon, Collings and Wenzel found that, although younger Inuit generations were less interested and involved in subsistence hunting, the ideology of subsistence still provided an integrating mechanism within the community, contributing to a sense of self-worth, of continuity with the past. These discursive resources helped younger Aboriginal people to struggle with their new identity in a changing northern environment. In this context, the less frequent hunting trips taken by young people seemed to have greater psychological significance for them: "To be a serious hunter is to be secure in one's Inuit heritage".[303]

Another indication of the continuing importance of subsistence harvesting in northern Aboriginal culture is provided by a study done by anthropologist Michael Nowak on three villages of the Yukon-Kuskokwim Delta region in south west Alaska in the late 1980s. Nowak examined the use of subsistence food by nine relocated families in the context of the changing socio-economic environment of Alaska. While Nowak indeed found some breakdown in traditional use patterns in relocated families (e.g. younger generations prefer Western food), he nevertheless concluded that the sharing of subsistence food through kinship relations was still important for these families. Sharing still allowed families relocated to urban centres and integrated to the cash economy to obtain subsistence foods. While the exchange was voluntary, relocated families often offered services or gifts in return, establishing relations of reciprocity. Moreover, Nowak found a persistent and significant degree of interest in subsistence hunting in many study participants despite their integration in the urban cash economy. Some participants even took leave without pay to engage in the seasonal subsistence harvest in their home village.[304] These findings serve to illustrate the on-going cultural importance of subsistence food and practices.

Aboriginal Self-Determination and Subsistence Rights

It is in this broad socio-economic context that the political struggle of Aboriginal peoples for yearlong subsistence rights takes its full social significance. As Julie Kitka, president of the Alaska Federation of Natives, put it in the early 1990s: "Subsistence is the core of the existence of so many people in the villages, and they feel threatened. They feel as if their whole way of life is being challenged by [sport hunters and environmentalists opposing a priority right for subsistence

users]".[305] For northern Aboriginal peoples, gaining the recognition of their subsistence rights is a step in the protection of their way-of-life, the recapture of their autonomy, and the fight against cultural assimilation. As such, it is an important part in winning recognition of their status as first peoples with control over their traditional lands and resources. In other words, the issue goes beyond mere demands for a bigger piece of the common pie. Granting this recognition requires the acknowledgement by the non-Aboriginal society of the centrality of land and wildlife in the identity of Aboriginal peoples and their sense of being in the world.

As a demand for recognition, the demands for the legalization of Aboriginal spring waterfowl hunting cannot be dissociated from the larger struggles of Aboriginal peoples for the rights of self-determination. As will see in the next chapters, this is evident in the fact that Aboriginal peoples frame their claim for an amendment to the Migratory Birds Convention as a need for their recognition as a distinct culture bearing historical group rights to land use. It is also suggested by the fact that Aboriginal peoples tend to conceive their hunting rights as standing outside the scope of state regulation and that their demands for resource access were also closely associated with demands for institutions of Aboriginal wildlife management (e.g. co-management bodies) that would provide them direct control over the resource. But other elements also illustrate the close association between self-determination and the spring waterfowl harvest issue.

In particular, while there was obvious discontent prior to this period, the first important Aboriginal demands for the amendment of the Migratory Birds

Convention, or their exemption from its associated domestic regulations, appeared in parallel to the rise of indigenous militancy in the 1960s. In Canada, the archival records suggest that the first direct demand by indigenous peoples for a change of policy occurred in 1957 when the Indian Association of Alberta adopted a resolution asking for the suspension of the migratory birds regulations on reserves.[306] Demands then intensified in the 1960s in both countries, fuelled, among other things, by a series of unfavourable court decisions confirming that the Migratory Birds Convention curtailed indigenous rights and by more stringent enforcement policies.

In Alaska, the issue gained particular prominence in the spring of 1961 when Inupiat residents of Barrow staged a "duck-in" to protest the enforcement of the Migratory Birds Convention. Echoing the civil rights movement's sit-ins and the southern indigenous movement's fish-ins, some 150 Inupiat individuals illegally killed a duck and presented themselves to the game warden, demanding to be arrested. While the incident did not succeed in permanently resolving the issue, it forced the federal and state governments to adopt a leniency policy.[307] It also illustrates the importance of hunting rights claims in these early years of indigenous militancy in the North.

This rise in militancy led to, and was subsequently supported by, the development of national Aboriginal organisations over the 1960s.[308] In Canada, the National Indian Council was formed in 1960 to give Aboriginal peoples a more effective voice in political debates. By the end of the decade, the Aboriginal movement was represented by the National Indian Brotherhood (representing First

Nations), the Indigenous Council of Canada (representing non-status Indians and Métis people) and the Inuit Tapirisat of Canada.[309] Northern indigenous organisations also emerged between 1969 and 1973 to assist Aboriginal residents of the territories in their struggle for recognition and the advancement of their collective interests. In particular, the Council for Yukon Indians was formed to represent both status and non-status Indians in the Yukon Territory. The Committee for Original Peoples' Entitlement (COPE), the Indian Brotherhood of the Northwest Territories, and the Métis Association of the Northwest Territories were also created to represent the Inuvialuit, the Dene and the Métis peoples of the Northwest Territories.[310]

These new organisations acquired a significant degree of political sophistication through their experience in fighting the resurgence of an assimilation policy represented by the federal 1969 *White Paper* and energy development projects in the Canadian North. Using the courts, the media and alliances with southern non-governmental organisations to successfully press their claims, the Aboriginal self-determination movement gathered momentum through a series of political successes. Inuvialuit, Dene and their environmentalist allies successfully delayed the construction of a pipeline in the Mackenzie Valley, forced the establishment of an unprecedented commission of inquiry that allowed them to communicate their distinct understanding northern development needs, and used the court system to affirm the existence of their Aboriginal rights.

These successes led the federal government to a major reversal of Aboriginal policy, abandoning the *White Paper*'s assimilationist approach in favour of the

negotiation of comprehensive land claims. By 1975, all northern indigenous organisations had submitted such land claims which, as Abele points out, were much more than demands for land ownership but called for a "fundamental readjustment of their relationship to the federal state".[311] Indigenous peoples were demanding greater control over their lives and the establishment of new forms of governance that would be conscious of their distinctive identities and values. These developments constitute landmark events in the modern history of Canadian Aboriginal policy in many regards. In the case of the subsistence hunting rights controversy, the development of northern and national Aboriginal organisations and the rise in self-determination militancy undoubtedly contributed significantly in promoting the issue on the national agenda.

Developments in Alaska were similar. In the 1960s, the Alaskan indigenous movement gave birth to the Alaska Federation of Natives.[312] The rise of indigenous self-determination militancy also led Aboriginal Alaskans to develop important political instruments, such as the state-wide independent Aboriginal newspaper *The Tundra Times*, which played an important role in communicating Aboriginal peoples' viewpoints among indigenous communities and in building political awareness.[313] As in Canada, the emerging indigenous self-determination movement in Alaska also proved to be politically sophisticated. In fighting for the recognition of their rights, indigenous peoples used the judicial system to press their claims and eventually obtained a freeze on the entire state land selection process in 1966. Indigenous organisations also struck key alliances with social groups in the southern States to push for their interest in Congress and publicize their case.[314] Moreover, they began

to engage more extensively in the electoral process, with the number of Aboriginal voters increasing by 69% between 1955 and 1968. Given their concentration in rural areas, they could exercise some influence in key ridings and, by 1970, they had elected two Aboriginal senators (on 20 seats) and five Aboriginal legislators (on 40 seats) at the House of Representatives at the state level.[315]

As in Canada, these political changes resulted in part from the growing desire of southern industrial interests to develop important energy projects in the state. The first important crisis centred on the Project Chariot of the U.S. Atomic Energy Commission in the late 1950s and early 1960s. The Commission wanted to test a civil application of nuclear technology by using nuclear blasts to excavate a harbour near the town of Point Hope. The project became a magnet of opposition and a source of indigenous mobilisation to fight this threat to human and environmental health. In the following years, other development projects, especially the discovery of oil at Prudhoe Bay in 1967, stimulated both indigenous militancy and the negotiation of land claims agreements.

However, in Alaska, industrial development was accompanied by another direct source of discontent: the state selection of land. Upon becoming a state in 1958, Congress gave the State the right to select more than 102 million acres of land from the public domain for its use. The State was to confine its choice to land that was "vacant, unappropriated, and unreserved" at the time of selection, explicitly excluding land held by indigenous peoples. However, as the selection process

unfolded, it became apparent that much of the land considered vacant by the State was actually used by Aboriginal communities for subsistence activities.[316]

As a result, statehood essentially set government authorities on a path of collision with traditional indigenous interests. Probably more than energy development projects, the land selection problem played a key role in the rise of indigenous militancy in the state and the protection of subsistence rights was a central issue in this process. As Burch argues, "the main reason Indigenous villagers were sympathetic to the claims movement in the first place was because of their fear that they were losing their right to hunt and fish on the land they traditionally used; most of them cared little about actual title".[317]

Moreover, while northern development projects contributed to the mobilization of Aboriginal peoples by threatening more directly and extensively their use of their traditional lands, their contribution to the rise of the subsistence rights controversy was also felt in another manner. Independently of their effect on political organisation, they suddenly offered important leverage to northern Aboriginal peoples for demanding the recognition of their hunting rights. By being "in the way" of southern industrial development interests, northern Aboriginal communities have been able to better press their claims for the recognition of their rights. While threatening their way-of-life, these development project also provided indigenous communities with a bargaining chip that they could use effectively to press their claims.

In Canada, the negotiation of modern treaties in the North included important demands for hunting rights. Harvey Feit even argues that the Cree of northern Quebec saw the protection of their hunting rights as the key component of the extensive negotiations leading to the 1975 *James Bay and Northern Quebec Agreement*.[318] With regards to the Migratory Birds Convention (as we will see in chapter 6), Aboriginal peoples negotiating modern treaties have for the most part asked that the resulting agreements contain a formal promise by the Crown to offer "its best effort" to obtain a spring subsistence hunting amendment from the American government.

In Alaska, the negotiation of land claims also contributed directly to further subsistence hunting rights. The *Alaska Indigenous Claims Settlement Act* (ANSCA) of 1971 officially extinguished the hunting and fishing rights of Aboriginal peoples but, in adopting the legislation, Congress specified in its conference report (which is considered to express Congressional intent) that their subsistence rights would be protected. In 1980, building on ANSCA, the *Alaska National Interest Lands Conservation Act* (ANILCA) confirmed and extended these rights to all rural subsistence users.[319] In sum, the indigenous peoples of Alaska have been successful in using their leverage to press their claims for subsistence rights at the federal level. Moreover, their legal and political capacity to hinder industrial development has also served them at times at the state level. For example, in 1990, oil companies contributed to their lobbying effort to convince the state legislature to recognise their subsistence rights by amending the state constitution. Companies apparently considered the granting of these priority rights as an important condition to ensure a peaceful relationship with these potential opponents to their projects.[320]

In sum, the political demands by Aboriginal peoples living in the northern part of the continent for the legalization of the subsistence spring harvest should be seen as part of a larger struggle for the affirmation of their group rights as first peoples and the preservation of their distinctive way-of-life. The harvest is undoubtedly considered nutritionally and economically important but it also holds great socio-cultural significance, which belies defining it strictly as an issue of resource allocation.

In this context, the intensification of demands for the amendment of the Migratory Birds Convention has been naturally associated with the resurgence of the Aboriginal self-determination movement in the 1960s and the negotiation of new land claims agreements in the North. Aboriginal nations in both countries have used their newly found political resources to press their claims for the protection of their subsistence practices and the recognition of their special right of access to wildlife resources. The development of more resourceful and sophisticated political organisations, the growing recognition of the legal validity of some of their claims, and the desire of state or southern industrial interests to access northern land resources have been used to place the subsistence rights issue on the political agenda in both countries. But in pressing their demands, Aboriginal communities also entered in conflict with other stakeholders in the waterfowl management regime, with competing interests in the birds.

Non-Aboriginal interests in the Aboriginal subsistence rights controversy

Aboriginal communities are not the only users of waterfowl in North America. People engage in a wide range of relationships with wildlife resources and they benefit in different ways from the continued existence of wildlife populations. In order to understand the politics surrounding the recognition of Aboriginal rights to a year-long harvest for subsistence purposes, it is necessary to briefly consider the range of values attributed to wildlife by other social groups. It is partly from the values that they attribute to these environmental resources (and from the assessment of available political options) that these actors derive their perception of their self-interest in relation to the resource management issues that become the object of political action in the context of conservation policy. In order to clarify the diversity of uses involved, table 4.3 divides them on the basis of whether these uses are consumptive or essential in nature. The resulting categories cover the diversity of values that will give rise to the positions of the main policy actors in the subsistence rights controversy: subsistence users, the sport hunting lobby, and environmentalists.

The hunting and fishing of wildlife may constitute the most obvious use of wildlife resources. They are consumptive activities, where individuals depend on the killing of animals to derive utility from the resource. However, most hunters in North America engage in it for sport or recreational reasons. As such, the consumption of wildlife by hunters can be considered a non-essential good. The main value of the resource is derived from the pleasure of the hunt and the relationship with the land of which it is constitutive (and only tangentially from eating waterfowl).[321] In contrast,

subsistence hunters rely on the harvesting of wildlife to meet their basic needs, often in the absence of well-developed and satisfactory alternatives. For subsistence users, the main value of the waterfowl is realised by its direct consumption as an essential source of nutritional food or through its use as an irreplaceable artefact in a religious ceremony or cultural practice.

Table 4.3: Categories of wildlife uses

	Consumptive	Non-Consumptive
Non-Essential	Sports hunting	Observation/ Existence value
Essential	Subsistence hunting[322]	Ecological services

However, and since the rise of the environmental movement maybe increasingly so, a great number of people also derive value from wildlife resources without engaging in consumptive activities. Bird watching and nature contemplation, in particular, have a growing number of adepts who derive significant benefits from observing the natural world. Relying on waterfowl as pure public goods, the popularity of these non-consumptive uses is such that they now generate more economic activity and directly engage more people than consumptive uses.

Among these uses, we must also consider the importance of the broader philosophical and spiritual commitment that people have towards wildlife and the natural world. In environmental philosophy and welfare economics applied to environmental issues, it is now common to speak of the existence value of wildlife; i.e. value that is derived by individuals from simply knowing that wildlife exists, even if they never plan to see specimens in the wild.[323] In practical conservation cases,

individuals frequently cite the simple knowledge that a natural area exists as a habitat for wildlife as the prime motivation for supporting conservation and for their willingness to contribute financially to the conservation effort. With the satisfaction of leaving such habitat for the next generations, the existence value of these habitat can outweigh the value derived from their current or potential direct recreational use.[324]

The recognition of such less tangible benefits is not only relevant for guiding wildlife management decisions (which must now acknowledge the interests of non-hunters); it is also crucial for an adequate understanding of the political engagement of many people who advocate the preservation or conservation of wildlife for non-consumptive reasons. While non-consumptive users will frequently agree with the predominant management objective of assuring maximum sustainable yield of wildlife populations (and not object to a sustainable consumptive use of wildlife), they may often disagree with consumptive users on how the annual yield should be allocated among users or on whether some harvesting practices should be permitted. In some cases, non-consumptive users will even question the morality of hunting altogether.[325] In any case, in the realm of modern conservation policy, non-consumptive environmentalists constitute an autonomous and distinctive group of political actors.

Finally, the roles played by wildlife in the proper functioning of natural ecosystems can be considered an essential, non-consumptive benefit of their continued presence. In natural ecosystems, each living components depend on a

complex web of inter-relations with other components to assure the proper working of the system as a whole and their own reproduction within it. By striving for their own survival, wildlife specimen indirectly contribute (as predators, as preys, as agents of adaptability and resilience, or otherwise) to the health of other species and to the reproduction of the natural systems that underpin human societies and economies. In this broad indirect manner, human beings benefit from the ecological services that wildlife performs as parts of ecological systems.

Viewed in this way, wildlife conservation as a general policy objective can be seen as an attempt to limit the anthropogenic threats to equilibria found in the environment, to protect the integrity of ecosystems. Undoubtedly, many ecologists actively promote the protection or preservation of species as a measure of prudence towards intervening in the misunderstood and vital processes of nature. Somewhat less obviously, some hunters also defend their consumptive practices on the basis that, by regulating populations, they contribute to the non-consumptive benefits derived from healthy ecosystems.[326]

This brief overview of the different uses made of wildlife resources serves to highlight two important points. Firstly, in a context in which the availability of resources is bound to be limited by the objective of conservation, claims regarding the need and legitimacy of a priority or guaranteed access to the resource will be made by the different stakeholders. These claims will be invariably revolve, at least partly, around the priority that society should grant to these competing uses and values.

In the case of waterfowl conservation, subsistence users made the case that they have a greater and more essential need for access to the resource than sport hunters or environmentalists and that, as such, the validity of their claim does not solely rests on treaty and Aboriginal rights but also on superior needs. But this point is not always granted by other users. Can subsistence use of waterfowl be considered a truly essential need for subsistence in this modern age (of the industrial economy and the welfare state)? Should it not be subject to the essential value of conservation and ecological sustainability? And even when this point is granted, the complexity associated with translating broad principles into concrete policy decisions and regulations often undermines its value. Should subsistence use always benefit from an absolute priority over all other uses? If need is the issue, should subsistence priority be based on ethnic criteria? Should subsistence needs translate into unregulated rights?

In sum, making conservation policy involves making collective judgements about the compatibility, validity and priority to be granted to the different uses of available resources in the absence of consensus among competing users. In large part, the Aboriginal subsistence rights controversy is precisely about whether, and how, subsistence users should be integrated into the existing waterfowl management regime in North America, that is about its place in relation to competing uses.

Secondly, the different categories of users have varying levels of political resources and influence. For social and historical reasons, the waterfowl management regime in North America has historically been dominated by the interests of

recreational hunters. As we have seen above, sport hunters are the primary consumptive users of waterfowl in America. But throughout history, direct habitat protection and restoration by private hunting organisations has also played a central role in conservation efforts. State funding for waterfowl management and habitat protection has also historically been based, in no small measure, on the taxation of consumptive users through licensing fees.[327] According to Lund, this system of funding of wildlife conservation has historically precluded "a continuing inquiry into the value of wildlife [for direct consumption] in comparison with other social goals" that could be associated to wildlife management.[328] As a result, waterfowl populations have been managed as a common resource for public consumption and the hunters' main policy objective, maintaining a sustainable maximum yield, has been the cornerstone of the North American waterfowl regime.

Over the years, environmentalists have also played an important role in making of conservation a central policy objective. But since conservation and sustainable maximum yield are largely compatible objectives, environmentalists have tended to concentrate their efforts on the protection of endangered species and wetland habitat with minimal conflicts with consumptive users. In fact, hunters and ecologists have regularly found themselves on the same side of battles against economic development projects destroying valuable habitat. The only notable exception probably concerns their divergence on granting access to natural parks and protected wilderness areas to consumptive users.

In contrast, subsistence users, especially Aboriginal subsistence hunters, have been historically marginal players in the development and operation of the modern waterfowl management regime. Claiming an open, year-long access to the resource, their claim could be easily conceived as both constituting a danger to the long-term conservation of waterfowl populations and, given a limited annual yield, as a direct threat to the share of birds available to recreational hunters. In sum, notwithstanding the moral validity of their superior claim to priority based on an essential need, subsistence hunters can be seen as a challenge to the main interests of the environmentalists and the sport hunting lobby, both of whom can command significant support and resources.

The sport hunting lobby

In contrast to other subsistence issues (e.g. whaling, sealing or the salmon fishery), the waterfowl subsistence harvest controversy does not include pressures from commercial harvesting activities. Market hunting has long disappeared. However, it would be inaccurate to conceive of sport hunting as an economically insignificant activity, a pure matter of cultural tradition and leisure.[329] The sport hunt is a significant industry in northern and rural parts of the continent. Sport hunting is an important part of the tourist industry in many communities in Canada and the United States and it generates considerable revenues from the provision of lodging, transport, guiding services and the sale of equipment.

Hunting is still a popular activity, drawing annually more than 1.5 million Canadians (or 7% of the population) and 14.1 million Americans in the early

1990s.[330] In both countries, recreational hunters also tend to differ from the demographics of the average citizen. In Canada, in comparison to the general population, hunting is more frequent among men (constituting 90% of all hunters) between the age of 25 and 45 living in a rural area and hunters are better represented among those with higher incomes, particularly in the $40 000 or more income category.[331] In the U.S., 92% of all hunters are men, the bulk of whom are between 25 and 44 years of age. Most of them are also found outside large urban centres (only 22% live within urban agglomerations of more than one million inhabitants) and live in households earning more than US$30 000.[332]

The economic impact of hunting activities is also significant. Based on data collected by Statistics Canada, it is estimated that American and Canadian sport hunters spent about $1.3 billion annually in the Canadian economy in the early 1990s. These direct expenditures are estimated to translate into $1 billion in personal income and $700 million in government revenues from taxes. They are also estimated to sustain 30 000 jobs and contribute about $1.7 billion to the Canadian Gross Domestic Product.[333] In the U.S., direct annual expenditures related to hunting were estimated at US$12.3 billion.[334] If one considers that a significant part of these economic benefits tend to be concentrated on regions and rural areas that are generally poorer and less economically diversified, we can appreciate that wildlife harvesting for sport can yield a significant political constituency.

With regards to the economic significance of waterfowl recreational harvesting, the Canadian Wildlife Service estimated that 394 000 Canadians engaged in

waterfowl hunting in 1991 (about 1.9% of the Canadian population), spending about $170 million. Unfortunately, this number excludes inhabitants of the three territories and Aboriginal hunters living on reserves and, consequently, probably significantly underestimates the number of waterfowl hunters in Canada. In the U.S., the Census Bureau and the U.S. Fish and Wildlife Service estimated that there were 3 million bird hunters, spending approximately US$686 million annually in the American economy in 1991.[335]

In keeping with the economic significance of sport hunting activities, sport hunting organisations also command significant resources. The Ontario Federation of Anglers and Hunters, the largest organisation of this type in Canada and one of the main opponents of Aboriginal hunting rights, counted over 80 000 members and 590 affiliated private hunting and fishing clubs in 1999.[336] Ducks Unlimited Canada, a recreational hunting organisation dedicated to the protection and restoration of waterfowl habitat, claimed over 100 000 members and was able to raise close to $12 million from fund-raising events alone in 1998.[337] In the late 1980s, the organisation had an annual operating budgets devoted to waterfowl habitat projects that exceeded $35 million.[338] In the U.S., Ducks Unlimited Inc. counted just over 700 000 members and raised more than US$118 million in fiscal year 1999.[339]

To understand the potential political leverage of sport hunters' associations, we must also appreciate the contribution these groups make to conservation efforts in North America. With the objective of assuring a sustainable maximum yield for the resource, sport hunting associations have historically invested heavily in research

programs, the conservation of habitat, and the rehabilitation of wetlands.[340] For example, since its creation in the late 1930s, Ducks Unlimited has protected and restored more than 8.8 million acres of land for wildlife habitat in North America.[341] Many scientists working with hunting groups, such as Ducks Unlimited, benefit from the respect of wildlife biologists in government and universities. Their technical expertise makes them serious and informed potential critics of government policy and has made them important participants in the wildlife management regime, often sitting on official technical committees determining the status of wildlife populations.

Their expertise and their sizeable contribution to conservation efforts on the continent, both in terms of taxation revenues earmarked for conservation programs and direct conservation spending, undoubtedly provide them with some influence over the evolution of conservation policy. Not only do their representatives participate actively in professional networks with government scientists and officials but it would seem hard for government agencies not to consider the impact that policies may have on their spending decisions. For example, in the course of the debates on the subsistence amendment to the Migratory Birds Convention, some groups pointed out that, if an adverse decision made caused sport hunters to lose interest in the management regime, the majority of the money spent on conservation would be lost.[342] Considered in parallel with the fact that its economic impact tend to be concentrated in rural areas and its political support among relatively higher income rural residents, it becomes apparent that sport hunting can exert significant political influence over conservation policy.

Environmentalists and wildlife conservation

While it may not benefit from the same kind of strategic support that recreational hunters possess, the environmental lobby for wildlife conservation is nevertheless a significant political actor and its organisations can draw from more wide-ranging popular support. Even when we exclude the weaker indicators of support for wildlife conservation, we still find that 1.9 million Canadians were members of wildlife organisations or supported them financially; and that 30% of Canadians expressed interest in doing so in the future.[343] Surveys from 1991 report that 86% of Canadians thought that maintaining abundant wildlife was a very or fairly important objective. A similar level of support was found for the preservation of endangered or declining wildlife. When isolated, the protection of waterfowl populations found the support of 82% of surveyed Canadians, a higher level than small and large mammals.[344]

In contrast to hunting, the non-consumptive use of wildlife is much more popular and widespread. In the early 1990s, 3.9 million Canadians (or 19% of the general population) took special trips to engage in non-consumptive activities related to wildlife, such as observing or photographing fauna. A significant 11.3% of Canadians took trips specially dedicated to observing waterfowl.[345] In the U.S., 30 million people engaged in the same type of activities and, of these users, 19.1 million went on trips specifically involving the observation of waterfowl.[346] In sum, in both countries, direct non-consumptive users clearly outnumber consumptive users (not to mention subsistence users).

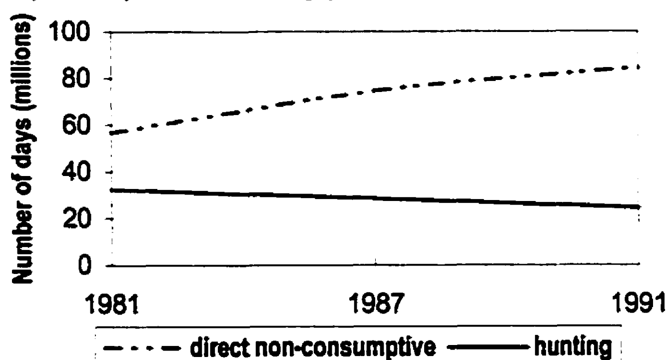
In contrast to hunters, direct non-consumptive users are almost equally divided between men and women in both countries. They are also overwhelmingly urban residents.[347] There are also interesting differences in income categories between countries and types of users. In Canada, direct non-consumptive users tend to be less over-represented in the higher income categories than hunters, compared to the general population.[348] However, in the U.S., they are clearly found predominantly in the higher income brackets, 44% and 23% of users being in households earning respectively more than US$50 000 and US$75 000 and more. This offers a sharp contrast with American hunters who find only 8% and 7% of their members in these respective income categories.[349] Finally, like recreational hunters, direct non-consumptive users in both countries are more frequently between 25 and 45 years of age.

In Canada, these direct non-consumptive users also poured more money into the economy in all provinces, with the exception of Newfoundland and Prince Edward Island.[350] In total, national expenditures attributed to the direct non-consumptive use of wildlife was estimated in the early 1990s at $2.4 billion annually, twice the amount attributed to game hunting.[351] In the U.S., non-consumptive users' direct expenditures were estimated at US$18.1 billion annually.[352] In both cases, much of these expenditures are spent on lodging, transportation, guiding, food and equipment.

Recent trends also seem to be working in favour of direct non-consumptive users. While the number of hunters declined over the 1980s, trips and outings dedicated to the direct non-consumptive use of wildlife increased both in number of

days spent and in number of users.[353] Moreover, over the 1980s, non-consumptive users taking special trips to observe wildlife out-numbered hunters in all provinces, with the exception of Newfoundland and New Brunswick (where hunters were more numerous in the early part of the decade).[354] And, as a group, they showed more growth potential. While only 15.6% of Canadians expressed great or some interest in engaging in hunting, 76.7% expressed the same level of interest in engaging in direct non-consumptive uses.[355]

Chart 4.2
Trends in the total days on which Canadians engaged in direct non-consumptive trips or in hunting (1981 - 1991)

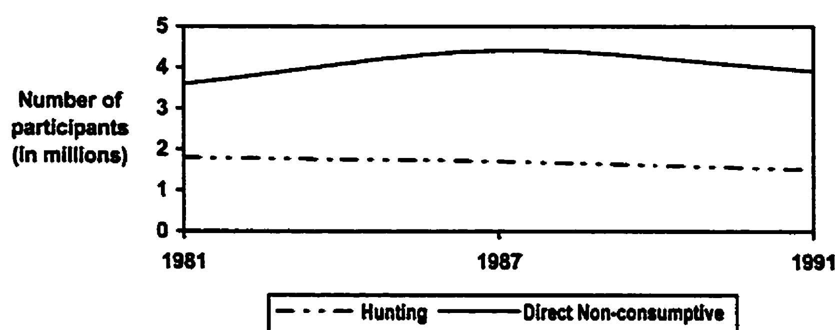


Source: Developed from data found in Canadian Wildlife Service (1993) The importance of wildlife to Canadians: Highlights of the 1991 survey, Ottawa, Minister of Supply and Services.

Some environmental non-governmental organisations concerned with wildlife issues count amongst the largest and best funded environmental lobby groups in Canada.[356] The Canadian Wildlife Federation claims to have 500 000 members. The Canadian Nature Federation, the Canadian Arctic Resources Committee and the Canadian Parks and Wilderness Society claim 100 000, 10 000 and 5 000 members

respectively.[357] Wildlife organisations can also command significant budgets. The World Wildlife Fund's endangered species and habitat programs alone had annual budgets of almost $5 million in the early 1990s. The Canadian Nature Federation's annual budget was close to one million dollars and Friends of the Earth (Canada) reported about $850 000 for its annual operating budget.[358] The Canadian Arctic Resources Committee was reporting about $700 000 in the early 1990s.[359] In the same period, the Canadian Wildlife Service estimated that wildlife organisations were altogether spending $151 million annually on wildlife-related activities.[360]

Chart 4.3
Trends in participation in direct non-consumptive trips and in hunting in Canada (1981 -1991)



Source: Developed from data found in Canadian Wildlife Service (1993) The importance of wildlife to Canadians: Highlights of the 1991 survey, Ottawa, Minister of Supply and Services.

American wildlife organisations are naturally larger than Canadian organisations. During the 1980s, the combined membership of the ten largest national environmental organisations, including the National Wildlife Federation, Friends of the Earth (U.S.), and the Sierra Club (U.S.), rose from 4 to over 7 million members. Over the same period, their budgets also increased significantly, often increasing by more than tenfold. And despite some difficult times in the early 1990s, these

organisations still command significant resources and support. In the early 1990s, the Wilderness Society still counted on 350 000 members and a budget of more than US$16 million.[361] The Sierra Club (U.S.) claimed over 500 000 members around the same time.[362] Among non-consumptive users alone, an estimated 11.5 million Americans contributed more than US$862 million in membership dues and donations to wildlife organisations in 1996.[363] The National Audubon Society alone reported over US$72 million in revenues in 1998.[364]

While these revenues may still be lower than those of groups like Ducks Unlimited, they still represent sizeable resources and allow conservation groups to mount sophisticated political campaigns to influence conservation policy. They also allow them to engage in significant direct research and conservation programs that make them important actors of the conservation policy community in both countries. They are informed and vocal critics of government policy. Some of them also sit on governmental technical committees and engage actively in partnerships for habitat restoration or biological research. In comparison to sport hunting interests, environmentalists can claim wider public support (although more urban and less concentrated in rural constituencies). They can also claim to be representing a constituency with a greater (and expanding) economic impact. And while they may appear to benefit from fewer financial resources, several large organisations still count on very significant budgets. As a whole, the conservation groups seem similar to the environmental lobby as a whole, a sophisticated political coalition finding its main support in the urban middle and upper classes and which depend on broad popular appeal for influence.

Conclusion

This chapter demonstrated that, while being very important for economic and nutritional reasons, the Aboriginal spring subsistence harvest bears greater meaning and significance for northern Aboriginal communities. Its import should be appreciated in the context of broader needs and struggles by Aboriginal peoples to protect their way-of-life and to assure their development in the respect of their distinctive group identities. In this perspective, it should not be surprising that, while grievances have been dating back to the late 1910s, it is with the rise of indigenous militancy that demands for an amendment to the Migratory Birds Convention and the recognition of subsistence rights have become more pressing. Tabling on the growth of their organisational, political and legal resources, Aboriginal nations have pressed their claims for subsistence rights as part of their broader agenda for self-determination in the 1960s. They have also used their new-found leverage to force hunting rights on the agenda in the context of land claims negotiations with northern and southern interests impatient to harness northern natural resources in the 1970s.

However, because indigenous claims to wildlife resources are strong and unique in their historical foundations, they challenged the existing order of the waterfowl conservation regime in North America and they unavoidably confronted competing interests in the resource. As we have seen, while Aboriginal subsistence users take a minor portion of the continental waterfowl harvest and while national governments have actively argued that their impact would not increase with the legalization of their spring harvest, there remained unquestionable uncertainty over the precise nature of the Aboriginal subsistence harvest in the North. In this context,

keeping in mind that renewable resources are nevertheless limited and fragile, environmentalists and sport hunters were understandably concerned by the sustainability of the resource and their own future share. More precisely, in the context of the significant decline of several waterfowl species for a good part of the past thirty years, some key factors, such as the exact relation of Métis and non-status peoples in relation to Aboriginal rights, raised non-trivial fears about the impact of a better access to waterfowl harvesting during the reproductive period.

As a result, indigenous communities' struggle for the legalization of the spring subsistence harvest has had to face the resistance of environmentalists and sport hunters. These non-indigenous interests have enjoyed a long history of association with the waterfowl conservation regime. We have showed that they can count on large organisational resources generally associated with effectiveness in political advocacy. Both sets of groups have large memberships, important budgets, and employ professional experts with a clear capacity to engage in complex technical analysis and actively participate in policy-making. They can both claim to represent politically active constituencies, which generate sizeable economic benefits particularly important to rural areas. In sum, despite their differences, environmentalists and sport hunters both constitute powerful political constituencies in field of waterfowl conservation; constituencies that cannot be avoided in policy change. Moreover, because of their common concern with the sustainability of waterfowl populations (even if these concerns rest on different kinds of values), many environmentalists and recreational hunters find a common cause in their opposition to a more liberal harvesting regime for northern Aboriginal peoples in the spring.

Despite the obvious distributive tensions that emerge from our examination of the issue, the opposition between environmentalists, Aboriginal peoples and sport hunters on the legalization of the spring subsistence harvest cannot be reduced strictly to a question of resource allocation. In confronting each other over the amendment of the Migratory Birds Convention, these protagonists employed more complex discourses which revealed important differences in ideas and values. These divergent conceptions of the proper basis of distributive rights, the nature of justice, and the character of Aboriginal peoples' relationship to the natural environment are also crucial for understanding the Migratory Birds Convention's subsistence controversy. The next chapter examines in detail these differences.

Chapter 5

RIGHTS AND CULTURE: DISAGREEING OVER ABORIGINAL SUBSISTENCE RIGHTS

> The subsistence issue is a collision of cultures.
>
> - Alaskan wildlife management expert Jim Rearden in 1982
>
> It was in the spring, when goose food becomes plentiful. [..] When the goose was coming it said: "In the spring here, plants that have just thawed are so tasty. I am coming your way!" It knew that it would be hunted and caught by a human being. [..] Even if they know that they are going to be killed, they say that they will come back.
>
> - Mike Uttereyuk, Sr., a Yup'ik resident of Alaska, telling a story about a goose telling a story in 1994

For eighty years, Aboriginal inhabitants of Canada and the United States have resisted an international conservation measure which counts as one of the most successful examples of international environmental policy. Obviously, they have done so in the name of assuring their essential needs. Unhindered access to waterfowl in the spring is a matter of adequate sustenance for many Aboriginal peoples. In the face of Aboriginal demands, environmentalists and sport hunters have expressed concerns about the sustainability of this valued resource and worried about the impact of Aboriginal spring hunting on their own use of its annual yield. This essentially distributive depiction of the subsistence right problem associated with the Migratory Birds Convention undoubtedly captures an important aspect of the reality. But it also fails to tell the whole story.

In order to better understand the nature of the controversy and the differences in the views of the policy actors involved, we must take a closer look at the discursive contours of the issue. An examination of the discourses of the organized interests involved over the twenty years spanning the amendment debates reveals that they also disagreed on some fundamental ethical issues hindering an easy resolution of the subsistence problem. More than a simple question of splitting the resource in an acceptable manner, conflicts involved different conceptions of justice and equity as well as fundamental disagreements over the role of culture in modern resource management.

The objective of this chapter is to summarise and illustrate the terms of the subsistence policy debate, which has historically pitted Aboriginal communities against environmentalists and sport hunters, by probing its discursive underpinnings. We will show that, without denying the obvious economic interests and environmental concerns associated with the allocation of a limited resource, the subsistence debate has largely evolved as an issue of justice and rights and, as such, it had been intimately associated with broader demands for autonomy, political recognition and cultural survival. As a consequence, many of the claims made by protagonists in the conflict concern the appropriate criteria for justice and equity, the compatibility of diverging cultural practices with modern conservation, and the necessity of subjecting Aboriginal rights to larger national interests or to liberal conceptions of individual rights.

After a brief section identifying the key areas of conflict revealed by their discourses, the chapter examines in more details the two key areas of disagreement over Aboriginal subsistence rights in relation to the Migratory Birds Convention. First, we examine the positions of the respective actors regarding the basis for Aboriginal rights to wildlife harvesting. We will explain why Aboriginal peoples see these rights as group rights deriving from their unique constitutional and historical position in North America. We will also show that environmental and sport hunting groups tend to reject indigenous conceptions of those rights. Then, the next section discusses the existence of an Aboriginal environmental ethic, which would underpin indigenous harvesting of waterfowl. We probe both the nature of this distinctive ethic and attempt to explain the roots of environmentalists and sport organisations' scepticism regarding its value as a self-regulation mechanism. Throughout the chapter, an effort is made to go beyond the description of major arguments and claims presented by the protagonists by discussing them in the context of contemporary social research in Aboriginal and environmental studies.

A collision of cultures: Disagreeing over Aboriginal subsistence rights

We have seen in the previous chapter that, while being very important to northern Aboriginal communities for socio-cultural, economic and nutritional reasons, the Aboriginal spring subsistence harvest constitutes only a small portion of the total North American harvest (about 8%). We have also seen that the ecological significance of the legalization of spring subsistence harvesting was difficult to assess for most of the period of amendment negotiations. While waterfowl populations

currently seem very healthy as a whole, there were legitimate sustainability concerns over the 1970s and 1980s, especially for some specific species. While the on-going existence of an illegal harvest alleviated some immediate environmental concerns about the spring harvest (making the case that the harvest was already taking place without significant consequences), sufficient uncertainties remained to justify some apprehension by other users of the resource, especially as long as the regulatory framework of this new legalized harvest remained imprecise. As a result, Aboriginal communities demanding the legalization of their spring subsistence harvest faced at least two challenges: overcoming concerns that their spring hunting would threaten a potentially declining common environmental resource and convincing other users that their exceptional status as Aboriginal nations justified a privileged yearlong access right to waterfowl.

In this context, the main zones of disagreement in the debate over subsistence rights and the Migratory Birds Convention have been around: 1) assessing the claims for justice and equity that would justify broadening Aboriginal peoples' access to the limited annual waterfowl harvest (especially considering that such access may eventually entail limiting other users' share); and 2) the nature of Aboriginal resource management practices and whether the exercise of indigenous subsistence rights should be regulated for the common good. While sport hunters and environmentalists share with Aboriginal communities a common concern for the sustainability of waterfowl populations, they often disagree fundamentally on the appropriate measures to guarantee sustainability and/or on the appropriate basis for allocating resources. Hence, it is generally on a backdrop of competing interests and

philosophical disagreement that Aboriginal peoples have been fighting for the recognition of their rights and the protection of their traditional livelihood.

The first issue of contention raises several questions about the appropriate allocation of a common but limited resource. In the absence of a consensus on the distributive criteria to be used, public decisions on the conditions of access to the harvest and the allocation of resources are unlikely to find the legitimacy required to win over the collaboration of affected stakeholders. Should access to natural resources be granted as matter of equal rights to all citizens or should Aboriginal citizens benefit from a privileged access due to their culture and political history? Should treaties justify privileged access to resources for Aboriginal peoples? Under conditions of rarity, should subsistence Aboriginal access outweigh all other uses, without even assuring a minimum access to other users? Should conservation concerns predominate over all other claims? Environmentalists, sport hunters and Aboriginal peoples have historically disagreed strongly over the answers to these questions and it has affected their positions on the spring waterfowl hunting controversy. Fundamental clashes between liberal conceptions of individual rights and Aboriginal peoples' demands for group rights rooted in the historical circumstances of their nations and necessary to protect their cultures are central to these disagreements.

The second issue of contention - the nature of Aboriginal peoples relationship to the land and its resources - also raises several policy questions. To assess the potential impact of indigenous spring hunting on waterfowl populations (and

consequently on their sustainability and their accessibility to non-indigenous sport hunters), one must pass judgement on the conservation practices of Aboriginal hunters. Are these hunters guided by a concern for the sustainability of wildlife resources? In the absence of strong regulatory controls, are they likely to engage in self-restraint in the exploitation of waterfowl at a crucial time for their reproduction? If Aboriginal self-regulation is granted, on what basis and precepts are those self-regulation regimes likely to be built? Are claims about an ancestral Aboriginal environmental ethics founded? Or are they convenient folklore? In the absence of consensual historical data about Aboriginal resource stewardship, value judgements about these questions contribute to shape stakeholders' attitude toward Aboriginal spring hunting; and, as we will see, the fact the Aboriginal environmental ethics are rooted in spiritual beliefs tends to clash with modern conceptions of scientific resource management, privileged by environmentalists and sport hunters.

In this context, the Aboriginal subsistence rights controversy should not be seen as a purely distributive issue; it also embodies a collision of cultures, placing at stake different conceptions of rights and the value of Aboriginal culture in resource management. We now turn to a detailed examination of these two areas of disagreement.

Subsistence harvesting as a rights issue

The discourse of Aboriginal peoples draws our attention to their perception of migratory birds conservation laws as oppressive measures by foreign and colonial powers that undermine their way-of-life and deny them their fundamental rights as

original inhabitants of this continent. For them, subsistence harvesting rights are primarily about the recognition of their distinctive relationship with the land by a majority society that has failed to uphold its historical promises and has progressively marginalized them on their own land. In this perspective, the struggle for the recognition of their rights to harvest waterfowl throughout the year is not simply an issue of economic well-being. It is a part of a larger struggle to regain self-determination as distinctive peoples and to uphold, in a manner consistent with their contemporary needs and circumstances, their distinctive way-of-life. In this perspective, the demands for the legalization of the spring harvest are also demands for greater political control over the terms of community development, a control that is to be exercised in accordance with traditional Aboriginal beliefs and precepts regarding the natural environment. In order to understand the foundation of indigenous claims, it is necessary to return briefly to the historical process that saw indigenous rights progressively eroded and denied by the dominant society.

The foundation of Aboriginal and treaty rights

Contemporary Aboriginal claims for access to wildlife resources are essentially claims about group rights. The legalization of the subsistence spring harvest is no different. The arguments presented in its favour were primarily founded on the existence of Aboriginal and treaty rights, which derive from Aboriginal peoples' status as the original inhabitants of North America and their historically unique relationship with the European states that colonized the continent. The history of the Aboriginal peoples' relationship with the European powers that have settled North America is long, multi-faceted and somewhat tortuous. But the progressive

subversion of Aboriginal sovereignty in practice and in law is an important dimension of the story. There is now little doubt that, throughout much of the settlement period until the mid-19th century, the French and British Crowns approached indigenous peoples as independent and organized societies who rightfully occupied the continent. Until the early 19th century, Aboriginal persons were not even considered subjects of the British Crown (unless they voluntarily became so) and were not submitted to the British common law. Correspondingly, they sought to negotiate treaties with the indigenous peoples that they encountered in order to assure the peaceful and orderly settlement of the land and the development of commerce.[365]

From the beginnings, the legal terms of the relationship between the European Crowns and indigenous peoples were a matter of some scholarly dispute. European legal scholars and theologians differed in their characterization of indigenous societies and on the nature of their natural rights, including those to property and land use. However, from the 16th to the 18th century, the dominant legal reasoning associated with the seminal contributions of Francisco de Vitoria and Hugo Grotius clearly considered indigenous peoples as independent societies with distinctive rights, rooted in the principles of natural law, to the control of their ancestral lands.[366] According to this perspective, the mere "discovery" of new land was insufficient to claim its ownership (except in the rare cases when the land is truly unoccupied - the doctrine of *territorium res nullius*), let alone justify ruling over its inhabitants against their will. According to this predominant reading of the international law of the time, the doctrine of discovery merely served to acquire a monopolistic right to acquire the land of Aboriginal peoples vis-à-vis other European powers. It was a doctrine meant

to regulate the relationship among imperial powers in their dealings with the new world. While it may have imposed some limitations on indigenous peoples' rights by constraining their ability to deal with the different European powers, it certainly did not legally dispossess them of their land and rights.[367]

In this context, the colonized territories could be legitimately appropriated solely by obtaining the consent of the indigenous peoples occupying them, through the negotiation of treaties or concessions. The only widely recognised exception concerned the rights acquired as a result of a rightful conquest. According to legal opinions of the time, such a conquest must be the result of a rightful war, which should have been justified by aggression or by a breach of the natural law by Aboriginal peoples. Including in this category of behaviour, we note mostly the refusal to trade with the settlers, a resistance to preaching their conversion to Christianity, or the practice of torture and anthropophagy.[368] The historical record suggests both that these conditions were not often met and that they were nevertheless repeatedly used to justify wars of aggression by the colonisers against indigenous peoples across the Americas. Nevertheless, at least for the northern part of the continent, the limited nature of the Indian wars seems to rule out the use of this doctrine to justify the widespread extinguishments of Aboriginal title to most of the territories that these peoples historically occupied.[369]

With respect to hunting rights more specifically, the same general rules applied to the acquisition of Aboriginal hunting territories. Vitoria, Grotius, Samuel Pufendorf and Christian Wolff, among other prominent legal scholars of these times,

seemed to have believed firmly that Aboriginal peoples had unequivocal rights over their hunting territories. In the absence of consent to abandon those territories or cede them to the Crown, the colonies would not be founded to simply appropriate them. In practice, from the moment of contact up to the mid-19th century, the French and British Crowns in North America generally respected the terms of international law in their dealings with Aboriginal peoples and treated them as independent sovereign peoples. In some cases, Aboriginal peoples were submitted as a result of military conquests; but, more generally, the Europeans relied on the negotiation of alliances and treaties in order to establish a *modus vivendi* with them and to allow for settlement and commerce. There are ample historical records to show that the colonial governments considered Aboriginal peoples as independent parties in the negotiation of these treaties or alliances.[370]

The *Royal Proclamation of 1763* probably most clearly confirmed the British Crown's view of Aboriginal peoples and their hunting rights in the latter part of the 18th century. Soon after conquering the French in the northern part of the continent, the British authorities encountered a renewal of hostilities with Aboriginal peoples as the British colony failed to come through on some of its promises and population growth led more settlers to encroach on Aboriginal ancestral lands. In order to preserve the peace and maintain several Aboriginal peoples as military allies, the British monarch issued a royal proclamation to delineate the terms of its relationship with the Aboriginal peoples. The *Royal Proclamation of 1763* clearly affirmed that all lands that had not been ceded to or purchased by the Crown were to be reserved for Aboriginal peoples for their use as hunting territories. In addition, the

Proclamation attempted to confirm the Crown's monopoly in securing Aboriginal titles for settlement by the colonists and formally placed Aboriginal peoples under its protection. The Crown alone could issue a permit to trade with the Aboriginal peoples and could attribute land in the unsettled territories to the colonists (presumably by obtaining a concession or by purchasing it). In any case, the language of the *Proclamation* suggests that British authorities considered Aboriginal peoples to hold sufficient title to their ancestral land to guarantee their hunting rights and to suggest the need to obtain their consent before appropriating the land for settlement.[371]

This *état de fait* would soon come to change both in theory and practice. In 1758, Emerich de Vattel published what was probably the first significant legal attack on the control by Aboriginal peoples of their hunting grounds. Vattel, who held a strong moral preference for agriculture and essentially considered hunting as a sign of laziness by primitive cultures, found in a Lockean reading of the natural law the necessary justification for the non-indigenous appropriation of Aboriginal hunting grounds. According to Vattel, under the principles of natural law, one can not claim as his property more land than he can inhabit and cultivate for his livelihood. In this perspective, the key determinant of land title becomes the fruitful "amelioration" of the land through one's labour. It is a conception that clearly seems ethnocentric and that plays against non-European hunting societies.[372]

Even if it ran counter to the predominant interpretation of international law at the time, Vattel's analysis remains of great historical significance. While it took almost a century for European thought to undergo a complete reversal on the

question, Vattel's views mark the beginnings of a new legal thinking about the European powers' relationship with Aboriginal peoples. According to his logic, Aboriginal claims over large hunting territories can not be sustained in view of the agricultural and sustenance needs of the colonies' settlers. This principle indirectly allowed the colonizers to justify the expansion of their settlement to the detriment of ancestral indigenous rights over their land used for hunting.

This new approach was eventually comforted by the convenient evolution of international law. After three hundred years of recognising the independence and land rights of Aboriginal peoples, legal scholars made a turn in favour of the submission of indigenous peoples by the more "civilised" European imperial powers. Following in Vattel's footsteps, some prominent international law scholars, such as the American Henry Wheaton, banked on the "uncivilised" nature of indigenous peoples to justify the appropriation of their land and to negate the juridical value of existing treaties.[373] According to the emerging doctrine, the key determinant of title becomes its control by a modern state, a sign of civilisation that Aboriginal peoples do not possess. As such, the territories of Aboriginal peoples can be legally considered without rightful owners and legitimately be appropriated by the colonial powers in America and Africa, without consent or compensation.

In America, as early as 1810, John Marshall, chief Justice of the U.S. Supreme Court, followed the new reasoning to state that, when they are not cultivated or truly inhabited, Aboriginal peoples' lands can be considered unoccupied and appropriated by the settlers. As Ward Churchill points out, it is this same reasoning that

underpinned such massive European appropriations programs such as the U.S. *Homestead Act* of 1862 and the U.S. *General Allotment Act* of 1887, which undermined the Aboriginal peoples' land base and eroded their capacity to maintain their traditional livelihood.[374] Ultimately, while American and Canadian law continued to view Aboriginal nations as distinct political communities, their autonomy came to be subverted by the sovereignty of the Canadian and American states in the dominant legal order.

By the mid-19th century, the situation has also considerably changed on the ground. After the end of the war of 1812, Aboriginal peoples were no longer considered indispensable military allies. The growth in the non-indigenous population and the decline in the Aboriginal population altered the historical *rapport de force*, undermining the equal status of Aboriginal peoples. Despite the terms of the *Royal Proclamation of 1763*, the colonial government was incapable (and/or unwilling) to prevent increasing encroachment on the use of Aboriginal territories. While the Judicial Committee of the Privy Council, and even provincial governments, repeatedly found violations of the *Proclamation* and called for compensation, the colonial authorities found nothing better to offer than the establishment of reserves.[375] Slowly but surely, colonial authorities submitted Aboriginal peoples to a system of tutelage and confined them to reserves.

Progressively, Aboriginal peoples were also submitted to hunting regulation adopted by the Canadian and American governments. Despite several controversies regarding whether Aboriginal peoples actually understood or approved such measures

during negotiations, several treaties contained provisions allowing governments to limit their hunting rights. Many Aboriginal nations have since strenuously argued that the oral agreements made at the time did not contain such provisions or that it had been originally clearly understood that the only regulations to be imposed on Aboriginal hunters would serve to ensure resource conservation. In any case, federal and provincial game acts progressively came to be seen as applying to Aboriginal peoples. Over time, despite the use of considerable discretion during some periods and some limited exemptions in some areas, Aboriginal hunting rights became subject to Canadian and American laws.[376] In sum, by the early 20th century, Aboriginal peoples' protection against non-indigenous people's encroachment over their hunting territories had been eroded and their sovereignty progressively denied.

This brief sketch of the historical evolution that saw the sovereignty of Aboriginal peoples over their ancestral hunting territories be progressively eroded in law and in practice allows us to better understand the nature of indigenous claims to harvesting rights. For Aboriginal peoples, the violation of their rights to harvest wildlife on their traditional hunting grounds is a matter of profound historical injustice. It either represents the dominant society's attempt to appropriate the use of Aboriginal territories that were never ceded through treaties or it is an inadmissible breach of treaty provisions, negotiated between sovereign entities, in which Aboriginal negotiators had often secured guarantees as to the continued use of their land for their traditional subsistence (and sometimes commercial) practices. In both cases, the problem is not one of needs as much as it is one of justice and rights.

Aboriginal rights and the Migratory Birds Convention

This general rationale for demanding redress is entirely consistent with Aboriginal claims regarding the amendment of the Migratory Birds Convention to legalize spring subsistence hunting. In the context of these debates, Aboriginal peoples consistently made the point that the spring harvest was an issue of rights. Most Aboriginal organisations argued that Aboriginal nations never ceded, through treaties or otherwise, their fundamental right to hunt on their territories and that, consequently, the Migratory Birds Convention simply did not apply to them. Moreover, many treaties explicitly guaranteed the on-going use of traditional lands for subsistence fishing and hunting. As a result, the enforcement of hunting regulations is considered an unjust harassment of indigenous hunters and the amendment to the Migratory Birds Convention, in the eyes of Aboriginal peoples, would simply constitute a long overdue rectification of an historical injustice.

As Robbie Keith and John McMullen point out in their report on the consultation process leading to the amendment of Migratory Birds Convention in the mid-1990s, "there [was] near unanimity among Aboriginal participants that the Migratory Birds Convention closed season provisions be dropped to 'decriminalize the northern spring hunt', since the spring hunt has never been illegal. Rather, the Migratory Birds Convention [violated] their Aboriginal and treaty rights, [..]".[377] This position was also emphasised in subsequent meetings and correspondence with the Canadian Wildlife Service.[378]

In Alaska, the logic of Aboriginal claims was essentially the same but the historical circumstances of the 1970s entailed a somewhat different basis for

demanding the respect of Aboriginal subsistence rights. As we have seen in the previous chapter, the federal government successfully negotiated a modern treaty with the state's indigenous peoples to clear land title issues in order to allow for resource development in this period. The *Alaska Indigenous Claims Settlement Act* (ANSCA) of 1971 essentially extinguished all claims indigenous peoples may have had based on ancestral use and occupancy of lands and adjacent waters of the state. While section 4(b) of ANSCA explicitly abrogated Aboriginal hunting and fishing rights, Congress, in its conference report on the legislation, also clearly affirmed that the federal government would protect Aboriginal interests in the subsistence use of the land. This position was later explicitly reaffirmed when Congress adopted a priority rule for subsistence users in the *Alaska National Interest Lands Conservation Act* in 1980.[379] Since then, it has been clearly recognised that the protection of indigenous subsistence activities was considered to be an integral part of the government's settlement over Aboriginal title in the state. In so far as it prevent Alaska's indigenous peoples to pursue part of their subsistence activities in the spring, the Migratory Birds Convention is clearly viewed as a breach of Aboriginal rights and an impediment to cultural survival.

In addition, it is important to note that, at least in Canada, most Aboriginal communities largely conceive of their hunting right as a right to an *unregulated* (or *self-regulated*) and *exclusive* access to resources. In the context of the debate on the Migratory Birds Convention subsistence amendment, many Aboriginal communities found very difficult to accept the viewpoint put forth by some non-Aboriginal people that their harvest would need to be controlled.[380] Since the take of migratory birds at

any time is seen as an unconditional right, most Aboriginal communities believe that they can take whatever is needed to meet their traditional requirements. And as such, they saw "guidelines, allocations, quotas, and bag and possession limits as not applicable to their harvest".[381]

Government regulations and harvesting by sports hunters were generally seen by Aboriginal peoples as taxing the resources serving as the foundation of the traditional economies of many communities.[382] For example, on sharing the resource with non-Aboriginal users, the Innu nation of Labrador argued that:

> "It is equally unacceptable to propose that Aboriginal peoples have the right to a [sic] Spring harvest, but then to go on say that all other residents should have the same right. This will result in greater pressure on the resource and it will fail to make the distinction between subsistence and sport harvests. To do so would be to make that Aboriginal right completely without meaning. The long term effect could be to deplete the resource to the point where Innu people would no longer be able to harvest."[383]

Some Aboriginal nations, such as the Cree and the Naskapi of northern Quebec, excluded the possibility that non-beneficiaries of treaties would participate in the spring hunt.[384] Other Aboriginal nations and associations agreed to share the resource with other users on the strict condition that a priority right of access be granted to Aboriginal hunters. Non-Aboriginal subsistence users, and more rarely sport hunters, would then be granted the limited privilege to hunt waterfowl, if at all, only once Aboriginal users had satisfied their needs. And generally, this privilege, as well as the conditions of its exercise, would be determined by Aboriginal communities themselves or by co-management authorities allowing for equal Aboriginal representation.[385] Throughout the early 1990s, most Aboriginal organisations either

opposed the possibility of a non-Aboriginal subsistence harvest or insisted that non-Aboriginal access to the spring harvest be controlled by Aboriginal or co-management wildlife management boards.[386]

Conservation is generally seen as the only objective that could over-ride Aboriginal hunting rights. However, while they supported conservation measures in theory, many Aboriginal communities thought that it should be left to them to decide when they were necessary and how they should be enforced. For example, the Innu nation told the government during the consultation process that:

> "The Innu Nation does want to ensure that migratory birds will always come to Nitassinan, and *it* is willing to implement additional conservation measures *if it is convinced that these are indeed needed*."[387] (emphasis added)

In this context, the considered opinion of wildlife state authorities was rarely seen as sufficient for imposing quotas and regulations on Aboriginal users. Associations most often insisted on self-regulation by Aboriginal communities or, as an alternative, agreed to co-management structures which would be used for joint decision-making with government agencies, relying on shared data including traditional Aboriginal knowledge.

In sum, despite frequently insisting on the difference between the essential needs imperative of their subsistence harvest and the luxurious aspect of the sport hunt, Aboriginal hunters and spokespersons clearly presented their demand for a subsistence amendment to the Migratory Birds Convention as a rights claim, emphasising the fundamental nature of their historic treaty and Aboriginal rights to

maintain their traditional activities on their ancestral lands. They also decried the historical injustice perpetuated by the Migratory Birds Convention by violating and negating these rights. Amending the Migratory Birds Convention is, for Aboriginal peoples, primarily a matter of justice. And as a fundamental group right (and since the 1990s a clearly constitutional one), the exercise of the right to subsistence hunting should be exempted from being restricted by the state and accompanied by a significant measure of Aboriginal control.

But in presenting their claims in this way, Aboriginal peoples met resistance from environmentalists and sport hunters who, even when they recognised the legal and historical foundation of Aboriginal claims, disagreed on the actual extent of Aboriginal rights.

Environmentalists and subsistence rights to waterfowl harvesting

The environmental movement harboured many doubts about the extent and nature of indigenous peoples' rights to the subsistence harvest of waterfowl throughout the year. As a whole, environmentalists were not opposed in principle to the recognition of the special needs of those living a subsistence lifestyle in the northern part of the continent and many even agreed that Aboriginal peoples had special rights to the resource. However, they were not willing to concede an unregulated access to subsistence users in the spring, whether they were Aboriginal or non-indigenous hunters. Moreover, some environmentalists rejected the idea of a legalized Aboriginal spring harvest altogether. Their particular opposition will be discussed in the next sub-section.

In essence, the central concern of all environmental groups lay in the consequences of opening up the management regime to a larger group of hunters for the sustainability of bird populations, especially those already under duress due to the loss of natural habitat. They generally couched their claims in terms of the defence of the "public" or "national" interest and stressed that wildlife resources are a public good managed by governments on behalf of all citizens. As such, the over-riding objective of the management regime should be to assure its long-term sustainability for the public good and its maximum sustained yield to accommodate as many users as possible. Such an objective could easily necessitate the curtailment of all uses in times of over-harvesting and certainly justified and required the continued monitoring and regulation of all waterfowl populations and harvests, including any Aboriginal harvest. For environmentalists, an effective waterfowl management regime implied above all that all uses would be adequately regulated by the state.

In this context, most environmental groups looked upon the legalization of a spring Aboriginal harvest with some wariness and apprehension. Already concerned with the decline of some goose and duck species, environmentalists feared that a legalized spring harvest would generate greater pressure on populations during the reproduction period when the resource is particularly vulnerable. Many ecologists endorsed the governments' argument that the regulation of spring subsistence hunting as a legitimate activity could prove more effective for managing waterfowl populations than a poorly enforced ban on spring hunting.[388] But they feared that the Canadian and American governments would do a poor job of monitoring and enforcing regulations against a politically sensitive constituency. Policies of lenient

enforcement against Aboriginal hunters adopted over the years by the Canadian government were cause for suspicion. And the debates raging in Alaska over the 1970s and 1980s as the State was struggling with its domestic subsistence laws also fuelled the concerns of environmentalists.

At the time, many Alaskan environmentalists and resource managers had been protesting state and federal subsistence laws entrenching a priority access for rural subsistence users in the management of the State's wildlife resources. The adoption of these laws, many conservationists claimed, would make the sound management of wildlife resources "virtually impossible".[389] By legally requiring the assessment of the impact of all new regulations on subsistence users, American subsistence laws were considered to enmesh environmental regulations into inextricable layers of bureaucracy as well as making them vulnerable to lawsuits by unsatisfied interests. For many wildlife scientists and environmental groups, subsistence laws were polluting environmental concerns with political and cultural considerations. As one prominent conservationist put it, "the subsistence laws in Alaska have nothing to do with scientific fish and game management: they are a political allocation scheme, an intrusion of politics into fish and game management, a thorny complication."[390] In this perspective, when politics are allowed to overtake science in wildlife management, the inevitable result is resource depletion and mismanagement.

These concerns led many environmentalists to stress that an amendment legalizing the Aboriginal spring harvest should be accompanied by an increase in the enforcement efforts of wildlife agencies and a reduction in the annual quotas of other

hunters.[391] In any case, no harvest should be left unmonitored and unregulated. "The Aboriginal use of wildlife must also be subject to regulatory measures designed to conserve wildlife, notwithstanding the extent to which these resources are required for subsistence."[392] For many environmentalists, if the curtailment of subsistence hunting was required for conservation reasons, then subsistence users should be compensated by governments for their lost of food and income. But at all times, public management of the resource for the common good should prevail over all categories of users.

Claims by Aboriginal peoples that they had a long track record of responsible stewardship did not seem to be sufficient to win over environmentalists to the idea of limited or self-regulation. In fact, the belief that modern conditions had profoundly altered the meaning and legitimacy of subsistence rights served to weaken the claims of Aboriginal communities in the mind of many environmentalists. For some environmentalists, it raised doubts about the real subsistence needs of Aboriginal communities as well as cast a shadow over their responsible management of the resource. In a brief filed with the Canadian Wildlife Service by the Canadian Nature Federation and the International Council for Bird Preservation, these environmental organisations affirm that:

> "In most cases, residents no longer face the winters of near starvation that led to the urgent need for fresh meat in the past. At the same time, the carrying capacity of the species' environments has decreased over the last century while Aboriginal hunting now involves all the modern technology used by non-indigenous hunters. Consequently, a great deal of abuse exists. Eye witnesses report that in some cases the current illegal hunt is nothing short of a wholesale massacre."[393]

In sum, notwithstanding claims about traditional Aboriginal management, there should not be any illusions about the contemporary environmental performance and ethics of Aboriginal hunters.[394]

Similarly, claims of traditional Aboriginal knowledge were not seen as justifying the absence of stringent regulations on Aboriginal spring harvesting or the complete delegation of such regulatory responsibilities to Aboriginal hunters themselves. Environmentalists were not necessarily opposed to the use of traditional Aboriginal knowledge as a complement to scientific data and methods for management decisions; the Manitoba Wildlife Federation even applauded the initiative of some Aboriginal bands to instil traditional management philosophies in modern management regimes.[395] But environmental organisations nevertheless clearly saw professional resource management as the essence of the waterfowl management regime. Aboriginal community management systems were clearly not considered adequate substitutes and Aboriginal representatives' emphasis on their traditional ethics and knowledge did not deter environmentalists from advocating a strong regulatory regime.

Environmentalists and Equal Access

In addition to a predominant concern for appropriate regulations to assure sustainability, a second dimension of the subsistence rights issue permeated the discourse of several environmental organisations: the appropriate basis for granting access to a controlled spring harvest. While several environmentalists did not express any opposition to a priority Aboriginal harvest as long as it was adequately monitored

and controlled, many of them opposed the recognition of Aboriginal subsistence rights on the basis of a different conception of justice. While Aboriginal peoples stressed their Aboriginal and treaty rights and condemned their violation by the majority society, these environmentalists, joining most sport hunting organisations, argued that justice required the recognition of an equal right of access to all citizens. In their view, the legalization of Aboriginal spring hunting constituted an injustice by granting them a privileged access to resources on the basis of ethnicity.

This point is illustrated by the statements of several wildlife federations. In a 1992 brief on the Migratory Birds Convention amendments proposals, the Canadian Wildlife Federation put it this way:

> "The Federation believes, however, that access to waterfowl populations in the spring should apply to all northern residents. We are very concerned with the government's preoccupation with granting special or preferential rights to persons based on Aboriginal status or linguistic differences, instead of promoting increased equal individual rights for all Canadians."[396]

In its correspondence to the Canadian Wildlife Service, the Newfoundland-Labrador Wildlife Federation illustrated a similar understanding of the issue:

> "Within an amending process, a wide variety of interest groups must be given equal consideration, and none allowed to benefit to the forced exclusion of another. Conceding 'special or priority privileges', based upon genetic or racial characteristics, is a form of apartheid and is a recipe for failure to all concerned, including the waterfowl. A person's genetic background should have no influence on whether he/she can, or cannot, hunt and kill waterfowl. Within reason, lifestyle, geography and residency are legitimate subjects for consideration, but using racial features only promotes racism, discrimination, alienation and loss of cooperation. As a result, such concepts are not appropriate in the development of an international conservation document, since the loss

> of cooperative endeavor will eventually mean the loss of concern and respect for the integrity of waterfowl populations."[397]

In the same period, the Northwest Territories Wildlife Federation stated that it did not support the 1979 Protocol legalizing the spring harvest for Aboriginal hunters because

> "it [did] not address the whole problem of unequal access to waterfowl for all northerners. It [did] not provide the opportunity for non-Aboriginal northern residents to hunt in the spring. This approach appears to be based on race rather than fairness and equal opportunity for all resource users."[398]

Other environmental organisations took similar positions throughout the debate.[399]

In the 1990s, a similar position was taken regarding co-management bodies to be set up to regulate harvesting activities at a local level. These environmental groups supported co-operative management in principle but opposed any scheme that would only allow for the participation of Aboriginal communities and government representatives in decision-making. According to them, all stakeholders should have equal access to decision-making forums.[400] In the U.S., these views were even more prevalent. Early experiences in co-management, such as the Yukon-Kuskokwim Delta Goose Management Plan institutions, included all the important stakeholders. Moving to a form of co-management that would exclude non-indigenous stakeholders was clearly not among the considered options.

Some environmental groups, such as the Canadian Nature Federation, took less sanguine positions on the matter of equality of access and they did not appear to necessarily oppose the recognition of special rights for Aboriginal peoples. In fact, as long as there is no preferential treatment accorded on the basis of ethnicity, all

environmentalists agreed to a priority right of access for subsistence users. This was not the case for sport hunters associations.

Sport Hunters: Subsistence, Privilege and Equality

It should be no surprise that sport hunters' associations also feared that the legalization of a spring subsistence harvest by Aboriginal peoples would result in excessive harvesting of waterfowl populations. Facing declining populations of some key species of ducks and geese in the 1970s and 1980s, sport hunters in both countries feared that the legalization would invite more people to harvest fragile species. Canadian and American sport hunters were apprehensive that these new hunting rights would be extended to a growing number of Aboriginal persons through the on-going negotiation of modern treaties. Rapid population growth in indigenous communities and the uncertain status of an undetermined number of Métis people also suggested that the number of harvesters could eventually increase dramatically.

Moreover, in the late 1970s, the concerning status of some key geese populations of the pacific flyway led the California Waterfowl Association, a prominent sport hunting organisation, to travel to Alaska to lobby Aboriginal hunters to stop taking eggs and hunting these species of geese. Under the circumstances, sport hunters on the west coast hardly felt that the regulatory regime should be weakened to make easier the northern harvest of geese during the sensitive spring season. The legalization of a subsistence exception to the closed season was largely seen as potentially detrimental to assuring the maximum sustainable yield of waterfowl populations. In the worst of cases, it would undermine the sustainability of species; in

the best of cases, it could still mean curtailing the annual quotas of recreational hunters to make room for a greater subsistence harvest. And this could hardly be considered good news. But to consider sport hunters' opposition only from this angle would limit us to only part of the story. To understand the nature of their opposition, we must also examine the ethical foundations of their categorical rejection of Aboriginal subsistence rights.

In the Migratory Birds Convention amendment debates, the Ontario Federation of Anglers and Hunters (OFAH) was one of the most vocal sport hunting association involved on the Canadian side. The association has also been one of the strongest opponents of an Aboriginal amendment to the Migratory Birds Convention and it has systematically opposed the entrenchment of "special rights" for Aboriginal hunters in international and domestic legislation.

On the issue of legalizing the Aboriginal subsistence harvest in the spring, OFAH rejected all amendment scenarios that would grant a spring access to Aboriginal communities without extending the same rights to non-indigenous hunters. The association has been among the most insistent in advocating for an "equal treatment before conservation laws" and condemning any legal regime that would differentiate among hunters "on the basis of race". Moreover, OFAH has categorically rejected the recognition of an Aboriginal treaty right to spring hunting. It has even denied the existence of a long-standing tradition of spring harvesting by many northern Aboriginal peoples, arguing that limited technology made this practice unlikely until modern times.[401]

In a 1993 article on the subject, Gord Gallant, land use specialist for the OFAH, wrote that: "The arguments advanced by provincial (and therefore other than Inuit) Aboriginal groups that the amendment [legalizing the spring Aboriginal harvest] should acknowledge a treaty right to spring hunting are categorically rejected by this federation".[402] Moreover, he questioned the special position of Aboriginal communities in relation to hunting rights:

> "Aboriginal peoples in the provinces are opposed, however, to non-Aboriginal spring hunting on the basis that spring hunting is an exclusive Aboriginal right and on the basis that non-Aboriginal access to spring birds would pose significant conservation problems. This federation believes that conservation knows no race, and Aboriginal access to spring waterfowl when fall access exists also poses significant conservation problems. It should be remembered that prior to the *Migratory Birds Convention Act* and other wildlife harvesting restrictions, all residents of Ontario had the "right" to harvest at will. It was, however, in the interests of conservation and to ensure the availability of wildlife resources in perpetuity that this "right" was voluntarily restricted."[403]

Gallant's position is problematic at several levels. First, it clearly ignores that, since a Supreme Court of Canada's decision of 1990, it had already been clearly established that Aboriginal and treaty rights could be curtailed for the purpose of assuring the conservation of environmental resources.[404] It also fails to recognise the special nature of Aboriginal and treaty rights as rights pre-existing the establishment of the Commonwealth or attributed through contractual means by the Crown itself and that carry special constitutional status. But the OFAH's position does illustrate clearly sport hunters' refusal to see Aboriginal peoples afforded any special status in relation to wildlife resources as a result of their unique historical circumstances.

The rejection of any special consideration for Aboriginal subsistence hunters was also prevalent in Alaska where the issue of priority subsistence rights has been hotly debated with respect to domestic legislation as well as in the context of amending the Migratory Birds Convention. For example, at the time of the adoption of a state legislation on subsistence hunting in 1978 as well as of the federal subsistence provisions of the ANILCA, opponents of these measures regularly accused politicians and state officials of promoting "a racist law", of establishing "two classes of Alaskans" or of setting "whites against Natives".[405]

In particular, the idea of a privileged right to subsistence hunting for a sub-group of the population (be they indigenous peoples or even all northern rural residents) seems to clash with American political culture, emphasising a liberal conception of individual equality rooted in universality. As the histories of American and Canadian Aboriginal policies both demonstrate, the concept of Aboriginal rights per se has often been criticised on the basis of equality arguments and objectives of assimilation have often prevailed in policy or public opinion over the recognition of a special status.[406] But, in Alaska, the issue seems to have acquired more prominence in relation to guarantees of access to natural resources.[407] When it acquired statehood in 1958, equality of access to public resources by all citizens had been among the most debated issues in constitutional discussions and the principle that "wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use" was entrenched in the state constitution.[408] This principle has been clearly interpreted to mean equal access.

In this context, granting an exclusive or even a priority access to waterfowl to subsistence users seems to many people as a breach of equity and violation of citizens' rights. While public opinion polls done in the early 1990s suggested that a majority of Alaskans agreed with special measures for rural subsistence users, opponents, including sport hunters, have particularly vocal in their opposition.[409] As an example, in summarising public comments on the introduction of subsistence priority provisions in the early 1980s, the Delta Junction Advisory Committee of Alaska wrote: "People just plain expect equal treatment under the law".[410]

Speaking about the subsistence issue in 1991, Rupert Andrews, the representative of the National Rifle Association for Alaska, explained the sport hunters' opposition to priority subsistence rights in these terms:

> "The story in Alaska is that everybody else has always won - big oil, big money, big environmental groups - and the sportsmen have taken it in the pants. [..] Frankly, they're fed up with being treated like second-class citizens. We're not against subsistence. We're against a system that allows it for some people and not others."[411]

The intensity of opposition was such that a group of non-rural citizens (mostly from Fairbanks and Anchorage) formed an association named Alaskans for Equal Fishing and Hunting Rights in the late 1970s to promote a constitutional initiative that would essentially have prohibited any discrimination in the allocation of fish and wildlife on the basis of race, sex, economic status, land ownership, local residency, past or current dependence on the resource, or lack of alternatives.[412]

In sum, both American and Canadian sport hunters' associations objected to the legalization of an Aboriginal subsistence spring harvest in the northern part of the

continent. In their argumentation, liberal notions of individual equality occupied a central position. While the environmental consequences of legalizing the spring subsistence waterfowl harvest were feared (both for the potential decline of bird populations *per se* and for the resulting reduction in waterfowl quotas attributed to recreational hunters), equity considerations were at least as important as ecological considerations in the sport hunters' opinion. In fact, in the event that a subsistence exception be inserted in the Convention and domestic implementing legislation, most recreational hunting organisations argued that a controlled spring harvest should be opened to all subsistence users regardless of ethnicity.

Subsistence harvesting and the Aboriginal environmental ethic

Both to support their claim against the necessity of stringent regulation of Aboriginal subsistence harvesting and to weaken their opponents' resistance to the recognition of their rights, Aboriginal peoples did not solely rely on rights arguments but also stressed their record as responsible stewards of the land. In practice, this argument emerges as a necessary counter-argument to warnings by non-indigenous interests that an unrestrained access to waterfowl resources by Aboriginal peoples would inevitably lead to abuse of the resource. In opposing this view, most Aboriginal peoples argued that Aboriginal hunting practices are guided by a distinctive environmental ethic which assures sustainable wildlife management practices (and consequently justifies the absence of state regulations or at least their delegation to Aboriginal communities).

This line of argument derives from a broader and contentious debate about the environmental ethic of First Nations within the field of environmental policy. Writing about the indigenous viewpoint on conservation, Georges Erasmus, a Dene and former national chief of the Assembly of First Nations, explains the fundamental cultural difference between Aboriginal and non-Aboriginal people in this way: the former regards wilderness as an integral component of "Mother Earth" with which they must live in harmony, while the latter sees it as a recreational, and perhaps luxurious aspect of their lives. According to him, Aboriginal peoples have much to offer to conservation: "a profound and detailed knowledge of species and ecosystems, ways of sharing and managing resources that have stood the test of time, and ethics that reconcile subsistence and co-existence [of humans and wilderness]".[413]

According to this view, Aboriginal culture, as a transgenerational transmitter of experiential and spiritual knowledge about the environment, adequate wildlife management practices and hunting skills as well as responsible environmental attitudes, should be seen as a guarantor of responsible environmental stewardship. During debates on the amendment of the Migratory Birds Convention, this viewpoint was frequently expressed by Aboriginal peoples. For example, in a consultation workshop held in Goose Bay in the early 1990s, the representatives of the Innu nation spoke of the Aboriginal environmental ethic adopting this line of argument:

> "It should be clear that the Innu practise conservation. It is not necessary for Innu people to have conservation offices: our culture makes conservation an inherent part of our life on the land. It is simply not acceptable for an Innu person to harvest more food then [sic] can be consumed at the camp. Any person who did this would be disrespectful to the animal spirits, and would not have good hunting success in the

> future. In addition, they would be subject to censure by the community."[414]

The Little Red River Cree Nation of Alberta made a similar affirmation about Aboriginal practices: ".. we contend that our specific hunting practices are ecologically sound and do not pose a threat to conservation."[415] The Pas Indian Reserve representatives, also speaking on behalf of the Assembly of Manitoba Chiefs at a meeting in Winnipeg, also defended Aboriginal hunting practices and warned about regulating Aboriginal subsistence hunting that "legislation should not try to eliminate our culture".[416] The representatives of the Grand Council Treaty No.3 (Anishinabes of the Ojibway Nations of Northwest Ontario and Northeast Manitoba), while admitting the need for more stringent conservation measures, insisted that better conservation measures called for the integration of traditional practices based on "spiritual consciousness" and modern resource management techniques.[417]

Some of these statements illustrate the ambiguity of the Aboriginal environmental ethic from the perspective of modern ecology. There is no doubt that Aboriginal spiritual and traditional beliefs about nature are less anthropocentric than modern science and prevalent Western attitudes about the natural world. There is also ample evidence to show that many Aboriginal hunting practices are infused with ethical standards of conduct that are conducive to ecologically prudent practices (e.g. waste of wildlife is often forbidden, rotation of hunting sites or the establishment of informal seasons can prevent excessive harvesting of some populations) and that, at least in some documented cases, these norms have led to effective self-regulation, including for waterfowl use.[418] However, it is also evident that these rules and

practices are at least partly derived from a spiritual understanding of the natural world that has little to do with the scientific principles of wildlife ecology.[419] And the extent to which all Aboriginal hunters are bound to these principles is not clear.

The spiritual foundation of traditional Aboriginal environmental management

In examining indigenous American beliefs toward the environment, Booth and Jacobs identify the following precepts as common to most Aboriginal cultures: 1) the Earth is a conscious, living being who is the source of the spirit of all its inhabitants and She must be treated accordingly with respect and loving care; 2) indigenous peoples consider the natural environment as an integral part of themselves (and vice-versa). Their personal histories and their sense of self are inseparable from the specific physical places that they inhabit. They rely on an ontology that does not clearly distinguish between themselves as beings and the land that they inhabit.; 3) the idea of kinship with other living beings (and sometimes inert objects or natural phenomena) is central. Deriving their spirits from a common Mother Earth, animals are seen as non-human persons, engaging in relationships with humans, deserving respect as relatives and sometimes even bearing rights.; 4) the world exists as an intricate balance of its components and human beings must strive to live within this balance, including in their relationship with animals. Reciprocity and mutual respect are fundamental elements for maintaining such balance.[420]

These spiritual precepts explain why we tend to associate Aboriginal peoples with responsible and prudent environmental practices. As long as one considers the natural environment as a living sacred being, constitutive of one's self, depletion and

abuse become synonymous of profanation, sacrilege, disrespect for relatives, and even self-mutilation. These precepts shed some light on the spiritual underpinnings of Aboriginal hunting ethics. Traditional Aboriginal hunting practices will respond to the necessity of maintaining an appropriate relationship with the hunted animals as non-human persons.

Most anthropologists writing on the subject have linked directly spiritual beliefs and hunting behaviour. In studying the Koyukon people of Alaska, Nelson finds that "all actions towards nature are mediated by considerations of its consciousness and sensitivity. The interchange between humans and environment is based on an elaborate code of respect and morality, without which survival would be jeopardized."[421] According to him, the Koyukon people sense that they live in a world inhabited by animals who are aware, personified, feeling beings who can be offended. As a result, they must be treated with proper respect, partly for fear of retaliation. While animals are not offended to be killed for use, there must be no waste and the killing must be humane. For the same reasons, the Koyukon culture has developed a number of taboos regarding the handling of the carcasses and the meat of the harvested animals.[422]

Harvey Feit has extensively documented the hunting culture of the James Bay Cree people in Canada and he finds a similar set of moral precepts derived from spiritual beliefs about animals. For example, in examining the beliefs of the Waswanipi Cree in the early 1970s, he notes that animals are thought of as being "like persons" with independent wills and who can understand human beings. In the

Cree worldview, animals willingly offer themselves to the hunters, sacrificing their bodies for the hunter's nourishment while their souls return to their own space to be reborn when they desire. In return for the offering, the hunter has the responsibility to treat the animal with respect, avoiding inflicting undue suffering in killing, taking appropriate care of the carcass, and avoiding waste and unnecessary harvesting. In the event of inappropriate behaviour, the animal spirit could decide not to return and even to warn other members of its species to avoid the disrespectful hunter. As a result, unethical practices are thought to result in a decline in the numbers of animals offering themselves to human beings.[423]

Reviewing evidence on a broader range of subarctic eastern Aboriginal communities, Martin finds similar norms prevailing in their cultures. The relationship between the hunter and hunted is crucial and marked with respect, including norms banning the waste of animal parts or refraining hunters from taking all members of flocks or herds. In many cases, the animals are not killed unless their consent is secured in the spiritual world (through divination or revelation).[424] The infringement of these norms would result both in social disapproval and in retaliation by the animal spirits.

In a more extensive review of American Aboriginal ecology, Hughes find similar moral hunting codes in existence across a wide range of Aboriginal cultures. According to him, Aboriginal peoples traditionally consider "hunting to be a spiritual encounter between two conscious beings who stood in reciprocal relationship to one another, a relationship that operated through ritual".[425] A good hunter is celebrated in

many cultures as one who kills only when the food is needed, leaves gifts for the animals in the forest, and treats them with kindness and patience. In return, animals help him in the hunt. Among a diversity of rituals designed for appeasing and attracting animal spirits or for the purification of the hunter after the hunt, Hughes also commonly finds behavioural precepts associated with sustainable hunting practices. Among those, he mentions the interdiction of waste of animal parts, limitations on the number of animals taken at one time, or the interdiction of harvesting some species in particular seasons.[426]

These studies demonstrate that the Aboriginal hunting ethics is rooted in a particular cosmology (where animals play an important role) and a different epistemology (where the material world is alive and knowledge is often revealed through spiritual processes and transmitted through ancestral narratives) that is considerably at odds with the Western scientific view of the world. Hunters engage in personal relationships with animal specimen and communities. The status of this relationship and the conscious will and feelings of animals have a direct causal bearing on fluctuations in the availability of animals.

The point here is not to paint Aboriginal communities as deaden cultures trapped in a pre-modern era, negating the evolving nature of Aboriginal cultures. The objective is rather to show the inherent complexity of the Aboriginal environmental ethics, a complexity that defies the simplistic depictions of Aboriginal peoples as either "natural ecologists" or as "unsophisticated wanton over-exploiters". There is no doubt that Aboriginal hunters can exercise great skills and possess a vast and

intimate knowledge of animal behaviour and its ecological determinants by relying on traditional Aboriginal knowledge[427]; but the structure of their traditional environmental ethics and at least part of their knowledge is derived from an epistemology and a cosmology that are inherently foreign to modern ecology and Western society. As such, claims about responsible stewardship based on Aboriginal culture can be difficult to accept for those adhering to a western scientific understanding of resource management.

Traditional Aboriginal knowledge and Aboriginal waterfowl management

It must also be noted that the spiritual dimension of the indigenous environmental ethics cannot be confined to a vestige of the pre- and early-Contact era. It is clear that the "modernization" of Aboriginal cultures has led them to absorb some modern concepts of ecological management. For example, Jostad, McAvoy and McDonald have found in their study of the environmental ethics of Aboriginal communities in Wisconsin and Montana that Aboriginal land managers expressed the same environmental beliefs as tribal elders but expressed them using the more modern terminology of resource management.[428] Some Aboriginal persons have acquired scientific training and are incorporating scientific precepts to their traditional knowledge. Many bands have used their administrative and political autonomy to develop environmental management plans similar to those produced by non-indigenous communities. But, for most people, their beliefs are still rooted in spirituality or derive from a complex mix of scientific and spiritual knowledge.

Some authors, most notably Harvey Feit, emphasise the similarity between modern concepts of ecology and Aboriginal understanding of human-nature relationships. In his view,

> "the striking feature of [the Cree ethno-ecology] is that while the mode of explanation, the causality that animates the Waswanipi ethno-ecosystem model, is very different from a scientific account, the structural relationships described are for the most part isomorphic with those of a scientific account of the relationships of hunter to animal population. Despite the difference in world views, the Waswanipi are recognizably concerned about what we would call ecological relationships, and their views incorporate recognizable ecological principles."[429]

In other words, despite radically different views on the causal relations explaining changes in wildlife populations, there are striking analogies between Aboriginal views of an appropriate human-nature relationship and some of the precepts derived from the modern science of population ecology. Moreover, it has become common over the past years to table on these analogies and the extensive experiential knowledge of indigenous communities to advocate the integration of traditional knowledge into modern management and policy processes.[430]

But the striking analogies hardly make scientific resource management and Aboriginal environmental ethics substitutable systems of knowledge and management. As Preston, Berkes and George point out, "we have learned that discerning Aboriginal conservation practices is more subtle than trying to discover current principles of environmental management in an Aboriginal guise".[431]

In the context of this research, this affirmation rings particularly true with respect to the beliefs of northern Aboriginal peoples regarding waterfowl

management. The spiritual foundation of the Aboriginal environmental ethics, and its corresponding limitations from a scientific viewpoint, is illustrated by statements such as this one made by the Indian Association of Alberta on the conservation implications of an Aboriginal subsistence right:

> "[The birds] go where they must go to feed the people of this world. That's what we believe. You people must also not be frightened that our leadership would jeopardise the existence of these Birds. The First Nations People know that these Birds come to our lands at the right times at the right places as determined by the Creator, not by man."[432]

In sum, the birds seemingly respond primarily to rules about their role in the Aboriginal religious world view; anthropogenic factors appear secondary.

Similar beliefs are vividly illustrated by a recent study of traditional Aboriginal knowledge in rural coastal Alaska. Collecting the Aboriginal traditional knowledge of six Yup'ik communities in north-western Alaska about geese ecology, Fienup-Riordan found that the Yup'ik view of geese as non-human persons could lead to strikingly different beliefs about their management than the ones espoused by non-indigenous resource managers.[433] In her interviews with community members, she found that they generally referred to geese as sentient, conscious beings with decision-making capacities who respond to personal relationships with the hunters. In correspondence with the Aboriginal traditional beliefs reported above, the interviewed Yup'ik hunters believed that, if the geese did not like the way that they were treated, they would not return.

According to Fienup-Riordan's study, these Yup'ik beliefs often translated to recognised principles of "wise use", such as the interdiction of waste or the abstention

from taking all the eggs of a nest or all the specimens of a flock. But it also resulted in beliefs and precepts that are quite at odds with modern scientific management. In particular, the research interviews showed that a central tenet of goose hunting for Yup'ik people is that the more birds people harvest, the more will return the following season. According to the author, "the decline of the geese does not reflect overharvesting by Yup'ik hunters. Instead, it is limited harvests that insult the geese, causing them to go elsewhere".[434]

This central tenet was held by many interviewees, and not solely by elders, and was often clearly seen to be at odds with the way wildlife managers tried to manage the geese populations. One interviewee put it this way: " While they are available, we should gather without limits. [..] If we follow the rules of the past, the land's source of food, the fish, the geese, and birds won't be gone forever [..] If we use the white people's rules, the food source won't increase".[435] Another one, decrying wildlife managers' insistence on studying wildlife, thought that, "when the geese had no one to keep an eye on them, there were so many".[436] Another interviewee was of the opinion that "because [Yup'ik hunters] don't kill a lot of geese like they did in the past, the numbers have declined. Because white men are keeping a close eye on them [..], they are making the goose population decrease".[437]

These beliefs are perfectly consistent with the type of Aboriginal cosmology described previously. But this analysis of the fundamental cause of decline in geese populations along the west coast is also in direct contradiction to the findings of American wildlife managers who attribute the trend at least in part to over-harvesting

by hunters along the Pacific flyway. It is equally at odds with the analysis of local Yup'ik resource managers that have been trained in the professional norms and techniques of resource management. Fienup-Riordan has found some of them to be caught between respect for the traditional ways of their communities and their fear that the traditional precepts would spell disaster for waterfowl resources.[438]

Hence, in the rift between science and spirituality seemingly lies an important source of disagreement in contemporary debates about Aboriginal wildlife resource rights and management: Aboriginal peoples insist that their time-honoured practices and beliefs embody principles of ecology that have served nature better than scientific resource management; but non-indigenous stakeholders find it hard to accept that resource management be allowed to rest on anything but the scientific underpinnings of professional resource management, especially on a spirituality and cosmology that they do not share.

Environmentalists: Subsistence and Modern Ecology

In the subsistence rights debate, this clash in world views becomes evident when we examine the opinions of environmentalists concerned with the sustainability of waterfowl populations. Historically, the North American environmental movement has harboured very positive attitudes towards Aboriginal peoples (at least in the abstract). Environmental philosophers and activists have generally regarded Aboriginal culture and religion to be models to be emulated by Western culture with regards to their attitude towards nature and animals. Their more explicitly holistic and eco-centric world view was thought to embody a much better disposition toward the

natural world than the one embodied in the Western anthropocentric ethics of progress and utilitarianism and of the domination of nature inspired by Christian morality. Rooted in equal respect for other living organisms (and even inert objects or climatic phenomena), Aboriginal world views were clearly perceived by environmentalists as inspiring an *ecosophia* - a philosophy of nature - that could inspire the modern environmental movement.

In fact, environmentalists showed such approval for Aboriginal environmental consciousness that Roderick Nash, in his seminal *The Rights of Nature: A History of Environmental Ethics*, asserts that non-Aboriginal peoples' "rediscovery of Indigenous American religious and ethical beliefs became a characteristic of modern environmentalism".[439] In the late 1960s and early 1970s, Aboriginal writers, such as the Sioux author Vine Deloria, Jr., were widely read for their views on environmental ethics. Recollections of speeches by prominent Aboriginal chiefs, such as Seattle and Standing Bear, were favourably quoted and used in environmental advocacy material. In speeches and writings, Aboriginal peoples were often described as "the first ecologists".[440] In sum, most environmentalists clearly believed that Aboriginal peoples were the depositories of some ancestral environmental wisdom and that their environmental attitudes and practices were good examples of effective stewardship of natural resources.

However, this favourable disposition by environmentalists toward Aboriginal peoples has suffered some damage over the last decades. Growing scepticism regarding Aboriginal peoples' respectful and benevolent attitude toward nature has

even given way to hostility in some occasions. In examining American debates on the issue, Schwartz even notes what he considers to be "a noticeable undercurrent of anti-Indian sentiment" within the environmental movement.[441] This change of heart by part of the environmental movement can be attributed to a number of factors.

Firstly, there has been some debate in the 1970s and 1980s about the accuracy of depicting Aboriginal cultures and religions in such favourable environmental terms. Anthropological and ecological studies of Aboriginal peoples' impact on nature in the pre- and early contact periods have shown that they had had a significant impact on nature and wildlife resources. According to White, such impact, while seemingly remaining within the realm of ecosystem sustainability, had already sufficiently altered the natural environment to preclude talking about wilderness (understood as nature unaffected by human use) for huge areas of North America at the time of contact.[442]

Moreover, there is now substantial evidence that, in the post-contact period, Aboriginal hunters actively contributed to the over-exploitation of some wildlife species. While there is significant debate about whether the development of the market economy and the fur trade were in fact the key determinants, it seems certain that, for whatever reasons, many Aboriginal communities participated actively in such unsustainable endeavours, such as the decimation of beavers and north-western whales populations. In addition, some authors examining Aboriginal hunting practices in the 1960s and 1970s simply found no evidence of significant conservation practices and they contributed to the emergence of a more critical

attitude toward Aboriginal environmental ethics.[443] In retrospect, as White points out, most ecologists appeared at first to be more interested in what Aboriginal peoples thought or in using Aboriginal world views to criticize industrial abuses of nature rather than in examining their actual environmental practices.[444] As a result, environmentalists' views on Aboriginal peoples' environmental practices were founded on a great deal of ignorance and simplistic assertions.

In any case, with time, anthropological studies increasingly demonstrated how Aboriginal environmental practices are deeply and primarily rooted in a particular spiritual beliefs system. In this context, to cast Aboriginal peoples as conservationists may have at best distorted the historical reality and meaning of more complex cultural practices by imposing on them Western values and concepts without much significance in Aboriginal cultures. At worst, such erroneous characterization may have led us to misunderstand the role that Aboriginal peoples played in the exploitation of environmental resources.[445] In any case, once the nature of Aboriginal environmental ethics is more accurately uncovered, it becomes more difficult for ecologists to see Aboriginal peoples as models to emulate in resource management. Their world view may inspire modern ecologists at a spiritual and philosophical level; but it becomes harder to accept their approach to resource management when its foundations rest on a spirituality and an epistemology that one does not share.[446]

Secondly, a number of environmental conflicts have raised doubts about Aboriginal communities' contemporary desire to place environmental protection and sustainability above development concerns. The average Aboriginal community in

North America suffers high rates of unemployment and poverty. Under severe pressures for economic and social development, Aboriginal communities often find themselves in a hard position to turn down development projects that may have negative environmental impacts and, in several cases, environmentalists have found themselves on the opposite side of these communities, fighting projects that are seen primarily by Aboriginal peoples as important sources of employment and royalties.[447]

Similar encounters resulted when Aboriginal peoples were found to engage in time-honoured wildlife harvesting activities with great economic and cultural importance touching species that environmental groups wanted protected for ecological, aesthetic or political reasons. Environmental campaigns against seal hunting in the Canadian Arctic or against the resumption of subsistence whaling in northern Canada and along the American west coast certainly revealed such profound instances of cultural misunderstanding and clash of opinions. In the seal controversy, southern environmental groups repeatedly accused Aboriginal communities of dismissing relevant ecological information or of putting profit ahead of the environment (albeit under the veil of protecting subsistence and cultural needs).[448] The United States has also seen controversial cases where Aboriginal hunters have been caught killing endangered species for religious needs, sparking rancorous public debates with environmentalists.[449]

Thirdly, several ecologists, like many sport hunters, harbour strong doubts about the meaning and legitimacy of subsistence practices in a modern context. In particular, "the notion that Indians exercising their unique hunting rights ought to do

so only with 'traditional' weapons seems to be gaining credibility among environmentalists".[450] In the U.S., sport hunters and environmentalists have argued publicly in some cases that Aboriginal harvesting rights should be strictly limited to hunting and fishing technologies that were available to them in the nineteenth century (at the time when the treaties were signed).[451] In the case of Aboriginal waterfowl harvesting, several Canadian and American environmentalists thought that the use of modern technologies, such as semi-automatic shotguns and snowmobiles, proved that these were not "traditional" subsistence practices.

These positions are defended in a number of ways. Many environmentalists tend to assume that the purpose of Aboriginal subsistence rights is to allow Aboriginal communities to preserve in a pristine fashion their ancestral ways-of-life. When modern technologies are used, Aboriginal peoples are no longer preserving such ancestral ways and their claim for special rights loses legitimacy in the eyes of these environmentalists. They should then be incorporated into the general regulatory regime for wildlife management. In other cases, it is argued that, while the limited technologies of ancestral practices worked to restrict the potential impact of Aboriginal harvesting on common resources, the use of new technologies threatened the sustainability of resources. Even if the use of modern technologies could be seen as part of the traditional practices, their instrumental effectiveness would necessitate the incorporation of Aboriginal users in the regulatory framework. In other words, traditional Aboriginal management may have worked in a low-technology era but it can no longer apply in a modern environment.

Finally, another related and common argument concentrates on the acculturation of contemporary Aboriginal communities. While traditional Aboriginal management regimes may have worked in previous centuries, the fact remains that contemporary Aboriginal communities are losing their traditional cultures. Many Aboriginal peoples are being assimilated; the traditional social structures are dissolving. Younger generations no longer participate as much in the traditional ways and the oral transmission of traditional knowledge, on which the Aboriginal environmental ethics depend, is not taking place. Aboriginal cultures, and their potential value as a model of environmental management, are being inevitably eroded by modernization. As Douglas Buege put it, "in the face of several hundred years of colonialism, how could we expect people to preserve in pristine fashion their traditional ways of life, especially when Euro-Americans have practically pounded their economics, and morals into [sic] these peoples?".[452] In other words, the Aboriginal environmental ethics may have been prevalent at one time among indigenous hunters but current circumstances preclude relying on it to assure the proper contemporary management of wildlife resources.

In recent years, environmental studies research has been sensitive to these issues of technological and cultural change in Aboriginal communities. In correspondence with some of the environmentalists' concerns, several biologists and anthropologists studying indigenous environmental practices have found that the ethical context of hunting is indeed changing in many communities. Examining hunting practices in the Moose River region, George, Berkes and Preston noted transformations in the cultural tradition of Aboriginal hunting, marked by greater use

of technology. The authors point out that changing traditions have altered the ethical context of hunting and lead to the harvesting of larger quantities of waterfowl.[453] This finding is consistent with similar studies that have found a sharp increase in Aboriginal waterfowl harvests in the post-war period.[454] In another recent study done in northern Ontario, Tsuji and Nieboer have also found that traditional management practices were falling into disuse and that the traditional precepts of Aboriginal wildlife management were not being transmitted to recent generations. According to the authors, coupled with the use of more effective gun, meat preservation and transportation technologies, these cultural changes put into question Aboriginal environmental ethics and knowledge as the foundations of an effective conservation regime.[455]

In sum, environmentalists' contemporary attitudes toward Aboriginal peoples should be described as "sympathetic scepticism" at best and, in some cases, there is clearly hostility and antagonism. After an original period of overwhelming sympathy, environmentalists now seem less unconditional in their support of Aboriginal environmental management. A more accurate understanding of the foundations of Aboriginal environmental ethics and the experience of several confrontations over Aboriginal harvesting and development issues over the last decades in North America have seemingly led environmentalists to reconsider their judgement about Aboriginal peoples' environmental performance.

There is also a fair bit of prejudicial romanticism involved in the tendency to deny the existence and value of traditional Aboriginal practices when these do not

conform to our pre-conceived image of the indigenous subsistence hunter. Nevertheless, the use of modern technologies and the historical loss of the traditional ways of life in many communities are seen as having weakened whatever reliable community wildlife management system there may have existed historically. As a result, while harbouring some sympathy for their historical plight and generally condemning past injustices, environmentalists are nevertheless increasingly unwilling to accept to recognise unfettered Aboriginal rights to natural resources on the basis of the historical and legal claims to such access. On the issue of subsistence rights, many environmentalists are doubtful that Aboriginal ethics would offer any guarantees to the sustainable management of natural resources. Hence, as we have seen in the previous section, there was generally a clear insistence on government regulation of the indigenous subsistence harvest and a definite resistance to the delegation of management authority.

Sport hunters, subsistence and the Aboriginal environmental ethic

In both countries, sport hunter's groups also questioned the existence of an Aboriginal environmental ethic that could serve as a safeguard against abuse. In Canada, the Ontario Federation of Anglers and Hunters (OFAH) simply claimed that there is no convincing evidence of the existence of such Aboriginal conservation practices. It denied that "indigenous management systems" served as self-regulation mechanisms in Aboriginal communities, arguing that such claims have been falsified by historical evidence. For example, in submissions to the Canadian Wildlife Service, OFAH repeatedly alleged that Inuit hunters have locally extirpated goose populations in areas such as Southampton Island. It also argued that some unsustainable and

irresponsible practices, such as corralling moulting adults and flightless juveniles for slaughter, were also part of Aboriginal hunting traditions.[456] Under these circumstances, sport hunters argued, any spring subsistence harvest should be stringently regulated to prevent abuse.

Moreover, several sports hunters associations denied the existence of true subsistence needs by indigenous peoples. The Waterfowl Habitat Owners Alliance, a sports hunting association from California, argued in the early 1980s that governments could postpone the resolution of the subsistence issue because, "after all, the spring hunt in Alaska is largely for a preference food and for recreation. Its basic purpose is not bottom line subsistence."[457] Northern rural residents, it is generally argued, have a sufficient access to a mix of employment and income-support programs, complemented by wildlife resources during the fall and winter, to assure their sustenance. In this context, many sport hunters argue, genuine need for waterfowl meat in the spring to assure adequate nutrition (that is real "bottom line" subsistence) is now a marginal occurrence.

These difficulties in accepting Aboriginal claims for subsistence needs in the context of a modern society also reveal an important rift in the understanding of the nature of "subsistence" rights between Aboriginal and non-Aboriginal stakeholders. As we have seen, Aboriginal peoples view their traditional hunting practices as identity-affirming practices, inextricable from their spiritual life and their social identity. As a result, subsistence rights are not solely about economic and physical preservation; they are also about the cultural survival of societies under the stress of

modernization. In contrast, many sport hunters view these claims for a cultural definition of subsistence with some suspicion and they tend to favour a more limited conception of subsistence needs, associated with the concept of sustenance.

According to sport hunters, subsistence rights ought to be mostly about having enough food to assure one's survival.[458] They are consequently considered as we have seen in the previous section, individual rights associated with purely individual needs. The cultural aspect of Aboriginal claims is minimised. And, while historically the "true" nature of subsistence would have naturally limited the potential size of this harvest (because there are physical limits to what hungry people can eat), the interpretation that contemporary Aboriginal peoples are giving to subsistence could potentially result in an ever expanding harvest going far beyond actual food requirements. The sheer potential size of the harvest given the use of modern equipment and the number of Aboriginal hunters argued in itself for submitting subsistence hunters to an adequate set of regulations.

Moreover, while sport hunters accepted that indigenous peoples could use for traditional handicraft the non-edible body parts of waterfowl otherwise killed for food, many of them rejected the idea that birds could be taken for the primary purpose of engaging in cultural practices. In any case, sport hunters rejected the option of allowing the commercial sale of waterfowl to allow Aboriginal peoples to acquire the means of subsistence through a limited participation in the cash economy. Instead, they strongly argued for a clear prohibition on the commercial use of the birds and advocated that stringent regulations be in place to prevent shipping birds

outside the immediate locality of the hunter. Finally, since many of them deny the existence of an Aboriginal environmental ethics, sport hunters also argued against any delegation of management authority to Aboriginal communities. In all cases, they argued, the federal or provincial states should remain the sole competent authorities to manage the waterfowl resource.

Conclusion

This overview of the conflicting discourses of Aboriginal, sport hunting and environmental interests in the debate on the legalization of the subsistence spring harvest reveals that the issue rests clearly at the crossroad of environmental and Aboriginal politics. Behind disagreements about approaches to environmental management and the equitable distribution of natural resources lies a more fundamental difficulty in recognising the essential difference of Aboriginal peoples from the majority society and about inscribing this difference in public law and administration regarding wildlife policy.

In this sense, the subsistence rights controversy fits comfortably within the history of Aboriginal policy and politics in North America. It embeds a confrontation between liberal conceptions of individual equality and Aboriginal demands for the recognition of a difference that ought to bear special rights. Such a confrontation characterises much of the recent history of Aboriginal peoples' struggles to reclaim their autonomy within societies that have attempted to eradicate their difference through assimilation policies. In Canada, it may have been particularly well illustrated by the short history of the 1969 *White Paper*, which attempted to repudiate

Aboriginal peoples' historical demands on the basis of the pre-eminence of individual rights. In a similar manner, many environmentalists and all sport hunters' associations opposed subsistence rights on the basis of individual equality arguments.

In the same vein, the nature of Aboriginal claims for direct control over waterfowl resources and subsistence harvesting met the same type of opposition from non-indigenous society as broader demands for self-government have received over the past decades. Even sympathetic attitudes toward Aboriginal demands for more autonomy and control over their own lives tend to turn into resistance when non-indigenous people realise that more Aboriginal self-determination may imply upholding Aboriginal values that are conflicting with important liberal values or world views. In the case of waterfowl management, we have seen that Aboriginal claims about the need to provide them with greater control over resource management or at least to base management partly on their own culture have been received with scepticism and opposition by non-indigenous stakeholders. Aboriginal environmental ethics were considered inadequate substitutes to state regulation and claims of Aboriginal distinctiveness were often simply rejected. In probing the underlying reasons for this response, I suggested that it partly lay in a distrust of indigenous environmental ethics and Aboriginal management regimes, which would rely primarily on traditional Aboriginal notions of human-environment relations foreign to modern scientific management principles.

This chapter brought to light another dimension of the politics of the indigenous subsistence rights controversy. It showed that, in addition to common concerns about

the sustainability of waterfowl populations per se, several environmental groups and recreational hunting associations also shared some values and worldviews that led them to jointly oppose a subsistence harvest amendment to the Migratory Birds Convention. The transnational coalition of environmentalists and recreational hunters that played a key role in the politics of amending the Migratory Birds Convention should not be solely conceived as a coalition of interests, concerned about the distribution and availability of resources. It also reflected some deep-seated differences in values and in conceptions of rights and justice.

The last three chapters have explained the nature of the subsistence controversy and the basis for the conflicts between some of the groups involved in its politics. The last two chapters of the dissertation now turn to the actual events that marked to the two consecutive attempts at entrenching subsistence rights in the Migratory Birds Convention between 1975 and 1997.

Part III

The Politics of Amending the Migratory Birds Convention

Chapter 6

THE FAILURE OF THE 1979 PROTOCOL

This chapter provides the first account of the failed attempt by Canadian and U.S. governments to amend the Migratory Birds Convention in order to recognise the right of Aboriginal peoples to hunt waterfowl for subsistence in the spring. In the late 1970s, after over 50 years of recrimination, the national governments of both countries suddenly attempted, but failed, to rectify the situation by amending the international convention to meet Aboriginal demands. In this chapter, we investigate both the reasons underlying the sudden opening towards Aboriginal peoples and the reasons that led to the failure of the 1979 Protocol Amending the Migratory Birds Convention.

The chapter's objective is to demonstrate how the ratification of the 1979 Protocol_has been blocked in the United States by opposition from a coalition of environmental groups, recreational hunters and sub-national state wildlife agencies. All feared that the Protocol's implementation, particularly in Canada, would lead to sharply increased and uncontrolled kills by indigenous peoples and endanger the sustainability of bird populations. In other words, it is argued that non-state and sub-national state actors have played a determinant role in stopping this change in

continental regime and that purely state-centric models of regime change could not have properly accounted for the facts of the case.

Furthermore, I also argue that the institutional context of treaty-making and ratification in the United States and Canada played a key role in structuring the politics that led to the demise of the 1979 Protocol. The chapter demonstrates how the constitutional requirement for Senate approval of international treaties in the U.S. provided an institutional veto point to Canadian and American non-governmental and sub-national state organisations, allowing them to force the negotiation of a parallel agreement and then essentially kill the Protocol by preventing its approval by the Senate. And the transnational coalition succeeded in blocking regime change despite the clear preferences for the adoption of the amendment by both national governments.

After exploring the domestic and international factors that led to the American and Canadian governments' agreement to negotiate a formal subsistence exemption to the Migratory Birds Convention, the chapter explores the preferences of policy actors and provides an historical analysis of the political dynamics that led to the demise of the 1979 Protocol. It concludes with a discussion of the case study's implications for our theoretical framework outlined in the first chapters of the dissertation.

The impetus for change

After fifty years of unanswered protests by northern residents, it is worth asking what led the American and Canadian governments to finally seek a formal subsistence amendment to the Migratory Birds Convention in the mid-1970s. What ultimately made the subsistence issue a priority item for continental environmental diplomacy? The answer lies in a multiplicity of interdependent factors, including the rise of the modern indigenous political movements in both countries and state desires to access and exploit northern natural resources.

Developments in the United States

In the United States, two important developments in the late 1970s provided a new impetus for a modification of the subsistence hunting provisions of the continental regime for the conservation of migratory birds. The first one was domestic and tied to the settlement of indigenous claims in Alaska. The second one was international in nature and concerned the interplay among international treaties dealing with the conservation of migratory birds in the United States.

The first set of domestic pressures to liberalise the rules regarding a spring subsistence hunt of migratory birds in Alaska emerged as a result of the adoption of the Alaska Indigenous Claims Settlement Act (ANCSA) in 1971. The legislation implemented a negotiated agreement with the indigenous communities of Alaska regarding the use of the State's land and natural resources. Alaskan Aboriginal signatories to the agreement retained a territory representing roughly 12% of the State's land (about 44 million acres) as well as other benefits. The transfer of land

titles was partly aimed at securing a sufficiently large area for ensuring the pursuit of indigenous subsistence hunting practices. Section (d)(2)(A) of the ANCSA also authorized the Secretary of the Interior to set aside up to 80 million acres of federal land in the State for the creation of national parks and wildlife refuges, on which controlled subsistence hunting could be permitted. Nine years later, this clause led to the adoption of the 1980 Alaska National Interest Lands Conservation Act (ANILCA) by the Carter Administration, which was partly adopted in fulfilment of the commitments made through the Alaska Indigenous Claims Settlement Act.[459]

In the years following the adoption of ANCSA, a few initiatives were pursued to meet indigenous grievances regarding subsistence hunting. In 1978, shortly pre-empting the federal government, the State of Alaska adopted legislation requiring the State's two Boards of Game and Fisheries to adopt regulations permitting subsistence hunting. The State's legislation targeted people who traditionally depended on subsistence hunting to survive and established that, whenever the harvest of fish and wildlife had to be curtailed for conservation purposes, subsistence users would be granted priority over other users. The State provisions met with much opposition but some people thought that State action might at least forestall further federal intervention in the management of Alaskan natural resources.[460] It did not.

In 1979, in the context of the debates that preceded the development and adoption of the broader ANILCA, the House of Representatives adopted a policy declaration "assuring the opportunity for Alaskan Natives and others to choose a subsistence lifestyle".[461] Considered particularly important for the rural inhabitants of

the State, many of whom were still dependent on migratory birds for food during the spring and summer when other sources of food are scarcer, the policy was often cited by wildlife authorities as an unequivocal statement of policy objectives regarding the subsistence issue by elected representatives.[462] About a year later, the ANILCA itself withdrew 100 million acres of federal "national interest land" for the creation of new national parks, granting the right to hunt for subsistence in these areas solely to those inhabitants who traditionally hunted on these lands. It also contained a broader section, Title VIII, officially entrenching the 1979 policy in federal law and specifically legislating a priority, preferential access to wildlife resources for "non-wasteful subsistence uses" by rural inhabitants of the State.[463]

The ANILCA declared that, consistent with sound scientific management principles and the conservation of fish and wildlife resources, the use of public lands in Alaska should cause "the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands" and that the non-wasteful subsistence uses of fish, wildlife and other renewable resources be "the priority consumptive use" and "be given preference on the public lands over other consumptive uses".[464] For purposes of federal regulations, the definition of "subsistence uses" emphasised customary and traditional uses instead of nutritional need and it included use for food, shelter, clothing, tools, and transportation. It also allowed for barter, sharing and customary trade of the fish and wildlife taken for subsistence.

While they were clearly targeted to meet the grievances of Aboriginal users, the eligibility criteria of the new subsistence provisions were not based on ethnicity. Access to the subsistence provisions was linked to a customary and direct dependence upon the resource as a mainstay of livelihood, the availability of alternatives, and the rural character of one's residence. Given the difficulty of establishing a management system on the first two criteria, local residency became the essential criteria, rural areas being generally interpreted as those outside the road connected area of communities of 7 000 or more residents.[465] As such, the new legislation was estimated to exclude about 85% of Alaskans who live in urban centres.[466]

The new subsistence provisions at the state and federal levels were revealed to be strongly divisive issues, pitting rural and non-rural, Aboriginal and non-Aboriginal, conservationists and subsistence users against each others in complex ways. Throughout the 1970s, subsistence hunting had progressively acquired political salience, it reached new heights at the end of the decade with the enactment of these laws. But, as mentioned in the previous chapter, subsistence hunting in Alaska had been an important point of contention in the State for a long time and resolution of the issue appeared to be an important element for the establishment of good relationships with the Alaskan indigenous communities. In this context, state actors at both levels of government remained strongly committed to the liberalisation of the subsistence regime in the State. However, for these commitments and their legislative embodiments to be workable in practice, the spring ban on the migratory birds harvest at the heart of the Migratory Birds Convention had to be eliminated for subsistence users.

The second important development leading to a reversal of American attitude about renegotiating the Migratory Birds Convention was the conclusion of the 1976 Convention between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and their Environment. The U.S.-Soviet treaty contained provisions regarding subsistence hunting by the people of Alaska that were much more liberal than the ones contained in the Canada-U.S. Migratory Birds Convention. In particular, the U.S. had negotiated a more general wording allowing "indigenous inhabitants" of Alaska to take birds for their "nutritional and other essential needs".[467]

At the time of adopting implementing legislation, Congress made it clear that it intended the U.S.-Soviet treaty should guide the administration's conduct with regard to subsistence hunting in Alaska.[468] However, courts in Alaska subsequently ruled that, since all international treaties on migratory birds are implemented in the U.S. through the same legislation, American game laws were constrained by the terms of the most restrictive treaty. This ruling meant that Alaskans were prohibited from benefiting from the more permissive provisions of the U.S.-Soviet treaty until the U.S.-Canada Migratory Birds Convention could be amended to include similar provisions.

As a result of both these legal developments, political pressures for an amendment to the Migratory Birds Convention began to emerge from rural Alaska and from Congressional members eager to the federal government live up to its earlier engagements. Moreover, the Department of the Interior itself found it

increasingly difficult to implement the more stringent regulations required by the U.S.-Canada agreement.

In effect, the new circumstances resulted in a reversal of the position of the U.S. federal government, which had opposed amending the Migratory Birds Convention in the late 1960s for fear of placing excessive pressures on the resource during the reproductive period. In the late 1970s, the U.S. began to actively seek a meeting with the Canadian government to amend the Migratory Birds Convention in order to clarify subsistence hunting provisions.[469] In his letter to the Department of State requesting the formal authority to undertake negotiations with Canada, the Assistant Secretary for Fish, Wildlife and Parks at the Department of Interior clearly stated the political difficulties faced by his department in enforcing current regulations in Alaska (describing the department's position as "untenable"), and the harmonisation of its subsistence provisions with the U.S.-Soviet treaty as a solution to these difficulties, as the primary reasons for amending the Migratory Birds Convention.[470]

Developments in Canada

In Canada, the mid-1970s also saw the emergence of additional sources of domestic pressure for amending the Migratory Birds Convention. After long and arduous negotiations, the signing of the James Bay and Northern Quebec Agreement (JBNQA) on November 11th, 1975, marked the beginnings of modern land claims settlements with Aboriginal peoples. The unlawfulness of the Aboriginal spring harvest, and the associated litigation of Aboriginal hunters, being long-standing irritants in Aboriginal-non-Aboriginal relations, Cree negotiators insisted that the

JBNQA addressed this issue. As a result, the agreement committed the federal government to "endeavour to obtain a modification or amendment to the Migratory Birds Convention" and "to eliminate to the extent possible any conflict with the right of the Indigenous people to harvest at all times of the year all species of wild fauna", subject to exceptional restrictions required for conservation purposes.[471] As such, the JBNQA created a new legal requirement for the federal government to seek a formal amendment to the Migratory Birds Convention that would legalize the Aboriginal spring harvest. A legal requirement that would eventually be reinforced by the constitutional protection afforded to land claims agreements by the inclusion of section 35 in the Constitution in 1982.

Moreover, while Canadian enforcement officers had traditionally exercised "tolerance" toward spring subsistence hunting by Aboriginal hunters (which allowed peaceful coexistence in northern communities), a court ruling essentially terminated the federal leniency policy in 1977. Pointing out the obvious, the Federal Court reminded the federal government that it could not officially advocate the infringement of its own international commitments and obligations. By forcing a change in policy, the court only strengthened the case for an amendment of the international convention. While the formal illegality of subsistence hunting in the spring and summer could at least be tolerated when it was not enforced, unless an alternative was found, the end of the leniency policy would soon accentuate conflicts between the governments and Aboriginal communities.

In sum, by 1978, a series of political developments and legal changes on both sides of the border had opened a window of opportunity which led state actors, at the bureaucratic and executive levels, to seek an amendment to the Migratory Birds Convention in order to accommodate indigenous subsistence hunters in the northern part of the continent. The negotiation of the Protocol of amendment was quick. However, as we will see later in this chapter, the Protocol signed by both countries was never ratified because of the opposition of a coalition of environmentalists, recreational hunters and sub-national state interests that lobbied against it.

The nature of the 1979 Protocol

Officials of the Canadian Wildlife Service and of the United States Fish and Wildlife Service first met in July 1978 in order to discuss the possibilities of amending the Migratory Birds Convention to liberalise the provisions for subsistence hunting in the northern part of the continent.[472] From the outset, both governments seemed to have sought an accelerated resolution of the issue. At the July meeting, each party agreed to expedite the legal examination of an amendment scenario and to report on its implications by mid-August. In Canada, the Minister of the Environment issued instructions that the Convention be amended as soon as possible.[473] Within a period of six months, on January 30th, the 1979 Protocol amending the Migratory Birds Convention was signed in Ottawa by the Canadian Environment Minister, Len Marchand, and the U.S. Secretary of the Interior, Cecil Andrus. After about sixty years of protests and complaints by Aboriginal peoples and northern residents, a mere

six months had been sufficient to reach agreement for amending the 1916 Convention to the benefit of subsistence users.

The 1979 Protocol amending the Migratory Birds Convention is disconcerting in its simplicity and its brevity. The entire text requires only two pages and contains two articles. The first article of the Protocol would amend the provisions of the 1916 Migratory Birds Convention establishing the closed season (article II) in order to address the needs of Aboriginal communities for a subsistence harvest during the spring and summer. The proposed amendment read as follows:

> "... the High Contracting Powers may ... authorize by statute, regulation, or decree the taking of migratory birds and the collection of their eggs by the indigenous inhabitants of the State of Alaska and the Indians and Inuit of Canada for their own nutritional and other essential needs (as determined by the competent authority of each High Contracting Power), during any period of the year in accordance with seasons established by the competent authority of each High Contracting Power respectively, so as to provide for the preservation and maintenance of stocks of migratory birds".[474]

Article II simply stated that the amendment protocol was subject to ratification and that it would only enter into force on the date of exchange of instruments of ratification.

In a nutshell, had it been ratified, the 1979 Migratory Birds Convention amendment would have provided a limited exemption for subsistence hunting in the spring. While the exemption would have been provided for all rural inhabitants living a subsistence lifestyle in Alaska, it would have been exclusively available to Aboriginal hunters in northern Canada, excluding Métis, non-status Indians, and non-Aboriginal hunters. In both cases, federal wildlife authorities would have been solely

responsible for setting the criteria of eligibility, and the conditions of the harvest, through administrative powers. Although the wording of the Protocol would have made it possible for the Canadian Wildlife Service to allow subsistence hunting throughout the country, federal officials had clearly expressed their intention to limit the subsistence exemption to some key northern areas.[475]

Subsistence hunting and interest group politics in the late 1970s

While, in the 1970s and early 1980s, the Canadian government and the Canadian Wildlife Service were seeking an amendment to liberalise the subsistence hunting provisions on behalf of Aboriginal peoples, they were not committed to an unfettered access to spring hunting by indigenous hunters. Firstly, both politicians and bureaucrats wanted to limit access to indigenous communities living in the north. Aboriginal hunters living in the southern areas of the country were to remain excluded from the spring harvest. Secondly, even northern Aboriginal communities would have to meet specific criteria. They would have to demonstrate that they were still dependent on a subsistence lifestyle for their essential needs. For the time being at least, Métis and non-status Indians would be excluded.

The American government held similar preferences. It was seeking to obtain an amendment that would provide a spring access to migratory birds to those rural inhabitants of Alaska still dependent on a subsistence harvest for their nutritional needs but wanted otherwise to keep a tight control over the taking of migratory waterfowl. In this perspective, the subsistence harvest would be kept under strict control through an administrative determination of what would constitute "nutritional

and other essential needs" justifying access to the spring harvest. According to the U.S. government, the amendment should also be "racially neutral", attributing privileges on the basis of needs rather than "racial heritage", an element deemed essential to deal with Aboriginal-non-Aboriginal tensions in Alaska.[476]

Environmental organisations were generally against a subsistence amendment but the degree of opposition varied from a complete rejection of all forms of amendment to moderate support for a better defined, restricted subsistence harvest. American recreational hunting associations, which were more politically active than their Canadian counterparts throughout this period, essentially shared environmentalists' concerns, fearing that a more liberal subsistence harvest would negatively impact waterfowl populations on the continent. Underlying these concerns was the basic concern that subsistence hunting in these northern areas would adversely affect recreational hunting in the U.S. Some organisations simply denied the existence of a real subsistence hunt, claiming that Aboriginal spring hunting was merely a matter of preference food and recreation.[477]

Some non-governmental organisations, such as the BC Wildlife Federation, were in favour of providing a controlled access to spring hunting to Aboriginal communities clearly depending on a subsistence harvest for their livelihood.[478] However, many of these organisations condemned the wording of the Protocol for being excessively vague, not specifying methods and areas of harvest, and not defining adequately who would have access to the subsistence harvest. Among prominent American organisations espousing these views were The Wildlife

Legislative Fund of America, the California Waterfowl Association and the Waterfowl Habitat Owners Alliance (California).[479]

Other organisations, such as the Canadian Wildlife Federation and its U.S. counterpart, the National Wildlife Federation, were more reluctant to allow any form of subsistence spring harvest, fearing that even limited measures might open a Pandora's box and place excessive pressures on waterfowl resources. American environmental organisations were especially concerned about the Protocol's effect on the size of the Canadian harvest and its consequences for the sustainability of bird populations.[480] In all cases, wildlife federations and recreational hunting associations were strongly against any spring harvest for commercial purposes by Aboriginal communities and feared that the wording "and other essential needs" would lead to widespread commercial use in both countries.

With the obvious exception of Alaska, U.S. state governments were generally opposed to the 1979 Protocol. American states feared that a larger Canadian take of waterfowl resources would result in a diminished stock for hunting in the U.S. and endanger the sustainability of populations on the continent. In Canada, provincial governments expressed a dual concern. First, some provincial wildlife agencies were preoccupied by the resulting impact on resource sustainability if the amendments led to a significant growth in mortality for migratory birds. But, secondly, several provincial agencies were also concerned about the equity implications of allowing Aboriginal hunters to hunt for subsistence during the spring while denying greater access to other subsistence users and to recreational hunters in general.

As it should be expected, Aboriginal organisations favoured the 1979 Protocol. As we have seen in previous chapters, most Aboriginal communities simply consider that any application to them of the Migratory Birds Convention Act constitutes an infringement on their Aboriginal and treaty rights. In this perspective, the recognition of an unfettered right to hunt throughout the year is perceived as a simple correction of an historical injustice committed in 1916 when their rights were unilaterally abrogated by the Migratory Birds Convention. In this context, the more modest 1979 amendments would have provided at least partial remedy by legalizing the spring harvest but without an explicit recognition of Aboriginal and treaty rights.

While most Aboriginal peoples were supportive of the general objective of the 1979 Protocol, we should note that they were almost entirely absent from the amendment process.[481] As we will see shortly, they were not consulted before the amendment negotiations and they were barely visible in the political battle that resulted from the 1979 Protocol's signature. While the National Indian Brotherhood adopted a formal resolution at its 1979 General Assembly to support the amendment, it did not engage in significant lobbying activities to ensure its ratification. Otherwise consumed in constitutional negotiations with the federal government, Aboriginal organisations by and large focused on the recognition, entrenchment and definition of Aboriginal, inherent and treaty rights within the Canadian constitutional order. In this context, the Migratory Birds Convention was a lesser priority.

The shaping and demise of the 1979 Protocol

As indicated above, the negotiation process leading to the 1979 Protocol entailed very little consultation with stakeholders. In fact, while securing the required cabinet approval for its negotiating position and drawing from the advice of an assistant deputy minister at the Justice Department in Canada, the process was almost exclusively the purview of high level bureaucrats in the respective federal wildlife agencies. Even the ministers played a marginal role. Provincial and state agencies, conservation organisations, recreational hunters' associations and even Aboriginal organisations were not consulted in the formulation of the governments' respective positions or the drafting of the Protocol.

While Marchand and the Canadian Wildlife Service had decided to by-pass stakeholder consultations prior to the signing of the protocol, upon announcing the agreement, the minister stated his intention to consult with provinces and Aboriginal communities for the purpose of setting subsistence hunting regulations under the amended Migratory Birds Convention Act.[482] Despite these reassuring words, most provinces immediately expressed concerns that the federal government had negotiated and signed an amendment protocol without their input.[483] Notwithstanding provincial opposition, the federal executive pushed ahead immediately. On January 25, 1979, the Canadian cabinet approved the Protocol and provided authority to the Minister of the Environment for its ratification through an exchange of instruments.[484] Five days later, the Protocol was signed in Ottawa by representatives of both national government. While the formal process was essentially complete in

Canada, the exchange of instruments sealing the international ratification of the agreement would need to await the Protocol's approval by the U.S. Senate.

Canadian Executive Prerogatives and American Legislative Realities

By mid-1979, the Liberals had been defeated by Joe Clark and the Conservatives and Len Marchand had been replaced by John Fraser as Minister of the Environment. The change of the party in power did not result in any significant changes in the preferences or approach for the Canadian federal executive. Fraser, a prominent Member of Parliament from British Columbia, also articulated a cautious approach to liberalising the spring subsistence harvest. In a meeting with his deputy minister and the director general of the Canadian Wildlife Service on July 11, Fraser "made clear that his approach to the question [of amending the Migratory Birds Convention was] based on the advice he [had] received from Mr. Otway, of the BC Wildlife Federation, with whom he [met] frequently".[485] The subsistence harvest would extend only to those Aboriginal communities living in the north and demonstrating a clear dependency on a traditional subsistence lifestyle.

Fraser's interval at the head of the Department of the Environment would nevertheless signal the beginning of a limited opening toward provincial and non-governmental stakeholders. By mid-1979, both the Canadian Wildlife Federation and its American counterpart, the National Wildlife Federation, were also publicly expressing strong concerns over the wording of the Protocol. Both organisations had launched a joint campaign to oppose the Protocol in the U.S., mainly by lobbying against Senate approval.[486]

The Canadian Wildlife Federation was a major influence in fostering opposition to the Protocol in both countries and building a coalition of opponents. In partnership with the National Wildlife Federation, it actively participated in the lobbying campaign against the Protocol in both countries. This active lobbying by the CWF vice-president in the United States led a high level Canadian official to write:

> "He has been a major influence in mobilizing the U.S. non-government [sic] opposition to the protocol. [...] he may have been making most mileage with two lines, that the protocol will lead to a greatly expanded native kill in Canada which the Canadian government will not have the guts to control, and that a million Métis will be newly legalized to hunt in the summer. His inflation of the Red Menace [sic] may be to keep the militant B.C. and Alberta federations in his national fold and him in a job, or for some other reason. [...] he intends to bring down the present protocol and, where necessary, distort the facts to suit his purpose. I suggest we treat him strictly as an opponent on this topic from now on."[487]

As explained in the preceding chapters, the reasons for opposing the new subsistence provisions were in fact multiple and complex. Environmentalists and sub-national wildlife agencies feared that a spring harvest would threaten the sustainability of waterfowl populations. Moreover, there was great scepticism about the environmental ethics of Aboriginal hunters and their capacity for self-restraint. The lack of detail about how the subsistence harvest would be regulated added to the general unease. Finally, the creation of a privileged access for Aboriginal hunters was also considered incompatible with the equality of all citizens and, consequently, conflicted with the classical liberal values espoused by many of the opponents.

In the hope of winning over the opponents, Fraser urged Canadian Wildlife Service officials to meet with wildlife federations in order "to try to convince them

that their interests were not pushed aside".[488] The attempt was a failure. The main national conservation organisations continued to oppose the subsistence changes to the Migratory Birds Convention and even intensified their lobbying campaign in the following years. On March 6, 1980, the Canadian Wildlife Federation, intensifying its efforts at home, sent a letter to all provincial ministers responsible for wildlife resources advising them that the organisation had taken a strong stance against the 1979 Protocol and that it favoured a re-negotiation of the Protocol on the basis of consultations with the provinces.[489]

In the nine months of his mandate, Fraser also led the Canadian Wildlife Service in a number of discussions with the provinces and the territories. In addition to a series of bilateral meetings at the regional directors' level, the protocol was also discussed at the Eastern and Western Wildlife Advisory Committee meetings in this same year.[490] But the federal-provincial meetings were incapable of winning over provinces. In fact, things got worse for the Canadian Wildlife Service as western provinces began to claim in the latter part of 1979 that the amendment protocol was incompatible with the Natural Resources Transfer Agreements and, as such, probably unconstitutional.[491] Yet, in April 1980, John Roberts, the new Minister of the Environment[492], indicated to his officials that he wanted to go ahead with the implementation of the Protocol notwithstanding the growing opposition by provincial governments and environmental non-governmental organisations.[493]

But his intentions would soon be contradicted by the success of lobbying efforts in the U.S. Soon after Roberts' decision to discard non-governmental and provincial

opposition and to go ahead with the implementation of the Protocol in Canada, the Department of the Interior notified the Canadian Wildlife Service that "there was no possibility of the protocol going to the U.S. Congress that spring due to the lobbying and opposition of the principal interest groups".[494] American and Canadian lobbying of the U.S. Senate had made it very unlikely that the Protocol would be approved by two-thirds of American senators, essentially stalling the international ratification of the agreement. The inability to push the 1979 Protocol in its original form through the U.S. Senate essentially forced the Canadian government to seek to accommodate some of its opponents.

Canadian Stalemate

In May 1980, the Protocol was further discussed at the annual meeting of Canadian Council of Resources and Environment Ministers, the main federal-provincial forum on environmental issues. At the meeting, Roberts was again under severe provincial pressures to modify the Protocol in accordance with provincial concerns. In the hope of overcoming provincial opposition, Roberts agreed to explore the possibility of re-negotiating some aspects of the Protocol with the U.S. However, upon consultations, a senior U.S. Fish and Wildlife Service official warned the Canadian Wildlife Service that amending the protocol to satisfy provinces, who wanted to extend privileges to non-Aboriginal hunters on their territories, might in fact make it harder to achieve ratification in the U.S. The political problem faced by the Senate was the environmental concern that the amendment resulted in a potential threat to sustainability by increasing the Aboriginal spring harvest in the north and the fact that declining populations meant a smaller harvest for U.S. recreational

hunters. After considering his options, in September 1980, Roberts decided again to push ahead with the implementation of the Protocol, notwithstanding the opposition of provinces, territories and non-governmental organisations. The federal government hoped that, faced with a binding international agreement and the federal government's authority to implement it unilaterally at home, the provinces would eventually cooperate.[495]

But the federal government's resolve seems to have simply further antagonized the provinces. In November 1980, the Assistant Deputy Minister of the Canadian Wildlife Service attended a meeting of the Western Wildlife Advisory Committee where he was subjected to considerable pressure by the provinces to recommend dropping the Protocol rather than to proceed with it in its existing form.[496] At the Wildlife Ministers' Conference in 1981, Manitoba's Minister declared that his government was ready to take the federal government to court to challenge the constitutionality of the proposed change to the Convention. Alberta and Saskatchewan similarly voiced their opposition, expressing reservations about the lack of consultations that had taken place leading up to the 1979 Protocol.[497]

In an attempt to break this impasse with the provinces, the Deputy Minister of Environment Canada wrote to his provincial and territorial counterparts in July 1981. The Deputy Minister attached a copy of draft regulations that would be adopted to implement the Protocol upon ratification by the U.S.[498] The department hoped that the regulations would serve as a focal point for provincial and territorial input and that this would be sufficient to get them to support the amended Convention. But,

unsatisfied with this limited approach, the provinces and the territories declined to engage in discussions over implementation unless they could be associated with the negotiation of the actual agreement. Stuck between wildlife federations advocating the status quo or a new agreement and the provinces seeking a broader exemption and declining to cooperate in implementing the existing amendment, the Canadian government was at a deadlock.

Trying to Address Stakeholders' Demands

Contemplating mounting political opposition abroad and at home as well as a potential defeat in the Senate, on January 24, 1981, Secretary Watt of the U.S. Department of the Interior asked the Senate Foreign Relations Committee to delay action on the Protocol until his Department had had an opportunity to deal with the growing objections to its ratification.[499] In the previous months, the lobbying campaign against the Protocol had intensified and it had become obvious that some form of compromise would be required to secure Senate approval. Two years after the signature of the original document, Canadian and American wildlife authorities were still unable to force the agreement through the U.S. Senate veto without overcoming opposition by non-governmental organisations and sub-national governments.

In the previous months, the most severe blow had come from the International Association of Fish and Wildlife Agencies (IAFWA), which, despite its name, is essentially an association of American state wildlife agencies formed to lobby the federal administration on the states' behalf in Washington. The American state

wildlife agencies were concerned about the impact of the new subsistence harvest provisions on the health of waterfowl populations on the continent. In order to firmly signify their opposition to the Protocol, the IAFWA adopted a resolution expressing "its opposition to ratification of the protocol by either the United States or Canada until it is clarified which peoples will qualify for subsistence taking of waterfowl and their eggs, what this utilization is estimated to be by species, and how regulations are to be enforced".[500] By withdrawing its support, the Association, which embodied the states' opposition for U.S. senators, added a powerful voice to the lobby against the Protocol.

Facing environmental, recreational hunting and state opposition all at once[501], the U.S. Department of the Interior began to seek ways to overcome the stalemate. At a bilateral meeting on November 23, 1981, the U.S. Fish and Wildlife Service presented the Canadian delegation with an issue paper outlining four options for the ratification of the Protocol, ranging from attempting to gain Senate approval with an unchanged Protocol to negotiating an additional document that would reassure key stakeholders.[502] Under the last option, both governments, on the basis of renewed consultations with stakeholders, would seek to develop an "implementation report" setting out the manner in which the new subsistence provisions would be implemented in both countries. Once an agreement had been reached with key stakeholders on the details of implementation, the implementation report would be annexed to the 1979 Protocol and considered to constitute an integral, legally-binding part of the Protocol. Canadian representatives were also told that, convinced that

opposition could not be overcome otherwise, American officials were strongly urging the Secretary of the Interior to choose the implementation report alternative.[503]

In order to explore potential solutions to the impasse and to ensure maximum stakeholder input, the International Association of Fish and Wildlife Agencies organized a meeting of all parties on February 10, 1982 in Washington. In addition to Canadian and U.S. federal wildlife agencies, IAFWA invited the Canadian Wildlife Federation and other non-governmental organisations as well as representatives from the U.S. State Department and of the Senate Foreign Relations Committee to the meeting.

At the meeting, The Wildlife Legislative Fund of America issued a position statement firmly urging the abandonment of the 1979 Protocol and asking for the negotiation of a new agreement.[504] Despite having received reassurances by the CWS that this would not be the case, the executive vice-president of the Canadian Wildlife Federation, Ken Brynaert, publicly raised the spectre of a million Métis getting access to the spring subsistence harvest, obviously irritating the representatives of the Canadian Wildlife Service who were present. Most of the other non-governmental organisations present, including the National Rifle Association, Ducks Unlimited, the National Wildlife Federation, the Waterfowl Habitat Owners Alliance, the Wildlife Management Institute, and the California Waterfowl Association, also expressed their disapproval and argued for the re-negotiation of the Protocol.[505]

In contrast, in one of its rare interventions, the Alaska Indigenous Federation explained that it would oppose any regulation seeking to hold the spring harvest at its

current "illegal" level and that it did not want eligibility restricted only to those inhabitants in need of food for subsistence.[506] This position statement probably tended to reinforce the view of environmental and hunting organisations that a consequence of the Protocol would be a potentially extended, uncontrollable Aboriginal spring harvest.

At the IAFWA meeting, non-governmental organisations were also presented for the first time with the option of writing an accompanying implementation report addressing their main concerns. The representative of the U.S. Senate Foreign Relations Committee present made it clear that the Senate might tie closely its approval of the Protocol to the content of such an implementation report. Immediately, several non-governmental participants expressed doubts over the legally-binding nature of such a procedure. In the following months, several of these organisations, including the Canadian Wildlife Federation and the Wildlife Legislative Fund of America, came out clearly against such an alternative to the outright abandonment of the 1979 Protocol.[507] In contrast, some U.S. states, most notably Alaska and California, expressed some support for this alternative.

On the basis of the results of the IAFWA's meeting, the Canadian Wildlife Service and the U.S. Fish and Wildlife Service held further discussions until June 1982. Finally, during the summer of 1982, the Canadian government reluctantly concluded that, if Senate approval was to be gained, it had to accept the U.S. proposal to negotiate an implementation report that would spell out the conditions of implementation of the new subsistence provisions. Writing to an American official to

explain Canada's position, Blair Seaborn, deputy minister of the Department of the Environment, explained that:

> "While ratification of the Protocol in Canada is not at issue, the delay since the Protocol was signed and the knowledge that ratification in the United States is not assured have encouraged opposition to the Protocol from various sources in Canada. [...] [We] have concluded that we should move to have the existing Protocol ratified along with an adequate negotiation report."[508]

In sum, it is not doubts about the fate of the Protocol in Canada but the success of the coalition lobbying against approval in the United States that forced the hand of the Canadian government. The availability of the U.S. Senate's veto point had been aptly used by the coalition to delay ratification and to gain time to build up more opposition to it. By alarming American states and convincing IAFWA that the Protocol was placing waterfowl populations in jeopardy, environmentalists and recreational hunters had created a sufficiently broad and influential coalition of opponents to convince American senators to stall the its approval.

The decision to negotiate an implementation agreement was taken although both governments were aware that several non-governmental organisations found this alternative unsatisfactory and still called for the negotiation of a new protocol of amendment. It was also understood that reaching a consensus among environmentalists, Aboriginal organisations, recreational hunters and provincial agencies would prove extremely difficult. Comforted by the support of some key state wildlife agencies, such as the one for California, state officials appeared to hope to win over some non-governmental organisations through the negotiation process and, any case, to gain enough state support to obtain the Senate's approval.

The 1979 Protocol: Death by Sudden Anachronism

The Canadian provinces and territories were immediately notified of the decision to adopt this new approach and a consultation meeting was scheduled for October 1 to deal with both procedural and substantive issues.[509] But before the meeting could be held, more fundamental developments in the realm of Canadian politics would come to derail the process and alter fundamentally the underlying conditions for the amendment of the Migratory Birds Convention. In the early years of the 1980s, Canadians were in the midst of patriating and fundamentally amending their constitution. In addition to the adoption of a new Charter of Rights and Freedoms and a series of other modifications, the Constitution Act, 1982, also provided constitutional protection to Aboriginal and treaty rights. This change would come to have great significance for the future of the Migratory Birds Convention and the political dynamics underlying its amendment.

The natural resource management implications of the 1982 constitutional reform were not self-evident. Section 35, which recognized and affirmed Aboriginal and treaty rights still existing in 1982, was formulated in broad terms and principles. Details remained to be worked out. For the purpose of defining the nature of these new entrenched rights, a series of constitutional conferences on Aboriginal issues had been scheduled, the first one to be held in March 1983.[510] The timing of the constitutional reform and the following conferences created problems for the discussions surrounding the amendment of the Migratory Birds Convention.

In August 1982, a few months before the start of federal-provincial meetings to discuss the implementation report of the 1979 Protocol, officials from the Department

of Indian and Northern Affairs expressed serious concerns that the development of an implementation report on the interpretation and application of the subsistence hunting amendment prior to the First Ministers' Constitution Conference on Aboriginal Rights in March 1983 would prejudice the conference discussions. The separate nature of the two processes could be interpreted as a sign that the federal government had already made up its mind on a crucial aspect of their rights and was ready to move ahead without negotiations. In this perspective, it would leave the government vulnerable to severe criticism by Aboriginal communities and organisations.[511] The Federal-Provincial Relations Office and several western provincial governments later joined Indian and Northern Affairs in advocating the suspension of all discussions on the Protocol until the end of the 1983 conference. To avoid upsetting constitutional discussions, the consultations on the implementation report were finally postponed until the end of the constitutional conference of March 1983.

Working to Overcome Obstacles: The Interim Period

In June of 1983, staff in the Department of Indian and Northern Affairs prepared an internal discussion paper outlining the options facing the Canadian cabinet and the Department.[512] In the discussion paper, DIAND officials reluctantly concluded that the negotiation of an implementation report appeared to remain the best alternative. However, the paper also stressed that the constitutional recognition of Aboriginal and treaty rights in 1982 had possibly turned the spring subsistence harvest issue into a constitutional one. Consequently, the agreement of provinces and Aboriginal organisations might be required on any resulting agreement with the U.S.

In reality, since the definition of Aboriginal hunting rights was now a constitutional matter, Aboriginal subsistence hunting could not be separated from the main constitutional process launched by the 1987 March First Ministers' Conference. In this perspective, DIAND took the position that Aboriginal peoples should be part of the team drafting the implementation report and that DIAND should actually become the lead agency on the issue of Aboriginal hunting rights. Up to this point, the DIAND had been only minimally involved, merely responding to Environment Canada's initiatives.

Maybe more importantly, DIAND also expressed strong concerns about the Canadian Wildlife Service's recommendation that the new subsistence provisions apply only to the territory north of 60° and to the James Bay and Northern Quebec Agreement area. Indian Affairs officials quickly noted that nothing in the original 1979 Protocol prevented Environment Canada from extending subsistence hunting privileges to all status Indians and Inuit peoples across Canada. Moreover, they emphasised that, in previous communications among the minister of Indian and Northern Affairs and Aboriginal representatives across the country, Aboriginal peoples had been led to believe that they would all be consulted in the implementation of the new subsistence provisions.[513] To renege on this promise by narrowing the applicability of the Protocol to northern areas would make the minister and the cabinet look bad and would prove to be a politically costly decision. On both political and constitutional considerations, the "north of 60°" scenario was clearly rejected by DIAND officials.[514]

Following the inconclusive result of the March 1983 First Ministers' Constitutional Conference, the Canadian Wildlife Service set out to consult the provinces and the territories on their views regarding the implementation of the future subsistence hunting provisions of the Migratory Birds Convention. After some consultations, a draft discussion paper, authored by high level American and Canadian wildlife officials, was distributed in August 1983 to all provincial and territorial wildlife directors, the Department of Indian and Northern Affairs, the Federal-Provincial Relations Office, the Department of External Affairs, and the U.S. Fish and Wildlife Service.[515]

An internal briefing note written in the mid-1980s is indicative of the Canadian Wildlife Service's understanding of the distributive and equity issue that had to be addressed by the amendment and is worth quoting at length:

> "The Department of Indian and Northern Affairs and southern Indian organizations have the view that all Indians and Inuit throughout Canada, even southern Indians living an urban lifestyle, should benefit under the Protocol as a matter of Aboriginal right. The Canadian Wildlife Service, the U.S. Fish and Wildlife Service, all provinces and territories and conservation and hunter organizations believe that the existing waterfowl hunting seasons can accommodate the needs of southern Indians because birds are then available. The Protocol is needed to allow legal access to northern people for subsistence use of birds which are generally only available in the spring and summer."[516]

The briefing note went on to refer to the July 22, 1983 court decision by Justice Guerin that found the <u>1982 Constitution Act</u> had not rendered the <u>Migratory Birds Convention Act</u> invalid and that its regulations still applied to Aboriginal hunters.[517]

Maybe more importantly, there is evidence that the Canadian Wildlife Service was fully aware of the political dilemma presented by the demands for recognising access to the spring harvest as a matter of Aboriginal rights in the mid-1980s. The same briefing note concluded with the following summary:

> "If the Protocol was to apply to all indigenous Canadians as a matter of Aboriginal right, it would be unacceptable to conservation organizations in Canada and the United States and to the United States Senate. Without an American agreement, there will be no Protocol amending the 1916 Convention."[518]

This political conundrum would eventually be ended by the 1990 *Sparrow* decision which, for all practical purposes, led the federal government to work on the assumption of existing constitutional recognition of the right of all Aboriginal peoples to hunt, including in the spring.

These domestic developments left the Canadian Wildlife Service in a difficult political and legal position. The extension of the spring harvest exemption to southern indigenous communities (at least those with demonstrable Aboriginal and treaty rights) seemed increasingly required by the domestic constitutional environment. However, such an expansion of harvesting opportunities would be seen by most people (including within the Canadian Wildlife Service) as detrimental to conservation, would heighten conflicts with non-indigenous users in the provinces, and would only diminish the chances for an American ratification of the 1979 Protocol. There seemed to be no room to negotiate some changes that help gain the approval of the Convention by the Senate. Facing an impasse, American and

Canadian national authorities essentially left the 1979 Protocol to die on the agenda of the Foreign Relations Committee of the U.S. Senate.

Regime change, institutional vetoes and transnational lobbying

What are the lessons that we can draw from our examination of this 1979 attempt to amend the Migratory Birds Convention for studying transnational politics and regime change? Overall, I find that the empirical evidence provided by the case offers encouraging results for the approach proposed by this dissertation for the analysis of international regimes in an era of globalized politics and that it confirms some of my working hypotheses.

With respect to my first set of hypotheses regarding the domestic and transnational sources of international regime change, the events and analysis presented in this chapter constitute supportive evidence. Based on my exploratory theoretical framework, I had hypothesized that transnational coalitions could be the source of international change by creating domestic political conditions in key target countries that would render such changes necessary for national state actors. Alternatively, I had also accounted for the possibility that such shifts in the domestic political conditions rendering international regime change necessary would not be associated with transnational relations. Changes in the domestic political environments affecting national states' preferences regarding international regimes could have purely domestic causes.

The events of the 1979 Protocol case failed to bear out my first hypothesis. In our analysis of the case, the impetus for international regime change was largely provided by the legal commitments gained by northern indigenous peoples through their negotiation of land claims agreements. The American and Canadian governments were driven to negotiate these agreements by their desire to access and freely exploit the North's natural resources without the liabilities and political instability potentially associated with the legal entitlements of increasingly militant northern indigenous peoples. While the rise of aboriginal militancy in the 1960s certainly had international ramifications and was assisted by transnational dynamics, in the case of the 1979 Protocol, I have found no real evidence of a transnational aboriginal movement directly lobbying in favour of changes to the Migratory Birds Convention. The motivating factors for regime change did not come from transnational relations.

However, conversely, the same evidence provides some support for my alternative hypothesis concerning the domestic sources of regime change. The pressures derived from the legal commitments made in the context of the settlement of Alaskan Aboriginal claims and of the James Bay and Northern Quebec Agreement were domestic in nature. It would have been impossible to fully explicate the impetus for negotiating the 1979 Protocol had our sights been exclusively set on the international, inter-state dynamics.

I must however note that the legal conflict that emerged between the provisions of the Canada-U.S. Migratory Birds Convention and the 1976 Soviet-U.S. Migratory

Birds Convention also provided incentives for the American government to seek an amendment to the North American regime. We will recall that, following a court decision to this effect, the U.S. government was prevented from benefiting from the more liberal provisions of the U.S.–Soviet treaty regarding subsistence hunting until the Canada-U.S. Convention was amended. These pressures coming from the conflicting norms of two international regimes constitute a purely international reason for change and indeed, as we have seen in chapter one, Oran Young has already clearly identified such a potential source of regime change without relying on a framework acknowledging the importance of domestic and transnational politics.

But despite this point, we can still consider domestic politics to have provided a more compelling reason to seek an amendment in 1979. Firstly, the conflict with the Soviet treaty did not affect the Canadian state and cannot be used to explain the clear desire of the Canadian government to seek a subsistence amendment with such heartiness. Moreover, even in the case of the American government, the conflict with the more liberal provisions of the Soviet treaty took on much more importance because the American Congress expressed its desire to see subsistence harvesting regulations in Alaska conform with these provisions instead of those contained in the convention with Canada. And Congress preferred the terms of the Soviet treaty mainly because it saw them as meeting the promises made in the context of its domestic negotiations with Alaska's indigenous communities. In sum, domestic politics strongly reinforced the international pressures for regime change.

My second set of hypotheses was more focused on the impact of domestic constitutional procedures in structuring the transnational politics associated with international regime change. I suggested in chapter one that it would be easier for transnational coalitions to block international regime change by targeting countries with more fragmented domestic institutions or, conversely, that successfully pushing international policy change within countries with more fragmented institutions would require broader and more powerful coalitions. In chapter two, after a detailed analysis of the constitutional procedures associated with treaty-making in Canada and the United States, I hypothesized that, in the case of the Migratory Birds Convention, we should expect to see a transnational coalition wanting to oppose regime change to focus their efforts on the more fragmented and permeable American institutions, especially given the veto available to the Senate.

The evidence provided by the defeat of the 1979 Protocol seems to confirm this hypothesis. Firstly, our analysis shows that transnational lobbying by non-state and sub-national actors is an important variable for understanding the evolution of international regimes in the context of a globalized politics. The outcome of the case would be impossible to account for by focusing the analysis exclusively on national state actors. The 1979 Protocol was largely defeated by the opposition of a transnational coalition of environmentalists, recreational hunters and sub-national wildlife agencies that collaborated in lobbying against the Protocol in the U.S. Both national governments were in fact clearly in favour of a subsistence harvesting amendment to the international convention and they deployed substantial efforts to achieve such change. The change was blocked despite their clear support for it.

While the events occurring between 1978 and 1980 could effectively have confirmed the ability of national states to isolate themselves from societal pressures and remain firmly in control of international regime change, the case as a whole showed the influence of non-state actors in a transnational context. Once in action, the coordinated opposition of the Canadian Wildlife Federation and the U.S. National Wildlife Federation was particularly important in raising the "dangers" associated with an indigenous subsistence harvest in the spring and in rallying other groups to their cause. With the help of recreational hunting associations, such as Ducks Unlimited, environmentalists successfully gained the support of the state wildlife agencies and obtained that the IAFWA, a powerful state lobby in Washington, officially oppose the Protocol. In the end, the opposing transnational coalition gathered sufficient support to threaten the Protocol's approval by the U.S. Senate. It is the credible threat of the Senate veto that forced the American government to suspend the ratification process indefinitely and that led a reluctant Canadian government to attempt to modify the Protocol through an implementation agreement. But, the difficulty in negotiating such an agreement and the changing domestic political environment in Canada ultimately made it impossible to revive the 1979 Protocol. For all practical purposes, the transnational coalition had defeated international regime change.

The evidence of the case also shows that the U.S. Senate did in fact become the focus of opposition for the transnational coalition. Canadian groups like the Canadian Wildlife Federation and Ducks Unlimited voiced their opposition at home but they also recognized that they could better influence the ultimate fate of the Protocol by

seeking the cooperation of other groups in the U.S. Moreover, in this particular case, its widely recognized influence in representing the American states' interests on wildlife issues in Washington made the IAFWA an important focus of the coalition's efforts to block the subsistence amendment. The traditionally close relationship between state interests and the U.S. senators appears particularly pertinent in this regard. By broadening the coalition by getting IAFWA, the recognized representative of state agencies in Washington, on board, the coalition of environmentalists and recreational hunters clearly helped raise the likelihood that the Protocol could be defeated or stalled indefinitely in the Senate.

The unrelenting efforts of the Canadian government to stick to the original version of the Protocol and to push through the changes despite the considerable opposition by environmentalists, sport hunters and provincial agencies in Canada also demonstrates that successfully blocking international regime change is more difficult in Canada. Despite their considerable efforts to stop the change both in Canada and the U.S., the opposing coalition did not succeed in getting the Canadian government to back down. Even official opposition in federal-provincial meetings by provincial agencies did not bring the federal government to reconsider its position. The Canadian government finally agreed to negotiate an implementation agreement addressing its opponents' concerns only when it became obvious that they had succeeded in getting the American government to suspend indefinitely the ratification process for fear of being defeated in the Senate. In other words, the same coalition of actors was more influential in the U.S. than in Canada. The relatively more

fragmented nature of American Congressional institutions seems to provide a credible explanation for this difference in outcome.

Overall, these results tend to confirm my hypotheses that the transnational politics of regime change would tend to target the more fragmented institutions of the American system and that the same coalition of actors would more easily block international regime change through these fragmented institutions than through the more centralized Canadian political institutions.

Conclusion

This chapter showed that the domestic factors played an important role in creating the impetus for amending the Migratory Birds Convention in the late 1970s and that the domestic institutional frameworks provided by American and Canadian institutions with regards to treaty-making played an important role in structuring the politics associated with the failed amendment process. Bilateral efforts of the national states throughout this period were frustrated by a coalition of non-state and sub-national state actors opposed to an indigenous subsistence exception to the international rules to protect migratory birds. While the strength of the interests involved was undoubtedly determinant in successfully stopping the ratification of the subsistence amendment, the institutional features of the American constitution with regards to the ratification of international treaties constituted an important factor for explaining the politics of amendment. For Canadian actors, the Senate's veto offered opportunities that did not exist in Canada and, for the transnational coalition opposing the change, it made the U.S. the focus of their efforts. The overall outcome of the

amendment process and the strategies of actors, including the behaviour of the Canadian government, could not be fully explained without accounting for the strategic role of the Senate veto.

Despite its fatal consequences for the 1979 Protocol, the U.S. Senate veto does not guarantee a permanent safety against undesired regime change for any transnational coalition. In the years following the abandonment of the 1979 Protocol, the Canadian and American governments renewed their commitment to an international amendment permitting the legalization of the indigenous subsistence spring harvest. The result of this process, the 1995 Protocol, was successfully ratified by both countries in 1997. How should we account for this different outcome? This is the subject of our next chapter.

Chapter 7

THE SUCCESS OF THE 1995 PROTOCOL

In the late 1980s, Canadian and American authorities came to terms with the failure of the 1979 Protocol to amend the Migratory Birds Convention. The provisions of this agreement were found to be unacceptable to a coalition of Canadian and American interests. The Protocol's relatively open-ended wording allowed sport hunters and environmentalists in both countries to play up fears of an abrupt increase in Aboriginal harvesting that would prove detrimental to conservation and to the hunting opportunities of non-Aboriginal hunters. Seeking to overcome the coalition's opposition, the national governments sought to negotiate an implementation agreement that would alleviate the main concerns of opposing groups. But this strategy also proved to be unsuccessful. Increasingly pressed by Canadian interests to extend the terms of the subsistence provisions to southern Aboriginal communities and non-Aboriginal northern hunters, the possibilities of finding an agreeable compromise without further alarming southern American interests eventually appeared to be dismal to Canadian authorities. By the late 1980s, the 1979 Protocol was left to die on the order papers of U.S. Senate's Foreign Relations Committee.

However, the late 1980s also brought changes in the political and legal environments, particularly in Canada, which created incentives for a renewed round of efforts to secure an acceptable compromise on the subsistence issue. Aboriginal organisations, that had been relatively silent in their support for the 1979 Protocol,

became much more active in their demands for an international amendment. These political pressures were largely driven and supported by a changing legal landscape where the reversal of previous jurisprudence lent considerable support to indigenous claims regarding subsistence harvesting rights. The changes were of such importance that civil disobedience was being increasingly advocated by indigenous organisations and legal threats to the continuing effectiveness of the Migratory Birds Convention itself were becoming credible. Despite taking stock of its previous failure, the Canadian Wildlife Service was cognisant of the growing importance of finding a long-lasting solution. Also pressed by unfavourable legal decisions at home, the American government became similarly impatient to find a lasting resolution to the Alaska subsistence controversy, even going to the extent of assessing the legality of unilateral domestic actions.

In this context, both national wildlife authorities went to work in the late 1980s on another international agreement to amend the Migratory Birds Convention. This second attempt led to the successful negotiation, approval and ratification of a 1995 protocol of amendment that recognised the rights of Aboriginal peoples to harvest for subsistence in the spring. However, as this chapter will show, for this second attempt, Canadian authorities in particular adopted a strikingly different approach at seeking an amendment to the international migratory birds regime. While the negotiations of the original 1979 Protocol had been characterized by secrecy and expediency, the process leading to the 1995 amendment was marked by an extensive effort to include indigenous peoples and other stakeholders in the amendment process from the outset. The Canadian Wildlife Service also orchestrated a lobbying strategy targeting U.S.

opponents to the original agreement and made use of a transnational forum, the International Association of Fish and Wildlife Agencies, to convey its message in the United States.

In this chapter, we argue that the more inclusive negotiation process, as well as the broader amendment agreement that resulted from it, can be attributed partly to an explicit effort to circumvent the U.S. Senate veto that had killed the first protocol by co-opting and reassuring the members of the transnational coalition of actors that drove the opposition throughout the 1980s. Moreover, we will demonstrate that, in successfully overcoming the original opposition to an Aboriginal subsistence amendment, Canadian and American authorities were significantly assisted by changes in domestic institutional conditions, notably changes in Canadian constitutional and Aboriginal law.

As a whole, the analysis of these events suggests that domestic institutional variables can contribute significantly to enhancing our understanding of the evolution of international regimes. The case study also suggests that domestic institutional conditions affect the behaviour and strategies of transnational actors. Moreover, it suggests that, in the North American context, the need to secure the approval of the U.S. Senate forced Canadian authorities to widen the terms of the desired international agreement to satisfy non-state opponents with some influence on this American institution. Finally, it also shows that the influence of transnational coalitions in affecting the domestic politics of treaty ratification can force state actors to get involved in the domestic politics of other parties to the agreement.

Domestic Subsistence Policies and Judicial Activism in the 1980s

The 1980s had a profound impact on North-American domestic policies regarding the subsistence activities of Aboriginal peoples in the North. The decade was particularly marked by important court rulings on the issue in both Canada and the United States. And while the evolution of the jurisprudence seemed to run in opposite directions in Canada and the United States, there is no question that judicial activism significantly influenced the formulation of domestic policies. In the United States, two key court rulings, the *Dunkle* and *McDowell* decisions, strengthened the position of non-Aboriginal hunters and altered the federal government's policy of accommodation of Aboriginal subsistence needs. In Canada, the recognition of Aboriginal peoples' rights in the *Constitution Act* of 1982, and especially their interpretation in the *Flett*, *Arcand*, and *Sparrow* decisions, profoundly modified the legal environment pursuant to the federal Aboriginal subsistence policy. Together, the decisions in both countries, but especially in Canada, altered the strategic context for negotiating an amendment to the Migratory Birds Convention, providing a renewed impetus for change and considerably strengthening the case for the recognition of a privileged access to waterfowl resources for indigenous hunters.

Domestic Developments in the United States

In the United States, even in the aftermath of the failure of the 1979 Protocol, federal authorities chose to pursue a policy of administrative accommodation for the subsistence needs of Aboriginal Alaskans in the 1980s. While shying away from the formal recognition of any special rights of access to wildlife resources for Aboriginal persons, both Congress and the Department of the Interior worked to create a

regulatory framework in Alaska that would accommodate the particular needs of Aboriginal Alaskans. This policy of accommodation is well illustrated by two important initiatives during this period: Congressional attempts to bring the State of Alaska to put in place a subsistence policy favourable to Aboriginal peoples living a subsistence lifestyle and the negotiation of a innovative agreement on goose co-management that acknowledged the special needs of the indigenous communities.

In 1980, pursuing policy objectives dating back to the conclusion of the landmark 1971 settlement with Alaskan Aboriginal communities[519], Congress entrenched in federal law a requirement for the federal government to protect indigenous subsistence activities in Alaska.[520] Recognizing the considerable role played by State authorities in land management and seeking to incite them to respect federal intentions of accommodating Aboriginal subsistence users, federal legislators also proposed to devolve federal responsibilities for wildlife management on federal lands to the condition that the State adopt wildlife regulations ensuring the long-term protection of the indigenous subsistence way-of-life.[521] Given that federal lands represent about 60% of the Alaskan territory, the offer represented a considerable promise for the State to achieve better control over its natural spaces.

While the State government met Congressional expectations by legislating a policy of preferential access for rural residents taking wildlife for subsistence purposes,[522] the policy immediately proved unpopular with a large segment of the non-indigenous and urban population. To avoid being seen to provide preferential treatment on the basis of race, the State legislature was careful to frame the

subsistence policy in terms of resource dependence and essential needs and, eventually, on a criterion of rural residency.[523] Notwithstanding these conceptual nuances, many Alaskan residents, with sport hunters leading the charge, strongly condemned the policy for attributing *de facto* special rights to Aboriginal hunters.[524]

When they failed to prevent the adoption of the policy, opponents protested the adoption of ensuing regulations at a local level.[525] Then, after creating a new organisation to lead the campaign, named the *Alaskans for Equal Fishing and Hunting Rights*, they sought to place an initiative on the State's 1982 ballot that would essentially have prohibited any discrimination in the allocation of fish and wildlife "on the basis of race, sex, economic status, land ownership, local residency, past or current dependence on the resource, or lack of alternatives".[526] While the initiative was defeated, the debates revealed a strong level of support and the federal government had to intervene in the debate by threatening to take back control over all fish and game management on federal lands.[527]

Far from giving up, sport hunter organizations finally took their case to court. Claiming that provisions of the Alaskan State constitution prohibited discrimination among resource users, they called upon the Supreme Court of Alaska to strike down the preferential subsistence policy. In the surprising and profoundly consequential *McDowell* decision, the court found that they were right. It found that the legislation's preferential treatment of rural subsistence users violated the "common use" article of the State constitution, which states that "wherever occurring in their natural state, fish, wildlife, and waters [be] reserved to the people for common use",

and it invalidated the law. Suddenly, the course of American subsistence policy in Alaska had been reversed, indirectly causing Alaska to lose control of wildlife management over the greater part of its territory. Since the State was now incapable of living up to the conditions set by Congress, the federal policy of delegating wildlife management over federal lands was eliminated.

The second federal initiative indicative of a policy of accommodation for Aboriginal subsistence needs was to meet the same faith. The Yukon-Kuskokwim Delta Co-Management Agreement, negotiated in the early 1980s to respond to concerns about the decline of several populations of geese migrating to the region, was struck down by the U.S. Court of Appeal in its 1987 *Dunkle* decision.[528] The Yukon-Kuskokwim agreement was widely regarded as an innovative and progressive approach to conservation problems because it rested on a multistakeholder negotiation process involving southern sport hunting interests (concerned about the decline of geese populations available for hunting in California), State and federal officials, and Aboriginal communities depending on the resource. The agreement was considered a landmark because it rested on an inclusive multistakeholder dialogue and a voluntary agreement by Aboriginal communities to curtail their harvesting on the precondition that the goose management framework would recognize their special subsistence needs. However, after Alaskan sport hunting interests contested the agreement for violating the closed season provisions of the Migratory Birds Convention by attributing subsistence harvesting privileges to Aboriginal hunters, the agreement was invalidated by the Court.[529]

The *Dunkle* and *McDowell* decisions had a considerable impact on the U.S. federal policy on subsistence harvesting in Alaska. Sixteen years after Congress had promised the protection of their subsistence lifestyle to Aboriginal Alaskans, it still faced considerable obstacles to delivering on its promise. With regards to waterfowl resources, the U.S.-Canada Migratory Birds Convention still stood in the way. The main attempt to move forward on an administrative level despite the restrictive provisions of the Convention, the Yukon-Kuskokwim co-management agreement, had been overturned by the courts, foreclosing this option. The federal policy of conditional devolution of responsibilities to State authorities had resulted in a similar failure in the face of sport hunting interests. While it seems likely that any recognition of subsistence privileges during the closed season by the State subsistence law would eventually have been found incompatible with the Convention with respect to waterfowl resources and consequently overturned as well, sport hunting interests had found a more effective legal instrument in the State constitution and rendered the law ineffective across a broader range of wildlife species.

As a result of these events, the federal government was forced to admit a lack of significant progress despite having contributed to an atmosphere of heightened conflicts and tensions in the State. This situation created such difficulty and urgency for the American government that the U.S. Fish and Wildlife Service began to examine the possibility of unilateral American action and the amendment of American conservation laws in contravention to the Migratory Birds Convention.[530] This move worried Canadian authorities who feared that it would mean a loss of mutual cooperation in continental bird management and the eventual demise of the

entire continental regime. To counter American intentions, Canadian authorities clearly opposed American unilateralism through official channels. However, if a unilateral course of action was to be avoided and the cooperative continental regime preserved, it was clear that an international amendment of the U.S.-Canada Migratory Birds Convention was still a necessity. This necessity was also underscored by domestic developments in Canada.

Developments in Canada

In Canada, the pertinent political developments were also driven by judicial decisions. Up to the mid-1980s, the paramountcy of federal environmental legislation over Aboriginal and treaty rights had been firmly established by jurisprudence during the 1960s. In 1964, in the *Sikyea* decision, the Supreme Court of Canada had upheld the conviction of an Aboriginal hunter party to Treaty 11 for the killing of one duck out of season.[531] The decision confirmed in no ambiguous terms that, if the particular needs of Aboriginal communities might have been regrettably disregarded by the Migratory Birds Convention, federal regulations implementing the Convention nevertheless clearly superseded any rights that Aboriginal peoples held to hunting on their ancestral territories. This interpretation, which illustrates the tenuous nature of Aboriginal rights in Canada prior to 1982, was later confirmed to hold in other circumstances by the *George* (1966) and *Daniels* (1968) cases.[532]

Up to the late 1980s, these three cases provided a sound legal footing for the enforcement activities of the Canadian Wildlife Service against indigenous peoples. Despite their willingness to legalize the subsistence hunting practices of indigenous

communities in 1979, federal officials were under no legal obligations (except with respect to the promises made in the modern treaties) to extend Aboriginal peoples' privileges to take waterfowl in the spring. In any case, while a considerable level of tension and numerous potential conflicts remained in northern communities, the failure to amend the Migratory Birds Convention did not place the waterfowl management regime in jeopardy and legal recourse against excessive Aboriginal harvesting remained available.

The decisions rendered in 1989 in *R. v. Flett* by the Manitoba Court of Appeal and in *R. v. Arcand* by the Alberta Court of Queen's Bench undertook a considerable reversal of this situation.[533] It is important to note that, in the twenty years separating the two series of cases, the legal status of Aboriginal peoples in Canada had changed considerably. Aboriginal peoples had been active and relatively influential during the period of constitutional renewal of the 1970s and early 1980s. Due to a mix of changing attitudes, better political mobilization and important legal decisions, they had successfully pushed forward their case for Aboriginal and treaty rights. More importantly in this case, they had successfully brought the federal government to include in the *Constitution Act, 1982*, a section recognising and affirming their Aboriginal and treaty rights. The significance of this section 35(1) for wildlife management in Canada began to be measured by the *Flett* and *Arcand* cases.

Both *Flett* and *Arcand* involved Aboriginal persons arrested for hunting waterfowl out of season in contravention to the terms of the *Migratory Birds Convention Act* and, just as in the 1960s' cases, the defendants argued that their

Aboriginal and treaty rights were violated by the federal legislation. However, in these cases, the courts found that Aboriginal and treaty rights represented a reasonable defence for Aboriginal defendants. By being constitutionalized by section 35(1), Aboriginal and treaty rights, including hunting rights, took on a more fundamental and authoritative stature. In *Flett*, the judge recognised that federal regulations regarding migratory birds had been interpreted to supersede treaty rights in the past. But, taking into account the significance of section 35(1), the courts could no longer conclude to the legality of such limitations on the exercise of Aboriginal peoples' constitutional rights.

The *Flett* and *Arcand* cases immediately modified the political dynamics between Aboriginal communities and the Canadian Wildlife Service. Soon after these court decisions were made, Aboriginal organisations began writing federal authorities, demanding the immediate stop of all enforcement activities affecting indigenous peoples. They also called for the withdrawal of all charges pending against indigenous hunters. In response, the Canadian Wildlife Service remained cautious. Waiting to see whether the provincial governments would appeal the decisions, federal officials requested an assessment of the situation by the Department of Justice. Even if the significance of the decisions was confirmed, the Canadian Wildlife Service reasoned, many individual Aboriginal nations still needed to prove the existence of their Aboriginal and treaty rights over specific territories. Moreover, section 35(1) of the constitution covered only the rights in existence in 1982 and legal uncertainty remained about the meaning of extinguishment of Aboriginal rights.

Before the federal government and indigenous peoples could fully take stock of the implications of the *Flett* and *Arcand* decisions, the Supreme Court of Canada rendered another decision that has had a fundamental and lasting effect on all aspects of wildlife management with regards to Aboriginal peoples. The 1990 *Sparrow* decision did not directly concern the *Migratory Birds Convention Act.*[534] Ronald Sparrow was a member of the Musqueam First Nation who, while fishing on ancestral lands, was arrested and charged with fishing with a net that did not meet the required specifications under the *Fisheries Act* regulations. Sparrow, in his defence, argued that federal regulations were violating his Aboriginal rights to fish for subsistence and were consequently inapplicable to him. In one of the most important constitutional decisions to date on Aboriginal rights, the Court found that section 35(1) of the *Constitution Act, 1982*, had constitutionalized the Aboriginal rights of Ronald Sparrow and the Musqueam nation and that federal regulations could not easily constrain the exercise of these rights. In this particular case, Sparrow's conviction was overturned.

The significance of the *Sparrow* decision for Aboriginal rights and wildlife management far exceeds the details of the case. In addition to confirming that section 35(1) did indeed constitutionalized Aboriginal and treaty rights that had not been extinguished before 1982, *Sparrow* also provided a justificatory analysis to determine whether government regulations illegally infringed on Aboriginal and treaty rights. While the Court affirmed the new constitutional nature of Aboriginal harvesting rights, it also clearly affirmed that these rights could be curtailed and controlled by governments pursuing "a valid legislative objective". Among the "compelling and

substantial" objectives that the Court found to be valid, the inclusion of conservation and resource management was deemed to be "uncontroversial".

However, even in the event of the existence of a valid legislative objective, the Court, stressing that the Crown's honour was at stake, argued that government regulation should infringe as little as possible on Aboriginal rights. In this context, it felt that a relation had to be established between the question of justification and the allocation of priorities in resource use. More precisely, the Court affirmed explicitly that, even when subjected to legitimate conservation measures, Aboriginal subsistence needs must take clear priority over all other uses. In the event of a necessary curtailment of harvesting activities due to conservation concerns, the Aboriginal harvest should take precedence over non-indigenous commercial and recreational harvesting. These latter users should be granted access to the resource only after Aboriginal subsistence needs were satisfied. In sum, in *Sparrow*, the Supreme Court effectively read into the constitution a rule of priority of access for Aboriginal subsistence users for Aboriginal nations who could demonstrate the existence of Aboriginal or treaty rights.

The *Sparrow* decision had a profound impact on the politics of the Migratory Birds Convention's amendment. It confirmed the legal reversal begun by *Arcand* and *Flett* by affirming the predominance of Aboriginal and treaty rights over the *Migratory Birds Convention Act*. As a result, the Canadian Wildlife Service would be progressively losing its capacity to regulate indigenous subsistence harvesting, including during the reproductive season, as individual Aboriginal nations proved

that their specific rights had not been extinguished prior to 1982. While waterfowl conservation obviously represented a valid legislative objective, the justificatory analysis proposed by the Court now necessitated to prove that the Aboriginal subsistence spring harvest by itself represented a threat to conservation. Given the limited scientific data available on the Aboriginal harvest, such a legal demonstration could prove to be difficult. In any case, given the new Aboriginal subsistence priority rule, the Canadian Wildlife Service could hardly continue to outlaw a spring subsistence harvest by a relatively small number of Aboriginal hunters while allowing the recreational fall harvest to represent the vast majority of birds killed every year.

Following the *Sparrow* ruling, Aboriginal representatives were quick to use their newly found constitutional leverage to push for a new amendment to the Migratory Birds Convention. They not only stressed the constitutional character of their rights but they now also threatened that the federal government might just lose the entire Convention, which now conflicted with recognized constitutional rights. If a subsistence amendment proved impossible to negotiate with the U.S., the Canadian Wildlife Service would simply not be in a constitutional position to implement its closed season provisions within the Canadian territory. For example, in a June 1991 statement on the Migratory Birds Convention amendment process, the Cree Regional Authority argued that, if the appropriate amendment could not be obtained as promised sixteen years earlier in the James Bay and Northern Québec Agreement, the government of Canada must "invoke its rights under international law to withdraw from the Migratory Birds Convention or suspend" its application so as to prevent its

conflict with Aboriginal and treaty rights.[535] This argument was repeated by virtually all Aboriginal nations throughout the period leading to the negotiation of the 1995 Protocol.[536]

In retrospective, it seems difficult to over-estimate the impact of the 1982 constitutional amendment, and its 1990 judicial interpretation in *Sparrow*, on the politics of the Migratory Birds Convention amendment. These events both lent greater legitimacy and power to Aboriginal claims and contributed significantly to radicalize the discourse and stimulate the lobbying of the Aboriginal movement. Moreover, they threatened to severely weaken the Migratory Birds Convention as a regulatory instrument to manage continental waterfowl populations. In the absence of an international amendment that would both recognise Aboriginal subsistence rights and allow for its incorporation into the regulatory system through new management measures for subsistence hunting, Canadian authorities ultimately feared that an unregulated, unmonitored Aboriginal harvest may prove detrimental to effective continental management. The constitutional changes renewed the urgency of negotiating a successful international subsistence amendment and significantly altered the political dynamics by empowering Aboriginal groups and modifying the default conditions to which the continental regime would revert in the event of a second failure.

In sum, domestic legal changes in Canada and the United States in the late 1980s and early 1990s modified significantly the political environment of the Aboriginal subsistence rights controversy. American changes increased pressure on

both the American, and indirectly on the Canadian government, for seeking once more a successful amendment to the bilateral continental agreement. Domestic conditions even led American authorities to assess the feasibility of unilateral action. But the constitutional changes in Canada proved to be even more important. A series of court decisions on the newly recognised constitutional rights of Aboriginal peoples effectively altered the distribution of power among governments, Aboriginal groups and other non-state actors. They provided greater authority and legitimacy to Aboriginal claims, weakened the position of the federal government, and even raised questions about the viability of the continental waterfowl regime in the absence of a successful amendment. As we will see in the rest of the chapter, these changes eventually had a profound effect on the amendment of the continental regime.

The Politics of the 1995 Protocol

While feeling growing pressures to amend the Convention in Canada and from the U.S., Canadian authorities were also acutely conscious of the failure of the 1979 Protocol and were at least determined to avoid repeating their mistakes. As one prominent official from the 1970s conceded during an interview, "while not consulting the non-governmental organisations was not unusual for federal policy-making at the time, our decision to negotiate an amendment without consulting the provinces was a clear mistake, even for the time". In setting out to negotiate a new amendment, the Canadian Wildlife Service was careful to engage the provincial agencies in the process.

The failure of the First Ministers' Conference on Aboriginal Rights in the late 1980s left the conservation community without much guidance in formulating a new negotiation position on subsistence rights. To find such guidance, wildlife officials turned to an established intergovernmental body composed of all wildlife ministers in the country: the Wildlife Ministers' Council. Predictably given previous provincial opposition to expansive reading of Aboriginal hunting rights, the Wildlife Ministers' Council adopted at its 1988 meeting a policy statement emphasising the equality rights of all Canadians and directing federal officials to formulate an amendment that would ensure "a fair and equal access" to waterfowl to all northern Canadians (living both in the territories and in the northern part of provinces).

Despite the 1989 *Flett* and *Arcand* decisions, the federal-provincial council nevertheless reaffirmed and clarified this "equitable northern access" preference at its 1990 meeting. At this meeting, federal and provincial governments agreed that any future Migratory Birds Convention amendment should expend waterfowl access only in the northern areas of the country (unless southern indigenous communities could prove the existence of constitutional rights to hunt during the closed season). They also agreed that the amendment should be applicable to all residents without regard to their ethnic background and should accommodate the exercise of Aboriginal rights only where they were found to exist in law (as opposed to recognising them as a matter of policy).

While this original policy statement by wildlife ministers assured federal officials the support of provincial authorities, it also forced them to adopt an original

position on subsistence rights that would prove hard to maintain and that would be virtually impossible to sell to Aboriginal nations in the aftermath of the *Flett*, *Arcand* and *Sparrow* rulings. In light of the federal-provincial agreement, the Canadian Wildlife Service's first amendment proposal focused clearly on improving the northern access to waterfowl resources for all potential users. In fact, most Aboriginal peoples, whose particular concerns and historic grievances were still at the basis of the entire amendment initiative, would be covered almost indirectly by virtue of being northern residents. This original reluctance to embrace Aboriginal subsistence rights proved a persistent feature of the federal position for the years to come. In fact, even after the *Sparrow* decision had changed significantly the underlying legal order, federal officials still clung to the view that many legal uncertainties remained and that individual nations still had to prove their historical rights. Changing this conservative approach to Aboriginal rights took more pressure from Aboriginal organisations as well as the fragmentation of the provincial common front, which created the possibility of change.

Opening up the policy process

While engaging the provinces early in the process was the first lesson drawn from the failure of the 1979 agreement, it was not the only one. The determining role played by non-state actors in blocking the ratification of the previous protocol by getting the U.S. Senate to withhold its approval was a central concern of Canadian federal officials. In order to prevent the repetition of these events, the Canadian Wildlife Service devised a political strategy that contrasts severely with the closed and expedient process adopted to negotiate the failed agreement. The new strategy

would seek to expand significantly the coalition of actors supporting the subsistence amendment or at least to diminish its influence on the American policy process. In order to meet these objectives, the Canadian Wildlife Service relied on a two-tracked consultation and lobbying effort.

The first track focused on American policy actors. Conscious that American States had played a determinant role in influencing the U.S. Senate, Canadian officials focused on winning their approval. Since the coalition of environmentalists, especially the National Wildlife Federation and Canadian Wildlife Federation, had successfully instilled doubts about the sustainability of the Aboriginal subsistence amendment, Canadian officials wanted to counter them by presenting more effectively their own case to U.S. wildlife agencies and recreational hunting associations. The cornerstone of this strategy was the use of the states' lobby association that had played a crucial role in defeating the 1979 Protocol: the International Association of Fish and Wildlife Agencies.

While the IAFWA clearly performs the role of an American state lobby in Washington, Canadian wildlife agencies, including the Canadian Wildlife Service, hold memberships in the association. This membership made of the IAFWA an exceptional platform from which to present the case for an Aboriginal subsistence amendment. In a move that proved rewarding, the Canadian Wildlife Service got the IAFWA to set up a special working committee on the Migratory Birds Convention and subsistence harvesting. The working committee would be mandated to gather all the facts available on the issue and to produce a discussion paper that could inform

the association's position. While the working committee included American members, was chaired by an American agency director and reported directly to the IAFWA Assembly, Gregory Thompson, the Canadian Wildlife Service's director for Migratory Birds and Wildlife Conservation, was one of the main contributors to the discussion paper. As a result, Canadian officials placed themselves in an exceptional position to influence the association's thinking on subsistence harvesting.

The second track of the Canadian strategy focused on domestic actors. Again, determined to broaden its coalition of supporters to prevent a repetition of the 1979 experience, federal officials designed an extensive consultation process to gather stakeholders' views and to explain its own intentions regarding subsistence harvesting. The consultation process was to have two phases: it would start by a series of bilateral meetings with the main non-state stakeholders, which might serve to revise the original federal position, and then be followed by a more formal multilateral consultation process that would tour the country. In the end, the domestic consultation process lasted about four years and it involved a large number of local and national groups in all categories of stakeholders.[537] Both by virtue of its mere existence as well as of its extensive nature and duration, the consultation process leading to the 1995 agreement offers a sharp contrast with the approach that had been taken by the Canadian government in 1979.

In understanding the politics of the Migratory Birds Convention amendment, the domestic consultation process is notable at least for two reasons. Firstly, the process represented the first systematic attempt to consult Aboriginal peoples on the

issue; but, paradoxically, it ended up both stimulating confrontation between indigenous organisations and the federal government as well as ultimately assuring a higher degree of Aboriginal input than what had been expected at the outset by Canadian authorities. Secondly, there is also clear evidence that the consultation process modified the content of the subsistence amendment eventually negotiated with the United States. The next sections will deal in turn with these developments.

Bringing Aboriginal Organisations In

In the fall of 1990, having devised their original amendment proposal to reflect the guidelines offered by the Wildlife Ministers' Council, federal wildlife officials set out to consult with non-state stakeholders. Aboriginal nations were first on the agenda of bilateral meetings. Given the "equitable northern access" approach preferred at the time, federal officials anticipated that Aboriginal groups would find the amendment proposal unsatisfactory. However, they immediately encountered a more hostile response than they had anticipated.

The Canadian Wildlife Service began their efforts by sponsoring a meeting of the Assembly of First Nations' Migratory Birds Working Group in Ottawa on 5 December 1990. The objective was to provide Aboriginal peoples' representatives with an initial briefing on the issue as a prelude to establishing a schedule of meetings with individual nations. However, when the Canadian Wildlife Service staff arrived at the meeting, they were asked to leave by the Aboriginal representatives and to come back in the afternoon. At the end of the morning, they were then informed that the Assembly of First Nations was unwilling to meet with them to discuss the Migratory

Birds Convention's amendment.[538] The Assembly of First Nations' concerns went beyond the inadequacy of the "equitable northern access" proposal. While they did oppose this proposal because it negated the recognition of subsistence rights as fundamental Aboriginal and treaty rights for all Aboriginal nations, their original resistance also focused on the very nature of the consultation process itself.

The Assembly of First Nations argued that the consultation process devised by the Canadian Wildlife Service did not recognise their special status within the Canadian constitutional order and simply diminished them to the rank of ordinary policy stakeholders or interest groups. The organisation insisted that nothing less than a series of high-level negotiations from "nation to nation" could adequately address their grievances and live up to the federal government's duties toward Aboriginal nations. The Assembly of First Nations' position was subsequently confirmed by the organisation's General Assembly as well as by other Aboriginal organisations that similarly condemned the consultation approach of the Canadian Wildlife Service.[539]

Immediately after the cancellation of the 5 December 1990 meeting, the organisation began to voice its opposition. The same day, the National Chief, Georges Erasmus, wrote to the deputy ministers of the departments of Justice and the Environment to condemn the approach taken for consulting Aboriginal peoples. A few days later, in an effort to raise awareness on the issue, the Assembly of First Nations adopted a resolution at a special chiefs' assembly and published a press release attacking the Canadian Wildlife Service for failing to recognise their unique constitutional status. The resolution reiterated its rejection of any form of Aboriginal

participation that would amount to less than direct, "nation to nation" negotiation between First Nations' leadership and the federal government. It also called for the provision of adequate resources in order for Aboriginal peoples to prepare for these negotiations.[540] In the following months, the organisation also asked for $600 000 to conduct a consultation exercise of its own with member nations.

Eventually, the Aboriginal organisations' persistent demands for "nation to nation" negotiations also exceeded concerns for their position in the domestic policy process and they included demands for a similar role and status in negotiations with the American government.[541] Aboriginal nations wanted to be at the table with the Canadian and American governments, representing directly their own peoples on an equal footing with the two national governments.

The fundamental disagreement over the actual status of Aboriginal peoples and how they should be treated throughout the consultation process was never truly resolved. Until the bilateral negotiations started with the American government in 1994, Aboriginal organisations continued to call for "nation to nation" status. However, while the Assembly of First Nations boycotted the process for the greater part of its duration, many other regional organisations and individual nations decided to participate both in bilateral and multilateral consultations. The Grand Council of the Crees of Québec, for example, repeatedly affirmed its agreement with the Assembly of First Nations' opposition but nevertheless attended bilateral meetings and multistakeholder workshops and exchanged a substantial correspondence with the Canadian Wildlife Service.[542] The Assembly of First Nations itself eventually

participated in informal meetings and one member of its staff participated in the multistakeholder process in 1992.

Despite the apparent inconsistency and frailty of Aboriginal opposition to the consultation process, it yielded significant results. Overall, Aboriginal peoples insistence on their special status brought the federal government to augment their level of high-level input into the negotiation process. During the domestic phase, the Canadian Wildlife Service did not fundamentally modify its consultation strategy but Aboriginal nations clearly represented the vast majority of participants in both phases of the consultations. With regards to the international negotiations process, while the demand for "nation to nation" status was found to be clearly unacceptable and inconsistent with international practices, the Canadian government eventually decided to create a Native Advisory Committee at the end of 1993 to assist the Canadian delegation during the negotiations with the United States.

The Native Advisory Committee was composed of three respected Aboriginal persons chosen by the federal government who were sitting in their own name (and not as delegates of Aboriginal organisations). It was chaired by Jim Bourque, a well-respected northern indigenous leader. The committee members periodically discussed the nature and evolution of the negotiations with members of the negotiation team. It also served as a liaison between Aboriginal nations and the negotiating team and it discussed with federal officials the required steps to make sure that the amendment would be supported by indigenous peoples. In the end, the committee did not win unanimous praise and some Aboriginal leaders complained about inadequate

information and consultation. However, there is no doubt that it contributed to the legitimacy of the process and that it served to keep indigenous peoples more involved in the amendment process.

The Aboriginal influence was not limited to procedural issues. Their vocal opposition to the "equitable northern access" scenario and their insistence on the full recognition of their Aboriginal and treaty rights, both in designing the consultation process and in deciding the actual content of the subsistence amendment, resulted in significant gains. Their relentless defence of their constitutional rights, helped significantly by the evolving jurisprudence, allowed them to influence the substantive results of the consultation process and ultimately the content of the international agreement.

Equitable Northern Access and the Sparrow decision

When it started its consultation with stakeholders in 1990, the Canadian Wildlife Service found itself facing advocates of opposing positions. On the one hand, Aboriginal peoples strongly and consistently argued that the Migratory Birds Convention amendments should recognise that they had a yearlong and minimally constrained access to waterfowl as a matter of Aboriginal and treaty rights. These rights were not seen as appropriately shared with other Canadians and expending the hunting opportunities of non-indigenous hunters was generally considered to be incompatible with the recognition of indigenous rights. On the other hand, environmentalists and sport hunters either opposed more harvesting in the spring altogether or insisted that greater resource access should be granted on a equal basis

irrespective of ethnic background. In this context, acceding to the demands of one group seemed to risk further alienating the other.

The original "equitable northern access" proposal seemed to bear the potential for winning the support of non-indigenous users. Under this scenario, any resident of the northern territories and the northern areas of many provinces would potentially qualify for expanded access to waterfowl resources in the spring. The exact northern area that would be covered by this new access regime would eventually be defined through consultation. As such, the "northern access" proposal seemed compatible with the equality rights discourse of most non-indigenous stakeholders while at least improving indigenous spring subsistence harvesting in the North where the needs were most important. More importantly, it followed precisely the principles identified by the federal-provincial council.

However, as we have seen, Aboriginal reactions were immediately strongly negative. In meeting after meeting, and letter after letter, Aboriginal nations condemned the "equitable northern access" proposal for not clearly recognising Aboriginal and treaty rights. From the outset, Aboriginal organisations were relying on the *Flett* and *Arcand* cases to bolster their position and, by the time the bilateral consultations began, the Supreme Court's ruling in *Sparrow* served to strengthen and radicalize their discourse. Federal officials were following closely the *Arcand* and *Flett* cases but refused to see them as definitive decisions. They were still awaiting the provinces' decision to appeal to the Supreme Court and continued to stress that these decisions were incompatible with previous decades of jurisprudence. The

Sparrow ruling, however, instilled some doubt about the legal and political soundness of their position on indigenous hunting rights.

It search for greater legal clarity, the Canadian Wildlife Service turned for advice to the Department of Justice. The early legal opinions offered by the Department of Justice recognised the significant implications of the decision for the future of wildlife management in Canada; but they were far from categorical. They emphasised that there remained many unsettled issues about the extinguishment of Aboriginal rights. According to constitutional experts, there also remained significant legal uncertainty about the extent of Aboriginal rights. Moreover, notwithstanding the rationale exposed in the decision for establishing the validity of infringement on Aboriginal rights, it remained that, for many Aboriginal nations, the existence of such ancestral rights needed to be demonstrated in court on the basis of their own particular historical circumstances.

The cautious approach by the Justice Department's lawyers provided limited guidance to the Canadian Wildlife Service in dealing with its Aboriginal subsistence policy and the amendment of the Migratory Birds Convention. Their refusal to adopt an expansive interpretation of the *Sparrow* ruling left federal wildlife officials in a difficult position. The legal ambiguity was unhelpful for finding an appropriate immediate response to the legal changes.

Moreover, the absence of certainty complicated finding a compromise that would be long-lasting. In effect, due to the slow but progressive affirmation of Aboriginal rights, any adequate amendment to the Migratory Birds Convention would

now need to be crafted in order to allow the accommodation of future Aboriginal rights, as they would be progressively found to exist in certain areas and as they would be progressively defined by the judicial process. Such an attentive, incremental and case-by-case approach would probably be quite unpopular with the American government and non-state actors in both countries. In particular, they would not respond favourably to the greater ambiguity about the scope and nature of Aboriginal hunting rights suggested by such an incremental and diversified approach. Who exactly would be the beneficiaries of the subsistence harvesting exemption at any given time? How many people would ultimately fall under the category of Aboriginal rights holders? How would (or could) their activities be regulated? Which territories would be covered by Aboriginal spring harvesting rights? Many of these questions could not be answered adequately at the time of negotiation and the answers would be likely to change in the future as new cases would be brought to courts by Aboriginal communities. Since the 1979 Protocol had been largely faulted and opposed because of its lack of specificity (which made it easy to lend credence to the worst scenarios), the scenario suggested by a narrow reading of *Sparrow* did not bode well for the future of the amendment process.

In addition, such a timid response to *Sparrow* would likely only fuel Aboriginal opposition. Insisting that individual communities prove the existence of their Aboriginal rights through the judicial process and awaiting for court decisions to modify the federal policy for specific territories implied an adversarial approach and costly legal battles for years to come. If the future of waterfowl management in Canada, including the implementation of the amended Migratory Birds Convention,

rested on a co-operative relationship with Aboriginal peoples, a judicial case-by-case approach was hardly promising to contribute to the creation of such a relationship. In sum, while *Sparrow* was interpreted by Aboriginal advocates as a clear statement of the constitutional rights, for the federal government, unwilling to opt for a generous reading of the Court's ruling, the decision was creating greater complexity, uncertainty and difficulty.

In order to better ascertain the changing constitutional environment concerning Aboriginal hunting rights, in late 1990, the Canadian Wildlife Service began to advocate the use of a Supreme Court reference to end the legal uncertainty. The Service felt that, if the Supreme Court agreed to clarify the extent and nature of Aboriginal hunting rights under the existing constitution, the federal government would work from a more solid legal position and the expectations of the different stakeholders would become clearer and more in tune with reality. However, the Department of Justice was categorical in its rejection of this alternative. Its preferred option was the careful selection of a test case resulting from normal enforcement activities. But, at this stage, the director of the Canadian Wildlife Service dismissed this option as taking too much time and as being simply "inhuman" for the Aboriginal persons involved in such a judicial process.

Meanwhile, Aboriginal lobbying against the "equitable northern access" approach was unrelenting. Incorporating the court rulings in their discursive arsenal, they kept voicing their opposition publicly, in bilateral meetings and through a substantial correspondence with federal ministers. In response to wide-spread and

growing Aboriginal criticism, the minister of the Environment began to reassure Aboriginal leaders that the federal government would not seek an amendment to the Migratory Birds Convention without their explicit support. The need to change the original proposal to find a compromise was becoming evident.

Yielding to Aboriginal Subsistence Rights

Since the "equitable northern access" proposal had been largely inspired by the position of the federal-provincial council, it was feared that abandoning it would create difficulties with the provinces. However, around the same time, the provincial common front on the "equitable northern access" began to crumble as Ontario and Manitoba changed their position on Aboriginal subsistence hunting.

The Ontario government was the first province to re-examine its commitment this scenario. The election of the New Democratic Party significantly changed the provincial attitudes toward negotiations with indigenous peoples in the province. Having toured indigenous communities in the years preceding their victory, the NDP were seemingly committed to improving their socio-economic conditions. Furthermore, in the wake of the 1990 Oka crisis in Quebec, the Ontario government was determined to avoid a similar event in the province. In both cases, granting more autonomy to Aboriginal bands was considered part of the solution. Overall, the government expressed a commitment to push ahead the self-government agenda and, in the area of resource management, the negotiation of co-management agreements with indigenous communities became a priority.

Moreover, Bud Wildman, the new minister of Natural Resources and Indigenous Affairs, adopted an expansive reading of *Sparrow*. In informal meetings, he explained that, in his view, it amounted to the recognition of Aboriginal rights to harvest all wildlife year-round throughout the province, subject only to conservation requirements. In this context, Ontario could no longer support the northern access scenario as it did not recognise the rights of Aboriginal peoples living in the southern areas of the province.[543] In meetings with federal officials, the provincial wildlife conservation director affirmed that an acceptable amendment scenario would have to allow spring hunting by all status Indians in the province.

Ontario was not the only provincial government to change its views on the Migratory Birds Convention's amendment. In early 1991, the province of Manitoba also made the decision to embrace a co-management approach for dealing with natural resources management when indigenous peoples were involved. The province's interest for co-management institutions was primarily driven at the time by conflicts with Aboriginal peoples over the allocation of forestry resources. The grant of large forest areas to some companies had angered Manitoba First Nations in late 1990 and tensions between Aboriginal communities and the provincial government heightened as a result.[544]

In response, a senior executive departmental committee of the Manitoba Department of Natural Resources endorsed the use of the co-management approach for managing natural resources and set to work on guidelines for the development of co-management agreements for most resource areas, including wildlife. Moreover,

under an agreement signed with The Pas nation, the province had already consented to a preferential hunting quota for Aboriginal peoples living on the affected territories. While migratory birds hunting fell under federal jurisdiction and were not covered by such agreements, the province had made a clear commitment to First Nations to push for such co-management and preferential treatment whenever possible. In the words of a senior provincial official, "the province [now planned] to go big on co-management". Correspondingly, in bilateral meetings held with the federal government in early 1991, the province was now advocating that discussions regarding amendments to the Migratory Birds Convention be premised on the extensive delegation of decision-making authority to co-management institutions involving Aboriginal peoples.[545]

While the endorsement of preferential treatment and co-management represented a significant shift in position, the provincial ministry eventually went even further by announcing that it would not take advantage of any potential opportunities to expand the access of non-indigenous subsistence or recreational hunters in the northern areas of the province. According to provincial officials, the tensions to be expected as a result of the attribution of greater harvesting privileges to non-indigenous hunters in northern areas would only serve to make future negotiations and collaboration with indigenous peoples more difficult. In the interest of a more peaceful relation with Manitoba First Nations, and fewer problems with natural resource management, these concessions to non-indigenous users were then to be avoided.[546]

In sum, a few years after the beginning of bilateral consultations with Aboriginal peoples, the federal government's original position was becoming untenable and the federal-provincial original consensus on the northern access scenario was falling apart. In March 1992, the Canadian Wildlife Service finally came to the opinion that "it is now clear from the Sparrow decision, bilateral consultations to date and our continuing discussions with the Department of Justice that the Wildlife Directors' approach to the Migratory Birds Convention amendments developed in 1990 is a non-starter". Consequently, the federal government decided to expand the scope of the amendment sought for Aboriginal peoples. It is worth quoting at length the federal official in charge of the amendment process at the time who, in writing to Aboriginal organisations, stated the following:

> "I am pleased to be able to say that the federal government's position respecting Aboriginal hunting of waterfowl and egging across Canada is evolving in response to various factors, including earlier consultation. Where rights are specified and agreed to in claims settlement, there is no question. Now, even where there are still some legal uncertainties about specific rights in the management of migratory birds, the federal government intends to act as though Aboriginal and treaty rights to hunt migratory birds may exist and may be exercised subject to government regulation for conservation and good management."[547]

This change of position is significant as it represented a new federal willingness to acknowledge Aboriginal peoples' special status in relation to the waterfowl management regime without waiting for judicial decisions in each individual case. Such a change in position represented a major concession to the repeated demands of Aboriginal nations and a clear response to the changing domestic legal landscape regarding Aboriginal constitutional rights.

It should be stated that, in granting this concession to indigenous peoples, the federal government nevertheless attracted the blame of some provincial governments. The Quebec government, for example, later partly opposed the federal amendment proposal because it took an excessively generous view of the Aboriginal peoples' exception. The province argued instead for a limited right to a spring subsistence harvest applicable only to Aboriginal nations who could prove legally that they held such Aboriginal or treaty rights over their ancestral territories.[548] In other words, it advocated a case-by-case approach more consistent with the position of the federal Department of Justice, which would rest on the design of different spring management regimes for each specific nation able to prove the existence of unextinguished rights to subsistence harvesting.

Concessions to Non-Indigenous Users

Once the decision had been made to concede more generous terms to Aboriginal peoples, the challenge of curtailing the opposition of non-Aboriginal hunters and environmentalists clearly re-emerged for the federal government. An obvious option for the Canadian Wildlife Service could be to grant better spring access to non-indigenous hunters in the hope of weakening their opposition and isolating environmentalists in their opposition to the amendment. However, such a concession would likely provoke a negative response from Aboriginal peoples who, as we have seen, tend to see their subsistence rights as exclusive and incompatible with the attribution of similar rights to non-indigenous users. A position that was re-iterated during the bilateral consultations held in the early 1990s with regards to both

non-indigenous subsistence users (living mainly in the Northwest Territories) and recreational hunters.

Regarding non-indigenous subsistence users, Canadian federal authorities had entered the consultation process with the intention of granting spring access to users that reside in the areas covered by land claims agreements but who have not been named beneficiaries. They felt that, under the guiding principles provided by the Wildlife Ministers' Conference insisting on "fair and equitable" access for all Canadians, non-beneficiaries spring hunting privileges originally seemed to represent a good solution.[549] But, as expected, this proposal was not well received by most Aboriginal organisations. Many Aboriginal organisations clearly expressed their opposition to allowing non-beneficiaries to harvest waterfowl in the spring and many stressed what they considered their <u>exclusive</u> right to a yearlong harvest.[550]

Moreover, notwithstanding the possible tendency of Aboriginal spokespersons to overstate the clarity and extent of treaty rights (as they were defined in jurisprudence at the time), Aboriginal communities were not alone in opposing the extension of the spring harvest exception to non-indigenous subsistence users who would not be beneficiaries of land claims. Some provincial governments, notably the Quebec government, were also flatly opposed to amending the Migratory Birds Convention to grant new privileges to non-indigenous subsistence users.[551] Since the province of Quebec saw the Migratory Birds Convention amendments as an important step to live up to the promises of the *James Bay and Northern Québec Agreement*, it did not want to see the amendment threaten the concessions made to

Aboriginal peoples covered by the Agreement by unduly expanding the privileges of other wildlife users residing in the area.

However, given the guidelines provided in the late 1980s by the Wildlife Ministers' Council, the outright prohibition for non-beneficiaries to hunt in these territories, including during the spring, had been considered early in the amendment process to be clearly unacceptable by the federal government. By the early 1990s, considering the opposition of Aboriginal peoples and of some provinces, the Canadian Wildlife Service chose to modify its original position. As a compromise solution seeking to recognise both the rights of Aboriginal peoples and the needs of non-indigenous subsistence users, the federal government proposed that "the amendment should neither make spring hunting by non-beneficiaries [of land claims agreements] impossible, nor <u>require</u> that they be eligible for spring hunting wherever it is allowed".[552] Instead, different regional regimes would be negotiated at the implementation stage for each land claim area with the relevant indigenous peoples, probably through co-management institutions. Such a framework could hopefully accommodate the modest harvest of non-indigenous subsistence users in the North while ensuring substantial indigenous control over access to waterfowl resources on their ancestral lands.

The extension of the opened season for sport hunters in the northern part of the provinces was a more difficult and contentious problem. Originally, the federal government considered a spring hunting season for recreational hunters as an essential part of the equitable approach commanded by the federal-provincial

consensus. As the Minister of the Environment Sheila Copps argued in a letter to an Aboriginal chief voicing his opposition to concessions to recreational hunters, the more generous terms for non-indigenous recreational users were "proposed to accommodate fair and equitable access by other Canadians to the hunted waterfowl populations".[553] In political terms, they were also seen as necessary to alleviate potential provincial and sport hunters' opposition to an exclusively Aboriginal amendment.

From the outset, the idea of a spring season for recreational hunters met a strong opposition from Aboriginal nations and some environmentalists. In addition to Aboriginal concerns about the exclusivity of their rights, the greater number of recreational hunters (and corresponding takes) raised serious concerns about the impact of such changes on the sustainability of bird populations. Some Aboriginal peoples and environmental groups were particularly concerned that southern tourists (and especially American hunters) may benefit from spring hunting rights in the Canadian North through local outfitters.[554] Moreover, the increasing number of southern workers working temporarily in the natural resources industries of the territories could mean that the number of local residents allowed to kill waterfowl in the spring would augment to unsustainable levels.

Federal officials attempted to reassure opponents by stressing that, despite provincial opposition, only northern residents (including those living in the northern areas of the provinces) would be allowed to harvest birds.[555] Eventually, the Canadian Wildlife Service even promised that any extended non-Aboriginal season would be

confined to the northern provincial areas and would exclude the Northwest Territories. However, even these proposals failed to convince opponents.

In the end, in an attempt to find a middle ground, the Canadian Wildlife Service proposed to allow varied seasons for recreational hunters in northern areas. The idea was that, while remaining within the three-and-a-half months duration limit prescribed by the Migratory Birds Convention, federal authorities could now open the waterfowl hunting season a few weeks earlier (e.g. August 15) in selected northern areas.[556] Relying on provincial and territorial estimates, the Canadian Wildlife Service argued that these changes would probably result in acceptable increases in harvesting. Furthermore, in reply to Aboriginal concerns about the exclusivity of their hunting rights, the Canadian Wildlife Service suggested that, in any case, Aboriginal nations should not concern themselves with the allocation of quotas to other users.[557] Despite protests, the federal government decided to stay the course and make varied early seasons for recreational hunters in northern areas part of the Canadian negotiation position for the amendment of the Migratory Birds Convention. This decision would eventually prove to be untenable.

The Multistakeholder Consultation Process

In March of 1992, the Canadian government undertook the second phase of its consultation strategy which provided for a series of workshops to be held across the country and which would now include recreational hunters and environmentalists. In order to improve the legitimacy of the process, the Canadian Wildlife Service hired a environmental non-governmental organisation, the Canadian Arctic Resources

Committee (CARC), known for its work and commitment to the northern environment to manage this phase the consultation process.[558] The Canadian Wildlife Service feared that, by organizing and directing the workshops itself, it would potentially contribute to polarize stakeholders' positions, be seen as orchestrating a complacent consultation process serving its own interests, and generally diminish the effectiveness of the exercise. By contrast, a third party known to be frequently critical of government policy would serve to legitimize the multistakeholder consultation exercise. And, in the words of a senior Canadian Wildlife Service official involved in the process, the multistakeholder consultation process would ensure that "the Canadian Wildlife Service would not be the sole lightening rode for the opposition, being alone in defence of subsistence users".

The CARC representative who handled the multistakeholder consultations remembers that the exercise seemed to have served an important educational purpose. At some workshops, some recreational hunters pointed out that it was the first time that they had a dialogue with indigenous hunters about their subsistence practices. Some misconceptions, such as the wrongful assumption that birds had to be killed to collect down, were corrected. But mostly, the state of Aboriginal rights in Canada, as interpreted by the Supreme Court of Canada in recent decisions, was explained to non-Aboriginal participants who, according to the CARC representative responsible for the exercise, became more willing to recognise the legitimacy of Aboriginal demands as a result.

Notwithstanding this claim of dialogue and learning, it should be noted however that the multistakeholder process seemed to give a disproportionate attention to Aboriginal peoples. The workshops could only be attended "on invitation" and, consequently, were not opened to all interested parties. In the end, Aboriginal peoples dominated the exercise, at least in number. Among the 120 persons listed as workshop participants in the final report, 46 represented Aboriginal organisations while only nine represented environmental non-governmental organisations and seven represented sport hunting associations.[559] Moreover, while environmentalists and recreational hunters stated positions that were quite critical of the proposed Aboriginal subsistence rules, citing such recurring problems like the lack of appropriate regulations and equality concerns, the recommendations resulting from the consultation process almost completely ignored their viewpoints.

In its final report, the Canadian Arctic Resources Committee made the following recommendations to the Canadian Wildlife Service:

- The Canadian government should affirm Aboriginal and treaty rights to kill migratory birds as needed, whenever and wherever available (including in the south), and that such rights confer Aboriginal persons a priority access before all other Canadians;
- The purpose of the spring harvest should be to meet nutritional and other essential needs, including cultural and social values (including sharing), traditional spiritual beliefs, economic well-being and necessity;
- There should be **no** non-Aboriginal hunt in the spring in Canada;
- Non-Aboriginal people who live a subsistence lifestyle should have access to waterfowl in the spring, only when resources are adequate and subject to the approval of local co-management authorities;
- Aboriginal peoples for the purpose of the spring hunt should include Indian, Inuit, Métis and non-status Indians;

- Local co-management authorities should be established where they do not exist and should include representation from all stakeholders;
- Population surveys and research should include traditional Aboriginal knowledge gathered from elders and Aboriginal hunters, and regulatory systems and traditional Aboriginal customs should both be used to foster compliance for conservation purposes.

In essence, despite the opposition of many environmentalists and recreational hunters, the Canadian Arctic Resources Committee generally endorsed the federal government's position, with some notable exceptions. Taking a more pro-Aboriginal and pro-environmental stance than the Canadian Wildlife Service, the CARC report implicitly rejected the varied season proposal for recreational hunters. With the exception of those living a subsistence lifestyle in the North, non-Aboriginal individuals were not to benefit from more generous harvesting opportunities as a result of the Migratory Birds Convention amendment.[560] Moreover, non-status Indians were to be included in the new provisions allowing subsistence harvesting during the closed season. However, despite the recommendation of the CARC, the federal government maintained its initial proposal for an earlier season for recreational hunters and did not open the door for non-status Indians when it moved into international negotiations with the U.S.

International Negotiations of the Amendments

Even if the Canadian government was now confident to have found an acceptable compromise on the domestic front, American opposition remained an important concern for the Canadian Wildlife Service. As we pointed out earlier in this chapter, Canadian officials were fully aware of the role of the U.S. Senate in the failure of the 1979 Protocol. This time around, they were determined to undermine

the potential opposition of environmentalists, recreational hunters and American States in Washington. Given the prominent transnational role played by organisations such as the Canadian Wildlife Federation and Ducks Unlimited Canada in defeating the first Protocol, more extensive consultations and a better deal at home was seen as the first step toward international success. But the Canadian Wildlife Service was not to limit its efforts to the domestic scene. It also consciously devised a strategy for directly gaining American support for its position.

In contrast to the approach adopted for the first Protocol, Canadian officials took a much more proactive stance in the 1990s. As mentioned above, the cornerstone of their international strategy was to work through the International Association of Fish and Wildlife Agencies. In the early 1980s, the IAFWA had been partly swayed by the arguments of the Canadian Wildlife Federation, which had argued that the state of Aboriginal rights in Canada and the vague wording of the proposed amendment would result in an excessive and uncontrollable indigenous spring harvest. In 1990, when the Canadian Wildlife Service began working again on a potential amendment, it sought to prevent any potential misinformation and exaggeration by an in-depth information campaign of the IAFWA members.

The senior Canadian official working on the amendment at the time realised that the best mean for this educational exercise was probably to convince the association to set up a working committee on the issue and to recruit to it some of its prominent members. Consequently, the International Association of Fish and Wildlife Agencies created a Migratory Birds Convention Ad Hoc Committee to look at spring

subsistence harvesting in the northern part of the continent in the course of 1991. The ad hoc committee was chaired by Roger Holmes, director of fish and wildlife for the Minnesota Department of Natural Resources, and it included five other American state-level wildlife officials and three provincial wildlife officials from Canada. Moreover, a number of advisors and observers were allowed to assist in the committee's work, including representatives of the American and Canadian chapters of Ducks Unlimited.[561]

While the work of the committee was shared among members and advisors, interviewees agreed that Gregory Thompson, the Canadian official leading the Canadian Wildlife Service's efforts for the amendment of the Migratory Birds Convention and an advisor to the committee, provided outstanding leadership in making the case for the amendment. At the same time as IAFWA's ad hoc committee was launching its work, Thompson also contributed significantly to placing the issue on the U.S. environmental policy agenda by presenting a paper at the North American Wildlife and Natural Resources Conference, a high-profile annual gathering of wildlife policy-makers and scientists.[562] Following his presentation, John F. Turner, the director of the U.S. Fish and Wildlife Service, wrote his Canadian counterpart, suggesting that it was now time to "aggressively and co-operatively pursue resolution" of the spring subsistence harvesting problem in Alaska and northern Canada. According to Turner, Thompson's paper would provide an excellent basis for further bilateral discussions by the two countries.[563]

From 1991 to 1993, the Canadian and American wildlife authorities essentially followed a dual process by working jointly through the IAFWA ad hoc committee and by working in parallel on their own domestic consultation processes. While the Canadian Wildlife Service went through the two-track consultation process described earlier, the U.S. Fish and Wildlife Service worked closely with the Alaska Department of Fish and Game on their own extensive consultation exercise. During 1991, several information briefings were held and documents distributed to inform the American public of the two countries' intention to negotiate a subsistence amendment to the Migratory Birds Convention. Then, in the first months of 1992, the U.S. Fish and Wildlife Service published public notices in the Federal Register describing the consultation process and inviting comments from interested parties.[564] In total, five public meetings were held across the lower 48 States and approximately 30 public meetings were held in Alaska. Finally, partly on the basis of these consultations, a draft environmental assessment exploring different amendment alternatives was then produced and released in March of 1993 and a second round of public comments were received before producing the final version.[565]

By the time the American consultation process was completed in early 1994, IAFWA's Migratory Birds Convention Ad Hoc Committee also completed its work and released a comprehensive final report that supported the negotiation of a subsistence spring harvest amendment to the Migratory Birds Convention. Moreover, the committee explicitly acknowledged that Canada and the U.S. were facing different constitutional frameworks and that appropriate amendments to the Convention should accommodate these distinctive realities. Overall, the committee

urged both countries to negotiate amendment wording that would be as precise and limited as possible, recognising the legitimate needs and rights of Aboriginal and subsistence users while ensuring that harvest levels would not significantly increase as a result. The ad hoc committee's report was adopted by the IAFWA's executive committee in March 1994.[566]

As a result of several years of extensive efforts, when they finally approached the formal international negotiations in late 1994, Canadian and American federal authorities were in a comfortable position. Both countries had undergone comprehensive consultation exercises that had allowed them to fine-tune their respective positions, involve potential opponents, reduce the level of misinformation about indigenous subsistence rights, needs and practices, and hopefully wear down some of the opposition. Moreover, by working through IAFWA, they had successfully obtained the backing of their most influential opponent of the early 1980s.

Resting on extensive preparatory work and a close working relationship over the previous years, the international negotiations were relatively speedy. Both negotiating teams involved non-governmental actors. The American negotiating team involved some indigenous peoples from Alaska as well as representatives from recreational hunting and environmental organisations. As mentioned earlier, the Canadian team relied on an advisory Aboriginal committee for feedback and liaison with indigenous communities at home. The association of these stakeholders in the negotiation process, albeit as observers or in an advisory capacity, further helped to

alleviate the potential for opposition during the Congressional approval and ratification process. By keeping them informed, stakeholders were more likely to understand the nature of political possibilities, the validity of other groups' concerns at the table and to witness the "best efforts" of government negotiators. By officially providing a channel for their input, government officials were also undermining potential accusations that some of the prominent stakeholders' interests had been disregarded during the amendment process. An argument that had been used by environmentalists and sport hunters to gain Congressional support against the 1979 Protocol.

At least two characteristics of the final agreement are revealing of the politics of the subsistence issue in the mid-1990s. Firstly, both in the period leading to the actual negotiations and the negotiations themselves, the changing constitutional status of Aboriginal rights in Canada played a determinant role in getting American interests to accept a spring Aboriginal subsistence harvest in Canada. Both the interviews with the people involved and the review of documents from the period show that the main argument advanced by Canadian and American federal authorities for gaining support for the amendment was that the new Canadian constitution, and the associated jurisprudence, made the change a constitutional requirement in Canada. Without the new subsistence provisions, the argument went, the whole continental waterfowl management regime was destined to be lost either because the closed season would become unconstitutional and practically unenforceable with regards to Aboriginal peoples or because Canada would have to withdraw

wholeheartedly from the Convention because of the *ultra vires* status of some of its core provisions.

In essence, the evolution of constitutional law in Canada allowed both Canadian and American federal authorities to reframe the issue of a subsistence amendment as one of improving current wildlife management and regulations. In the face of the inevitable legalization of the Aboriginal spring harvest in Canada, the alternative was, it was repeatedly stated, to adopt a Convention amendment that would regulate and monitor the exercise of these subsistence rights (through co-management institutions, for example) or simply accept to have these harvesting activities fall outside of the continental waterfowl conservation regime. In the best case scenario, the latter option would represent a weakening of the integrity of the waterfowl regulatory framework, potentially threatening the sustainability of bird populations; in the worst case scenario, the entire management regime would be at stake if the Convention became inoperative in Canada or had to be abrogated.

In the U.S., the constitutional status of Aboriginal rights was also of great importance. The argument was at the heart of the Canadian diplomatic strategy to lobby American Congressmen and environmentalists in Washington from the early 1990s until the time of Senate approval.[567] Canadian constitutional developments also played an important role in the analysis and deliberations of the IAFWA's Ad Hoc Committee on the Migratory Birds Convention.[568] To convey the necessity of the subsistence amendment, the extreme eventuality of Canada's withdrawal from the Migratory Birds Convention, even if it might have been overstated,[569] was also often

raised to argue for the amendments. For example, once the final agreement of amendment had been forwarded to the Senate for approval, the U.S. Fish and Wildlife Service issued a press release defending the amendments in these terms:

> Were the Migratory Birds Convention not amended, the U.S.-Canada treaty would probably have to be abrogated because the Canadian constitution guarantees a legal harvest for Canadian Aboriginal people. This would effectively end 80 years of cooperation between the governments of Canada and the United States in managing these migratory birds. Without a Convention, management of migratory birds in Canada would revert to the Provinces. Eventually the lack of strong cooperative and coherent management at the Federal level could reduce bird populations.[570]

According to a prominent representative of Ducks Unlimited Canada involved in the amendment process, these arguments stressing Aboriginal constitutional rights and the potential weakening of the management regime were very effective in overcoming the opposition of many recreational hunting organisations and environmentalists, especially in the U.S. However, even in Canada, constitutional developments, especially the *Sparrow* decision, served to alleviate the opposition of many actors who had forcefully opposed the subsistence amendment in the 1980s.

Some federal wildlife officials and the CARC representative who handled the 1992 multistakeholder consultation process agreed that these constitutional changes helped change many opponents' attitude toward an Aboriginal subsistence harvest amendment. As one of the federal official in charge of the process stated during an interview, "[recreational] hunters refused to see Aboriginals [sic] have a preferential treatment. But the reality is that the constitution gives them a special status and they have special hunting rights. People just had a hard time accepting that." The

consultation process partly served to explain the realities of Aboriginal rights to non-Aboriginal individuals and the Supreme Court's endorsement of many Aboriginal peoples' claims seemed to help legitimize the recognition of Aboriginal subsistence rights in the mind of many of them.

The final text of the 1995 Protocol reflects this evolution of thinking about Aboriginal rights in Canada and it also underscores a key difference with the American legal and cultural tradition towards indigenous peoples. While the 1979 Protocol would have essentially subjected Aboriginal access to the spring harvest to the Canadian Wildlife Service discretionary approval (through the setting of differentiated seasons), the 1995 Protocol, signed in December 1995 in Washington, explicitly recognised year-round access as a matter of constitutional rights, conditional only on conservation requirements. Moreover, while the 1985 implementation paper (detailing the implementation of the 1979 Protocol) had proposed to limit spring access to Aboriginal hunters living in designated northern areas, the 1995 Protocol, given its premise in constitutional rights, permits a year-round subsistence harvest for Aboriginal peoples throughout the entire country.

However, these terms, dictated by Canadian constitutional realities, contrast significantly with the terms concerning the American component of the agreement. While the 1995 Protocol states that American authorities are looking favourably upon co-management institutions for managing the subsistence harvest, American documents stress repeatedly that the 1995 Protocol would not grant any preferential access to the resource for any group in the U.S.[571] On the contrary, American

authorities continuously emphasise that their wildlife management policies will be founded on principles of strict equality among American citizens and access based on need.[572]

A second revealing characteristic of the 1995 Protocol is its treatment of the demands of recreational hunters and environmentalists. Dating back to 1990, Canadian wildlife authorities had seen the attribution of more generous spring hunting provisions to recreational hunters in the territories and the northern areas of the provinces as an important element to respect equity considerations and alleviate this constituency's opposition to Aboriginal subsistence rights. These considerations had been given significant importance in crafting the Canadian negotiating position. Despite Aboriginal peoples' criticism, the unfavourable recommendations contained in the final report of the multistakeholder consultation process, and on-going concerns in the U.S. about increased harvesting, the Canadian government went into the international negotiation process in 1995 demanding the required flexibility to vary the timing of hunting seasons for recreational hunters in northern areas. The fall hunting season could then open in mid-August in northern areas.

However, according to one of Canada's leading negotiators, the provisions for recreational hunters met very strong American opposition from the start. For American interests, there were two main concerns. First, environmentalists and southern recreational hunters feared that these provisions would open the hunt to too many new individuals and would represent a risk to the sustainability of bird populations. While Canadian wildlife officials tried to reassure the Americans by

claiming that the number of people involved would be limited, details about which areas would actually be covered by the early seasons were few and found to be too uncertain for American interests.

The second concern focused on the impact of these proposed provisions on the equity of the international allocation of the annual harvest. American southern recreational hunters were very concerned that a greater take by recreational hunters in the North would result in smaller quotas for them. On the one hand, the accommodation of subsistence hunters was more easily accepted since they were relatively few in number, were already illegally hunting in the spring, and their claims for greater access rested on essential needs. On the other hand, recreational hunters, especially those residing in the northern areas of the provinces as opposed to the territories, were not thought as being as deserving of special consideration. Moreover, their potential number was feared to be sufficient as to eventually force a curtailment of harvest quotas for the very large population of southern American hunters.

American federal wildlife officials were fully conscious of this opposition and they feared that the inclusion of varied season provisions for northern recreational hunters in Canada in an amendment protocol would eventually threaten its approval by the U.S. Senate. These measures, even if they satisfied Canadian recreational hunting interests, would undoubtedly antagonize American recreational hunters and environmentalists. As early as 1991, the U.S. Fish and Wildlife Service had identified

these proposed measures as problematic. In a letter addressed to the Canadian Wildlife Service, the director of the U.S. Fish and Wildlife Service pointed out that:

> "For example, the prospect of spring and summer hunting in the prairie provinces of Canada will be viewed with alarm by hunters and other waterfowl interest groups here in this country. This is because the prairie provinces are historically the most important source of ducks for U.S. hunters and they will expect to be adversely affected by spring and summer hunting in this area."[573]

In the intervening years, nothing had led them to expect a different reaction from their domestic constituency. For example, the 1994 IAFWA ad hoc committee report on the Migratory Birds Convention amendments had stressed that, while the needs of northern residents were legitimate, a *de facto* redistribution of harvest quotas in favour of northern hunters remained the primary concern of its members. It urged the Canadian government to avoid taking any measures resulting in a significant increase in harvesting.[574]

As a result of this opposition, Canadian officials were forced to make concessions during the bilateral negotiations. In response to American concerns, measures in favour of the residents of northern provincial areas were dropped and, in the end, the possibility of varying the seasons' timing for the residents of the Northwest Territories is the only provision for recreational hunters that made it into the final text of the amendment protocol.[575]

While more narrow provisions for recreational hunters equally served to reassure them, environmentalists were also able to make some distinct, even if modest, gains of their own. In contrast to the 1979 Protocol, the 1995 agreement

includes an explicit commitment to habitat conservation and biodiversity that considerably modernises the treaty's focus. Reflecting the shift in concern and philosophy of wildlife management over the previous decades, the 1995 agreement states that each government "shall use its authority to take appropriate measures to preserve and enhance the environment of migratory birds". (art. IV) In particular, "within its constitutional authority", each government commits itself to prevent damages to the birds' habitat, including damages from pollution and those caused by the introduction of foreign species, and to seek to conserve such habitat through the use of co-operative arrangements.

Moreover, while the 1979 Protocol focused almost exclusively on the economic and utilitarian value of birds, the preamble to the 1995 Protocol espouses a more comprehensive vision of the value of nature and recognises the "nutritional, social, cultural, spiritual, ecological, economic, and aesthetic values" of migratory birds. The 1995 agreement also stipulates a number of fundamental conservation principles agreed to by both countries as underpinnings of the continental management framework for migratory birds (art. II). Among these principles, we find the need to take an international approach to conservation and the agreement to ensure a variety of sustainable use of the resource as well as the protection of habitat necessary for conservation.

These measures are simply elements of "soft law" - commitments to principles without clear regulatory measures that can be enforced - but they nevertheless reveal a desire on governments' part to signify their support for some of the

environmentalists' main demands regarding continental migratory birds management. While these concessions were easy to make for governments in the 1990s, at a time when habitat conservation had already joined population management as a major focus of wildlife authorities for several decades, they also served, in the context of the Migratory Birds Convention amendments negotiations, to reassure environmentalists of their commitment to sustainability. Such reassurances, it was believed, would help alleviate environmentalists' concerns with the more generous hunting provisions granted by the treaty's amendments.

At the close of almost six years of work, Canadian and American wildlife authorities held a negotiated agreement for amending the Migratory Birds Convention and rectifying its provisions toward indigenous peoples and northern subsistence users. The Protocol Between the Government of Canada and the Government of the United States of America Amending the 1916 Convention Between the United Kingdom and the United States of America for the Protection of Migratory Birds in Canada and the United States was finally signed by the responsible ministers, with a related exchange of notes, in December 1995. Then, on 2 August 1996, President Clinton transmitted the Protocol to the U.S. Senate, asking for its "advice and consent" to ratification. At the same time, he withdrew the stalled 1979 Protocol from the Senate's order papers.[576]

Sixteen years after the failed 1979 Protocol had been transmitted to the Senate, Canadian and American wildlife authorities were undoubtedly in a much better position to gain the legislative institution's approval. In contrast to the early 1980s,

the opposing coalition was much weaker. The main opponent of the 1980s, the International Association of Fish and Wildlife Agencies, was now formally on board. Some of the most prominent recreational hunters' associations, most notably the Canadian and American chapters of Ducks Unlimited, were also defending the amendments. Having been associated to the process from the outset through their participation in the work of the IAFWA ad hoc committee on the issue, they were now more closely associated with the results of the process. Moreover, the new constitutional realities in Canada also provided new powerful arguments for wildlife federal authorities to win over potential Congressional opposition. And the extensive consultation processes in both countries had succeeded in alleviating the opposition of many groups. As a representative of a recreational hunters association put it in an interview, "Compared to 1979, there wasn't any outcry in 1995. There was more maturity and the culture [towards Aboriginal peoples] had changed. But for many people who were still unhappy, it was kind of 'approval by default'".

Notwithstanding these conditions, the memory of the 1979 Protocol's experience still loomed large for Canadian federal wildlife officials and they were determined not to let the 1995 Protocol die in the American Senate. Refusing to take for granted the Senate's approval, the Canadian Wildlife Service joined the IAFWA and the U.S. Fish and Wildlife Service in the development of a lobbying campaign focusing on American senators. Unprecedented for the Canadian Wildlife Service, this extensive international lobbying effort involved a series of individual meetings with members of the Senate's Foreign Affairs Committee as well as the production of promotional material distributed widely to Congressional offices. The package even

included a promotional video featuring Canadian Aboriginal peoples' representatives, Canadian Wildlife Service officials, as well as representatives of prominent sport hunting associations that had previously opposed a subsistence amendment, including Ducks Unlimited, endorsing Congressional approval of the Protocol.

These extensive efforts finally bore fruit in November 1997 when the U.S. Senate granted its formal approval for the ratification of the 1995 Protocol amending the Migratory Birds Convention.[577] Almost seven years after work began on a new protocol, Canadian and American wildlife authorities had finally succeeded in amending the continental management regime to accommodate the subsistence needs of northern Aboriginal peoples.

Regime change, domestic institutions and transnational relations

The events associated with the successful adoption of the 1995 Protocol tend to support my claim that domestic institutions and transnational relations can be important variables to explain international regime change. In my first set of hypotheses proposed in chapter 1, I argued that transnational coalitions of domestic actors could successfully achieve international regime change by affecting the domestic political environment of key target countries, and thereby making regime change necessary or desirable for these national states. Alternatively, I also argued that, in other cases, purely domestic factors could also bring about such changes in the domestic political environment of these states and lead to international regime change. In both cases, these hypotheses focus on sources of international policy change that have not been considered by current scholarship on international regimes.

The evidence presented in this chapter to explain the success of the 1995 Protocol amending the Migratory Birds Convention fails to support my first hypothesis. Like in the case of the 1979 Protocol, I have found no evidence that transnational lobbying by coalitions involving non-state or sub-national state actors played any significant role in re-launching international negotiations about amending the Convention. For both the Canadian and American states, a major reason for desiring the subsistence changes was still the desire to meet the legal commitments given at the time of the settlement of northern land claims with indigenous peoples. And the powerful additional motivational factors that emerged only in the 1980s and the early 1990s, especially the key constitutional decisions regarding aboriginal rights in Canada, were also essentially domestic in nature. For these reasons, while the 1995 case does not support our expectations regarding the role of transnational relations in triggering regime change, it does provide support for our second claim that changes in the domestic political environment of key states can lead to international regime change.

In the case of the 1995 Protocol, we have seen that American court decisions in the *McDowell* and *Dunkle* cases played an important role in frustrating the U.S. government's efforts to accommodate subsistence hunters in Alaska and that they served to increase domestic pressures for making changes to the continental framework for waterfowl management. But, more importantly, the *Flett*, *Arcand* and *Sparrow* decisions in Canada played a determinant role in triggering this second effort at international regime change. These decisions were the indirect result of purely domestic political dynamics arising out of the patriation of the constitution in

1982 and the subsequent evolution of constitutional jurisprudence. But their impact on the continental regime for migratory birds was very important in several respects.

Firstly, the changing jurisprudence on Aboriginal constitutional rights played an important mobilizing function for indigenous organisations. While indigenous peoples had claimed the predominance of their fundamental rights over the migratory birds regulations for decades, the case showed how important the *Flett*, *Arcand* and *Sparrow* decisions were in accentuating their pressures on the Canadian government for a change in waterfowl conservation policy. This effect of constitutional changes on the militancy of political movements has also been observed in other cases.[578] Moreover, the *Sparrow* decision provided greater legitimacy to Aboriginal peoples' historical demands, clearly boosting the validity and urgency of their claims for governmental actors, by granting these claims the partial support of the Supreme Court of Canada.

The second important effect of the *Sparrow* ruling was to effectively alter the default conditions associated with the bilateral Migratory Birds Convention negotiations with the American government. During the 1980s, the failure of the 1979 Protocol was mainly associated with a return to the status quo. The legal capacity of the Canadian government to control indigenous harvesting would not be diminished. Despite a poor historical record of enforcement regarding indigenous hunters, the Migratory Birds Convention Act still clearly superseded indigenous rights and the potential for enforcement in the event of population concerns remained intact. However, after the *Sparrow* decision, the potential for losing the Migratory Birds

Convention as an effective regulatory framework was clearly significant. American and Canadian authorities faced the prospect of being left without a management framework for effectively managing indigenous harvesting throughout the year.

Moreover, indigenous groups were clearly aware of this situation, explicitly threatening the loss of the Migratory Birds Convention and civil disobedience by indigenous hunters throughout the country. Internal memoranda from the U.S. Fish and Wildlife Service show that American authorities saw the evolution of Canadian jurisprudence as an important and credible menace to continental waterfowl management. In this respect, Canadian constitutional changes did not only affect the preferences and behaviour of the Canadian government. It also provided a significant incentive to the American government for renewing its search for an amendment to the international regime.

Overall, it seems clear that domestic factors played a very important role in driving the process of international regime change in the case of the Migratory Birds Convention. It would be impossible to fully account for the reasons underlying the amendments finally made in 1997 to the continental regime for waterfowl management without including these factors in our theoretical framework for understanding regime change.

The evidence presented in this chapter also tends to confirm my second set of hypotheses. In chapters one and two, I argued that, given the constitutional procedures prevalent in Canada and in the United States, the more fragmented nature of American institutions would make the U.S., and the United States' Senate, the

likely target of transnational coalitions opposing regime change. Consequently, the transnational politics associated with the regime change would focus on the U.S. rather than on Canada. In addition, I argued that, given the more fragmented nature of U.S. institutions, success in pushing international policy change through these institutions would require a broader and more powerful coalition of actors.

This chapter showed that, with regard to the 1995 Protocol of amendment to the Migratory Birds Convention, the presence of the U.S. Senate veto forced both national states to win the support of a broader range of non-state and sub-national state actors than they had sought in their first attempt at continental policy change in 1979. As I have shown, the much more extensive processes of bilateral and multipartite consultations were indicative of a clear desire by national wildlife officials to win over opposing stakeholders and avoid a repetition of the 1979 failure. The need to undermine the coalition of actors who had succeeded in stalling the approval of the amendment the first time led Canadian authorities to seek to win many of them over through both concessions and persuasion. Moreover, the 1995 case showed an unprecedented effort to lobby directly American stakeholders in order to alleviate their opposition to the amendment. The work of persuasion accomplished through the IAFWA working committee, the inclusion of non-state actors on the international negotiation team, as well as the direct lobby of Congress, all indicate a strategy of international policy change responding directly to the impact that the lobbying of the transnational coalition had in the 1970s and early 1980s.

The 1995 Protocol also constitutes a clear expansion of the political settlement that had been crafted by Canadian and American bureaucrats in the 1979 Protocol. The 1995 Protocol is clearly broader in scope and is reflective of a political agreement that addresses the needs and demands of a broader coalition of stakeholders. Environmentalists benefit from more progressive language on the values and principles underlying the amended Convention. Aboriginal peoples in Canada are granted access to a spring harvest throughout the country (as opposed to an access limited to northern Aboriginal subsistence users) as a matter of rights (as a opposed to as a matter of privilege dependent on administrative discretion). They also benefit from a formal commitment to assure their participation in migratory birds management through co-management institutions and to the use of traditional Aboriginal knowledge in management decisions. Finally, non-indigenous subsistence hunters and even recreational hunters in the Northwest Territories clearly won concessions. In sum, the 1995 Protocol was negotiated to meet the demands of a broader set of stakeholders than in 1979 and to alleviate potential opposition to the subsistence amendment.

These differences between the 1979 and 1995 cases are particularly significant for understanding the dynamics of international regime change for Canada. While Canadian state actors had been capable of imposing the 1979 agreement at home, even in the face of significant opposition, the capacity of the transnational coalition of actors opposing the 1979 Protocol to block its approval in the United States forced Canadian authorities to re-evaluate its strategy for policy change. It is largely the necessity to win the U.S. Senate approval that forced Canada to engage in more

extensive stakeholder consultations in the 1990s and to expand the terms of the amendment. In this regard, it is worth noting that, while the principal obstacle to amendment approval was in the U.S., it is Canadian authorities who ultimately had to expand the most the terms of the subsistence amendment to win the (even passive) support of some key groups and constituencies and consequently weaken the transnational coalition opposing the change. This seemingly paradoxical situation is suggestive of the new conditions for international governance created by the expansion of transnational relations and it militates clearly for a better understanding of the role of domestic institutions in shaping the dynamics and results of international regime change.

Overall, I conclude that the 1995 case generally supports my second set of hypotheses. As in 1979, the transnational politics associated with regime change focused on the U.S. and were particularly affected by the necessity to overcome the potential veto of the American Senate. However, in contrast to the 1979 case, the Canadian state actors were now more extensively involved in this transnational politics and they played a key role in countering the opposition of the transnational coalition of environmentalists, recreational hunters and wildlife state agencies originally opposed to an indigenous subsistence amendment. Furthermore, in order to secure the approval of the Protocol, the Canadian state actors did not only lobby American politicians and state agencies but it also chose to grant significant concessions to different stakeholders previously opposed to the amendment in the hope of gaining their support. In other words, to succeed where they had failed in 1979, i.e. successfully pushing the amendment through American constitutional

procedures, they had to broaden the group of actors favourable to the Protocol in both countries.

Finally, I must point to an apparent shortcoming of my theoretical framework that is suggested by the events of the 1995 case. We have seen that the *Sparrow* decision clearly played a major role in the politics of amending the Migratory Birds Convention. As I argued above, the decision helped to heighten the need and urgency for regime change by threatening to render ineffective the existing continental waterfowl management regime. But in fact, the 1982 constitutional reform, and the subsequent jurisprudence related to section 35, also had an important impact on the strategies of state and non-state actors during the amendment process. By threatening the effectiveness of the Convention, it both affected the bilateral negotiations and weakened the resistance of subsistence rights opponents.

Once the Canadian Wildlife Service decided that the acknowledgement of Aboriginal subsistence rights was inevitable and that building a management regime more inclusive of Aboriginal communities seemed a better management and political strategy, its representatives also shrewdly seized this new argument to make their case in the U.S. Repeatedly, the threat of losing the Migratory Birds Convention as an effective cornerstone of the North American waterfowl management regime because of emerging conflicts with the Canadian constitution was used by Canadian authorities promoting a the subsistence amendment in the U.S. This argument was presented in meetings with American stakeholders and it was repeatedly made during IAFWA meetings. It was also emphasised in the documents of the IAFWA, the

Canadian and the American governments dealing with the Migratory Birds Convention. It is clear that contemplating the possibility of loosing the entire management regime helped subsistence rights opponents find new virtues in a negotiated amendment for subsistence users.

This factor highlights a potential short-coming of my original theoretical framework for understanding international regime change. The original framework emphasised exclusively the broad institutional constraints associated with treaty-making in national constitutions, most notably the divergent roles of the U.S. Congress and the Canadian Parliament. In light of the findings, it now seems warranted to also acknowledge the potential impact of other domestic institutional features in structuring the politics associated with continental governance. In particular, the role of courts as an access point to the political process and the importance of specific constitutional rights constraining the realm of possible agreements appear to be important institutional factors that can affect the evolution of international regimes. I return briefly to this point in the general conclusion of the dissertation.

Conclusion

This chapter examined the events that led to the successful negotiation and ratification of the 1995 Protocol amending the Migratory Birds Convention. It showed that some key domestic developments, namely a series of court decisions in Canada and the United States, provided renewed momentum for the modification of the continental regime for managing migratory birds. It also showed that domestic

constitutional procedures and institutions played an important role in structuring the politics associated with regime change. As in the case of the 1979 Protocol, the necessity to overcome the potential veto of the American Senate focused much of the political activities surrounding the amendment on the U.S. However, in contrast to the events of the 1979 case, Canadian state actors were also very active in influencing the outcome in the process in the United States, lobbying senators but more importantly winning over American wildlife state agencies and recreational hunters. Moreover, I have argued that the same necessity to weaken the transnational coalition that had defeated the 1979 Protocol also led Canadian authorities to expand the terms of the 1995 Protocol by granting concessions to some opponents. Overall, the chapter demonstrated the importance of domestic institutions and transnational coalitions for fully understanding international regime change.

CONCLUSION

In the field of environmental policy, international regimes have progressively taken more importance over the last decades. The deterioration of the global commons, the salience of transboundary pollution problems and the difficult international management of shared migratory resources, coupled with greater concerns for sustainability, have led to the multiplication of the number of international agreements addressing international environmental issues. As a result, policy and international relations scholars have also paid more attention to the formation and dynamics of these regimes. And for good reasons: making sense of national and international environmental politics will increasingly require a better understanding of how these international regimes come to exist, how they impact environmental management and how they change over time.

Amongst past and current efforts to understand international regimes, the study of regime change has been one of the least explored areas of research. As Oran Young recently argued, it is essential that regime theorists soon develop and pursue an agenda of research on this important problem. This dissertation constitutes an early effort to investigate the dynamics of regime change in the context of an increasingly globalized politics. The theoretical framework proposed has drawn attention to the influence of transnational coalitions of non-state and sub-national state actors and of domestic constitutional procedures for understanding international regime change. Up to now, these factors have been under-investigated in the writings dealing with this question.

As I have argued in chapter one, the origins of international regime theory in the discipline of international relations have led it to under-estimate to the potential role of non-state and sub-national state actors. Explanations of regime formation and preliminary examinations of the sources of change have reproduced a convenient ontological division between the realm of domestic and international politics and they have relied excessively on a concept of national states as exclusive and unitary actors in regime politics. While this convenient way of looking at the politics of regimes may have been justifiable in the past (although this is also certainly questionable), I have argued that an increasingly globalized world renders it increasingly unproductive for analytical purposes. Increasingly, domestic non-state actors have the means and willingness to cross national boundaries and engage in transnational political behaviour in the hope of gaining greater influence on the international decisions that will affect their lives. Such a development necessitates that theoretical models aimed at understanding international regime change account for the possibility that domestic non-state actors will play a non-trivial role in initiating and influencing such changes.

The exploratory framework that I presented in this dissertation proposed to conceive of the globalized politics of international regime change as deploying itself within a series of more unified political spaces where national boundaries bear less significance. It proposed in particular to identify non-state and sub-national state actors as real political forces in regime change and to recognize the non-trivial influence of the domestic institutional environment of relevant countries. To do so, I relied on the concept of transnational coalitions and on a detailed consideration of the

constitutional treaty-making procedures of Canada and the United States (provided in chapter two) to identify two sets of exploratory hypotheses that would be relevant for the study of bilateral regimes between the two countries.

The first set of hypotheses focused on the domestic sources of international regime change. The first hypothesis postulated that transnational coalitions of non-state and sub-national state actors could bring about international regime change by creating domestic political conditions in key target countries that would render such changes desirable for national states. Successful transnational strategies of this kind could be achieved in a number of ways, ranging from appeals to domestic political opinion to more direct impacts on state decision-makers. However, I also argued that we should make room for the possibility that the changes in domestic political conditions leading to international regime change have no relationship to transnational political behaviour. In sum, my second hypothesis about the sources of regime change – one that is not related to a globalized politics – is that purely domestic changes may affect the desirability or effectiveness of international regimes for national states and lead to international regime change.

The second set of hypotheses that I proposed in chapter one, and then refined in chapter two, tries to account for the role of domestic institutions in structuring the transnational politics of international regime change. I hypothesized that, because of the importance of institutional veto points in the treaty-making process, transnational coalitions seeking changes would need to be broader and more powerful to succeed in target countries that have more fragmented domestic institutions. The same logic led

me to propose a related second hypothesis. Conversely, the same transnational coalitions seeking to block international regime change should be more successful in target countries with more fragmented institutions. This latter hypothesis also has some implications for the general dynamics of transnational politics regarding international regime change. If we expect it to be easier to block undesired changes by targeting countries with more fragmented and permeable institutions, then we should expect that, when such opposing coalitions exist, they will focus their activities on the country with the more fragmented institutions. In other words, the countries with the more fragmented institutions would become the privileged site of struggle against international regime change.

This second set of hypotheses remains too general for an application to a specific case study. For this reason, I dedicated the second chapter of the dissertation to an in-depth examination of the constitutional procedures of Canada and the United States regarding the negotiation and implementation of international treaties. This examination revealed that, at least regarding treaties ratified before 1931, American institutions were more fragmented than Canadian institutions. On this basis, I argued that, in the case of bilateral regimes involving Canada and the United States, we should anticipate the transnational politics of regime change to focus on the United States, and especially the American Senate. Moreover, I argued that, to be successful in achieving change, the American institutions would require the formation of a broader and more powerful coalition of actors in support of change than would the Canadian institutions. Conversely, a same coalition of non-state and sub-national

state actors should have greater success in preventing change through the more fragmented institutions of the United States than would be the case in Canada.

Amending the Migratory Birds Convention

Using this exploratory theoretical framework, the dissertation then provided an in-depth analysis of the politics that characterized the two consecutive attempts to amend the Canada-U.S. Migratory Birds Convention between 1978 and 1997. Here, I pursued a dual objective. I wanted to provide a first empirical test of the hypotheses derived from my theoretical framework for analyzing international regime change. But I also sought to provide an original account of these attempts to deal with the northern subsistence rights controversy as it related to waterfowl harvesting. In other words, I intended to contribute to our existing knowledge of North American environmental and indigenous policies by explaining part of the political history of this important controversy.

At the heart of the subsistence controversy is the failure to account for the needs and the rights of indigenous peoples, especially in the North, to harvest waterfowl during the spring and summer seasons. Early in the last century, Canadian and American authorities disregarded the special conditions of northern Aboriginal peoples in Canada and Alaska in their quest for obtaining a landmark international agreement to protect the declining populations of migratory birds in North America. As I argued in chapter three, this unjustifiable decision most likely resulted from political expediency and from the negligible political weight of northern

constituencies at the time more than from prejudice or genuine oversight. But it nevertheless created an important injustice and a policy problem difficult to resolve.

Once the Migratory Birds Convention had become the cornerstone of migratory birds protection and waterfowl management on the continent, changing its provisions bore the potential of displeasing influential constituencies. As I showed in chapters four and five, granting special harvesting rights to indigenous subsistence hunters proved to be immensely unpopular with many environmentalists and recreational hunters on both sides of the Canada-U.S. border. The claims of indigenous peoples were solid. They rested on exceptional and fundamental needs for culture, nutrition, social integration and spirituality. Moreover, with time, indigenous claims were also firmly rooted in calls for justice and ancestral rights. But notwithstanding the forcefulness and legitimacy of these claims, the fear that greater harvesting of waterfowl species during their reproductive season would threaten the sustainability of bird populations was enough to raise strong opposition.

Fuelled by additional concerns about the willingness and capacity of governments to appropriately regulate indigenous harvesting, recreational hunters and environmentalists found themselves in agreement about the undesirability of amending the Convention. For recreational hunters in particular, threats to the sustainability of waterfowl populations could easily be envisaged to translate into reduced hunting quotas. However, as I showed in chapter five, these concerns over the size and distribution of the waterfowl resources were also accompanied by fundamental differences in values which served to strengthen the opposition to the

demands of indigenous peoples. Distrust about Aboriginal hunting ethics and traditional knowledge as a partial substitute to scientific management and a conception of justice in a liberal society seen as incompatible with special group rights also largely contributed to bring some environmentalists and recreational hunters to oppose any indigenous subsistence amendment to the continental waterfowl management regime.

The political consequence of the clash of interests and values described in chapters four and five is that, when the Canadian and American governments moved in the late 1970s to amend the Migratory Birds Convention in favour of indigenous subsistence hunters, they encountered opposition from environmentalists and recreational hunters on both sides of the border. To establish whether these non-state actors played a significant role in the Convention amendment process, a contextualized analysis of the events between 1978 and 1997 was warranted. Consequently, in chapters six and seven, I provided such a detailed examination of these events. In these chapters, I both provided an explanation of the consecutive failure and then success of the international efforts to amend the continental migratory birds management regime and thereby offered a first empirical application of my framework for analysing international regime change.

With one important exception, the case of the Migratory Birds Convention amendment provided considerable support to my hypotheses. The exception regards the role of transnational relations as a source of international regime change. My analysis of the political conditions that led the Canadian and American governments

to suddenly attempt to amend the Convention in 1978 and then to renew their efforts in the mid 1980s revealed no evidence that the transnational politics of non-state actors was an important motivational factor. However, the analysis supported my second hypothesis about purely domestic factors leading to international regime change. In the case of the Migratory Birds Convention, the settlement of important land claims with northern indigenous communities in Alaska and Canada seems to have been the major factor contributing to the decision of American and Canadian authorities to amend the Convention in favour of northern subsistence hunters. And the promises and legal commitments by national governments to seek such changes were essentially granted in an effort to buy indigenous approval of the industrial development of northern natural resources.

Furthermore, I showed in chapter seven that a series of court decisions in Canada and the United States, namely the *Flett*, *Arcand*, *Sparrow*, *Dunkle* and *McDowell* decisions, were the more important factors that led to a renewal of the amendment process and ultimately to the negotiation of the 1995 Protocol. The Canadian decisions in particular did not only change the domestic political conditions in Canada, increasing the pressures for international regime change. They also contributed significantly in increasing the pressures for an amendment in the United States and provided a powerful argument for the Protocol's ratification.

The only exception to these domestic factors could be found in the pressures created in the United States by a court decision preventing Alaskan rural inhabitants from benefiting from the more liberal subsistence harvesting regulations granted by a

conservation treaty signed with the Soviet Union because of the stricter Canada-U.S. Convention. However, as I argued in chapter six, while the conflict between these two international regimes represent an international source of regime change, it was secondary and its significance was greatly enhanced by the fact that the U.S. Congress determined that implementing the Soviet-U.S. treaty provisions would be a way to meet the promises it had made to the Alaskan indigenous peoples in domestic agreements.

While transnational relations have not played a role in triggering regime change in the case of the Migratory Birds Convention amendments, the case nevertheless clearly showed that transnational coalitions of non-state actors can have significant influence over the outcome of international regime change. In our case, the coalition of environmentalists, recreational hunters and eventually sub-national state agencies opposing the subsistence amendment played a crucial role in the outcome of the amendment process and influenced the overall political dynamics of regime change.

In fact, the case study also provided considerable support for my second set of hypotheses concerning the influence of domestic institutions. As I had hypothesized, the transnational coalition opposing the subsistence amendment was more successful in its efforts by focusing on the more fragmented American institutions. In 1979, while environmentalists, sport hunters and provincial wildlife agencies were unable to bring the Canadian government to change its position on the issue, the efforts of the coalition were much more successful in the United States. As chapter six has shown, the transnational coalition's campaign, including its success in gaining the

support of the IAFWA and state wildlife agencies, was sufficiently successful to credibly threaten the future of the Protocol in the U.S. Senate. In fact, it is only when the American government was forced to suspend the ratification process because it felt that it would loose in the Senate that the Canadian government agreed to reconsider the terms of the amendment and negotiate an implementation report. And, in the end, the incapacity to secure the U.S. Senate's approval is essentially what permanently stopped the 1979 Protocol.

The evidence of the 1995 Protocol case also largely confirmed my second set of hypotheses. In chapter seven, I showed that, for fear that the transnational coalition that had defeated the 1979 Protocol would repeat its accomplishment, Canadian wildlife authorities adopted an entirely different approach to seeking international regime change. In particular, it undertook a major process of consultation abroad and at home in an effort to weaken the coalition of non-state and sub-national state actors that still opposed the subsistence amendment. At home, Canadian state actors consulted, persuaded and eventually granted concessions to stakeholders who had traditionally been hostile to the subsistence amendment in an effort to narrow the coalition of actors that could oppose a second amendment proposal in both countries.

Abroad, in cooperation with the American government, it decided to work through the International Association of Fish and Wildlife Agencies to win over some of the key players that had killed the 1979 agreement by alleviating the concerns of sub-national state wildlife officials. Similarly, by directly associating the recreational hunting group Ducks Unlimited to the extensive study produced to inform the

IAFWA's decision-making process, Canadian and American authorities also sought to narrow the set of actors who could credibly oppose a new protocol of amendment. Finally, they even engaged in a lobbying campaign targeting American senators.

These extensive efforts, especially by the Canadian government, tend to confirm that the more fragmented American institutions do not necessitate transnational coalitions to be as broad and powerful to prevent regime change. While the Canadian government, facing fewer veto points and hence having more control over the fate of its decisions regarding international regime change, would have been perfectly able to push through the subsistence amendment in 1979, it was nevertheless forced in 1995 to seek the approval of a greater number of stakeholders than its own institutional context would have required in order to ensure the approval of the amendment in the American Senate. To put it differently, Canadian and American authorities had to work hard at undermining the coalition of opponents that had killed the 1979 Protocol in order to ensure that the coalition would not be sufficiently broad and powerful to prevent ratification again in 1995.

The case study supports my claim that our understanding of international regime change would benefit from taking into account the role of domestic conditions, transnational coalitions of non-state and sub-national state actors, and domestic institutions. The politics of amending the Migratory Birds Convention, including the contrasting fates of the 1979 and the 1995 protocols, could not have been effectively explained without considering for these factors.

Notes on a future research agenda

In addition to these positive results, the case of the Migratory Birds Convention suggests a number of insights about the relation between domestic and international politics that could constitute promising avenues for further research. Firstly, the influence of court decisions in the politics of amending the Convention, and the exceptional importance of the *Sparrow* decision in particular, underscores the importance that judicial institutions and specific constitutional norms unrelated to treaty-making can play in the politics of regime change. The ability of domestic opponents to access judicial institutions and to play on substantive constitutional provisions regarding the issue at the heart of the international regime made a significant difference. For example, the American hunters' success in using the courts to hinder national and state efforts to liberalise indigenous subsistence harvesting without amending the Convention and the ability of Canadian indigenous peoples to use section 35 of the Constitution Act, 1982 to change Canadian jurisprudence regarding their subsistence rights clearly influenced the evolution of the continental regime regarding waterfowl management.

This observation seems to militate for the inclusion of the courts and constitutional rules related to the substantive regime issue (as opposed to the broader rules structuring the treaty-making process) in our framework of analysis. Under my first set of hypotheses, these factors were subsumed under the broader category of "changing domestic political conditions" that could bring about international regime change. However, our understanding of regime change may be advanced by investigating in more detail the institutional characteristics that make such domestic

changes possible. Would regimes whose key member countries have more accessible judicial systems and more active courts be more prone to frequent changes as a result? Will countries with more accessible judicial systems be more frequent targets for transnational coalitions? Will transnational coalitions be comparatively more successful in advocating regime change in these countries?

This avenue of research underscores a more general limitation of the framework and analysis presented in this dissertation. Despite acknowledging the more complex nature of domestic institutional conditions affecting politics and policy-making in the first section of chapter two, the dissertation then reverted to a more narrow focus on the macro-institutional differences represented by constitutional procedures regarding treaty-making. While this approach seems reasonable in a first effort, it obviously overlooks the potential importance of other institutional differences. For example, do the institutional specificities associated with legislative committee structures make a difference? For example, in the case of the Migratory Birds amendment, the 1979 Protocol never made it out of the Senate Committee on Foreign Relations. For all practical purposes, the transnational coalition seeking to block the Protocol probably only had to influence the members of this committee to threaten withholding its approval. Would less powerful committees and different parliamentary rules made a difference in the outcome? How should we account for these more minor institutional factors? In sum, a productive avenue for further research might be to attempt to account better for the true complexity of domestic institutions.

Secondly, the behaviour of Canadian state actors in our case raises other interesting questions about the strategic competencies of state actors in contemporary international bargaining. The repeated decisions of the Canadian government to push ahead with the 1979 Protocol despite opposition by domestic non-state and sub-national state actors suggest a mindset of state actors that is out-of-synch with existing transnational realities. Canadian state actors did not appear to fully understand the potential effectiveness of transnational action, repeatedly under-estimating the impact of the transnational coalition in the U.S. and seemingly relying on traditional claims of sovereignty to downplay the importance of non-state and sub-national state opposition abroad. According to a high-level Canadian bureaucrat at the time, the Canadian Wildlife Service simply assumed that many environmentalists and most sport hunters would be opposed to any amendment allowing for an Aboriginal subsistence harvest during the spring. As a consequence, a decision was made to avoid consulting them. "Our feeling was that 'the least they knew, the better it was'".[579]

As it turned out, this decision was an important strategic error. Maybe working on the basis of their own experience in a less fragmented domestic institutional environment where state decisions can more easily be ratified in the face of opposition, they failed to foresee how domestic and foreign opponents could use the more fragmented American institutions to block the Protocol. Such miscalculations raise interesting questions about the ability of national state actors to adapt to a world of declining sovereignty and about the role of policy learning in the adaptation of political actors to the new world brought into existence by globalisation processes.

However, their radically different approach in the case of the 1995 Protocol also raises the real possibility of social learning in international policy-making and illustrates the ability of national state actors to adapt to a world of declining sovereignty.

If the history of the Migratory Birds Convention amendment provided evidence of social learning by policy-makers, it suggests the possibility of further comparative and historical research on this topic. What is the role of social learning in the adaptation of political actors to the new world brought about by globalisation processes? Would past or subsequent bilateral negotiations for supranational wildlife governance reveal the same strategic errors by Canadian state actors? Would similar strategic miscalculations be common in other fields of supranational governance? Did Canadian environmental policy-makers learn from the history of the Migratory Birds Convention in negotiating the recent changes in the continental regime managing the pacific salmon resources?

The same line of reasoning would suggest the necessity to investigate further the involvement of state actors in domestic politics of their regime partners. I showed that, in the case of the Migratory Birds Convention amendment, Canadian state actors got more directly involved through transnational action in the domestic politics of regime change in the United States in order to ensure their success. If we acknowledge the importance of transnational coalitions of non-state and sub-national state actors in the politics of regime change, it is only normal that we should expect national state actors to respond by getting increasingly involved in the domestic

politics of their regime partners when desired changes are threatened by these coalitions. Would a series of case studies confirm this trend?

Finally, we must acknowledge the obvious limitation of the dissertation as a single exploratory case study. If my framework, and the hypotheses derived from it, is to be accepted as more solid contribution to our understanding of international regime change, it will be necessary to apply it to a broader array of empirical cases. The evolution of North American bilateral environmental regimes would be a good place to start. For example, the pacific salmon or air quality (smog and acid rain) agreements would make good case studies. The framework of the dissertation could also be easily applied to other areas of bilateral relations, such as border controls or common defence. Moreover, while a close examination of their specific institutions would be necessary, the framework could also be used to analyse the evolution of bilateral regimes involving other countries. A more challenging avenue of research will be to expand my framework for understanding the influence of transnational politics and domestic institutions to cases of multilateral regimes. In this dissertation, my task has been greatly simplified by my focus on Canada and the United States. But what are the implications for the study of changes of the more complex multilateral regimes dealing with the ozone layer or climate change?

While the challenges represented by this research agenda are important, such a more systematic attempt at thinking about the importance of domestic factors and transnational relations in the evolution of international regimes provide us with a better understanding of governance in a time of globalized politics.

ENDNOTES

1 In the dissertation, I use the terms "Aboriginal" and "indigenous" interchangeably to refer to those communities, peoples or nations that have an historical continuity with pre-invasion and pre-colonial societies that developed on their territories and still consider themselves as being distinct from other communities now prevailing in those territories. Aboriginal or indigenous peoples are considered cultural entities (as opposed to primarily "racial" groupings) deriving from the original communities living in North America. For an extensive discussion of the cultural basis of aboriginal nationhood, see Canada (1996) *Final Report of the Royal Commission on Aboriginal Peoples*, Ottawa, Canada Communications Group Publishing.

2 As we will see in chapter 3, the Migratory Birds Convention rests on three main regulatory provisions. First, the Convention imposes a total ban on killing migratory insectivorous and other non-game birds. Secondly, the Convention prohibits the taking of game birds, essentially waterfowl species, from March 10 to September 1 in order to protect them during their reproductive season. Finally, to alleviate excessive harvesting and protect game bird populations, the Convention also limits the length of the annual opened season to a maximum of three-and-a-half months. By instating this continental regulatory regime, the Convention contributed significantly to the curtailment of the over-harvesting that had seriously threatened the sustainability of migratory bird species migrating between the two countries early in the twentieth century.

The distinction between game, non-game and insectivorous species of birds is not straightforward. For example, Aboriginal peoples eat some species that are not typically considered game birds by non-Aboriginal recreational hunters. For the purpose of the continental regulatory regime, the Convention specifies which species are covered by its provisions and under what category the different species fall. The overwhelming majority of species classified as game birds are waterfowl species. The listing of individual species in the Convention led to some pressures to update its provisions to reflect advances in avian taxonomy. Some important non-game birds, such as many raptors, were also left out of the Convention for unknown reasons.

3 For an earlier review and a notable conceptual exploration of this literature, see Oran R. Young (1989) International Cooperation: Building Regimes for Natural Resources and the Environment, Cornell University Press. More up-to-date reviews can be found in Oran R. Young (1994) International Governance: Protecting the Environment in a Stateless Society, Icatha, Cornell University Press, especially chapter 1; and in Olav S. Stokke (1997) "Regimes as Governance Systems" in Oran R. Young, ed., Global Governance: Drawing Insights from the Environmental Experience, Cambridge, The MIT Press, 27-63.

4 The recognition of the importance of international institutions in international politics and policy-making makes possible the analysis of international politics as a middle point between politics as state interactions in an international state of nature and as politics mediated by the centralized authority of international organizations. Far from reflecting a state of chaos, the existence of anarchy in many areas of international policy reflects the existence of a normative and rule-based environment that constrains and regulates

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the interactions of state and non-state policy actors, even in the absence of central organisation.

5 Discussing governance in the context of regime theory, Oran Young argues that "at the most general level, governance involves the establishment and operation of social institutions -- in other words, sets of rules, decision-making procedures, and programmatic activities that serve to define social practices and to guide the interactions of those participating in these practices". In this perspective, governance is essentially rules-based and there seems to be no possibility for governance without regimes (with the exception of an improbable world government). See O. Young (1997) "Rights, Rules, and Resources in World Affairs" in Oran R. Young, ed., Global Governance: Drawing Insights from the Environmental Experience, Cambridge, The MIT Press, 4.

6 For List and Rittberger, the spread of international regimes reflects a change in the nature of international society and in the strategies of national states. National states are slowly abandoning their predominant reliance on self-held strategies for the management of interdependence in favour of governance strategies. Only by relying on a new understanding of governance, i.e. through the acceptance of norms and rules that limit their autonomy, can national states assure their resilience and development in an increasingly ecologically, economically and security-wise interdependent world. In sum, the multiplication of regimes can be conceived as a state response to growing international complexity and interdependence. See Martin List and Volker Rittberger (1992) "Regime theory and international environmental management" in Andrew Hurrell and Benedict Kingsbury, eds., The International Politics of the Environment, Oxford, Clarendon Press, 108-109.

7 O. Young (1999) Governance in World Affairs, Ithaca, Cornell University Press, 5. This definition is similar to other prominent definitions found in the literature. For a slightly different definition, see Gail Osherenko and Oran R. Young (1993) "The Formation of International Regimes: Hypotheses and Cases" in Oran R. Young and Gail Osherenko, eds., Polar Politics: Creating International Environmental Regimes, Icatha, Cornell University Press. A more often quoted definition is probably Stephen Krasner's, who defines regimes "as sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations". See S. Krasner (1983) "Structural causes and regime consequences: regimes as intervening variables", in S. Krasner, ed., International Regimes, Ithaca and London, Cornell University Press, 2.

8 For an extensive description of many environmental regimes, see Lynton Caldwell, International Environmental Policy: From the Twentieth to the Twenty-First Century, third edition, Durham, Duke University Press, 1996, especially chapters 8 and 9.

9 Conceptualising regimes as social institutions allows analysts to fully account for the importance of norms that have not been codified and formalised through the negotiation of an international treaty but which are nevertheless important in structuring the behaviour of state actors in international society. Similarly to unwritten constitutional conventions in the realm of domestic governance, such as elements of ministerial responsibility in parliamentary systems, unwritten norms can also develop in the context of international regimes which gain the compliance of states. Often unwritten norms can develop in the context of more formal regimes to supplement the negotiated arrangement or to clarify aspects of the formal regime that hinder its operationalisation. In definitive, regimes can vary greatly in their degree of formality and will often be composed of a

mix of written and unwritten conventions. One should note that, despite this point, a vast majority of studies of regimes focus mostly on negotiated treaties. See Oran R. Young (1989) International Cooperation: Building Regimes for Natural Resources and the Environment, Icatha, Cornell University Press, 24.

10 According to Krasner, it is "the infusion of behaviour with principles and norms that distinguishes regime-governed activity in the international system from more conventional activity, guided exclusively by narrow calculations of interest". S. D. Krasner (1983) "Structural causes and regime consequences: regimes as intervening variables", in S. D. Krasner, ed., International Regimes, Ithaca and London, Cornell University Press, 3. On the distinction between the two concepts, see Martin List and Volker Rittberger (1992) "Regime theory and international environmental management" in Andrew Hurrell and Benedict Kingsbury, eds., The International Politics of the Environment, Oxford, Clarendon Press, 90.

11 Such an approach is very wide-spread in the literature and is adopted by many authors discussed throughout the chapter. A strong statement of an interest-based approach can be found in Arthur Stein (1983) "Coordination and collaboration: regimes in an anarchic world" in S. D. Krasner, International Regimes, Icatha and London, Cornell University Press, 115-140.

12 Such a view of the formation of regimes has been criticized on two accounts: it conveys a view of the evolution of institutions as a result of purposeful rational choice by actors that is problematic for many sociologists of the new institutionalism and it suggests a degree of functionality that can be disturbing to many others. In response, many authors point out that the fact that states purposefully enter into bargaining to create regimes to solve collective action problems does not mean that the messy result of such bargaining works to adequately solve these problems or actually reflect the conscious choice of any individual actor. Moreover, Young points out that in some cases, which he calls "spontaneous regimes", treaties are signed that simply formalises social practices that had evolved through an informal and uncoordinated process of interaction which does not necessarily reflect the exercise of conscious choice. In some of these cases, treaties are never drafted or signed and the prevalent regime is solely constituted of established and recognised but non-written conventions.

13 For evidence that regime scholars hold this view, see Oran R. Young (1983) "Regime dynamics: the rise and fall of international regimes" in S. D. Krasner, International Regimes, Ithaca and London, Cornell University Press, 104-105; Oran R. Young (1994) International Governance: Protecting the environment in a stateless society, Ithaca and London, Cornell University Press, 91-95; and Donald J. Puchala and Raymond F. Hopkins (1983) "International regimes: Lessons from inductive analysis" in S.D. Krasner, ed., International Regimes, Icatha, Cornell University Press, 66-67.

14 Susan Strange (1983) "Cave! Hic dragones: A Critique of Regime Analysis", in S.D. Krasner, ed., International Regimes, Icatha, Cornell University Press, 337-354. This criticism of regime theory as being naively understating the essential role of state power in international relations is a common criticism formulated by realists and structural realists who tend to see institutions as mere epiphenomena.

15 Other, more moderate, structural realists adhere to the utilitarian approach for some cases but continue to stress that, in other cases, states seek to maximize benefit differentials among them in a zero-sum game that excludes a utilitarian approach to regime formation. See the discussion in Stephen D. Krasner (1983) "Structural causes

and regime consequences: regimes as intervening variables", in Stephen D. Krasner, ed., International Regimes, Ithaca and London, Cornell University Press, 7-8.

16 For a discussion of this hypothesis, see Duncan Snidal (1985) "The limits of hegemonic stability theory", International Organisation, no.39, 579-614; Robert O. Keohane (1980) "The theory of hegemonic stability and changes in international economic regimes, 1967-77" in Ole R. Holsti et al., Changes in the International System, Boulder, Westview; and Robert O. Keohane (1984) After Hegemony: Cooperation and Discord in the World Political Economy, Princeton, Princeton University Press. I should note that these authors are generally regarded as critics of hegemonic stability theory. For the work of an exponent of the hypothesis, see Robert Gilpin (1987) The Political Economy of International Relations, Princeton, Princeton University Press.

17 There are variants of this hypothesis. While some others emphasise the coercive power of hegemonic states to impose self-serving regimes on other states without regards to their preferences, other authors espouse a more benign view of domination and stress the fact that hegemonic states essentially bear the costs of establishing and enforcing the regime which truly are public goods. The *hêgemôn* does not act altruistically, as it may hope to establish a regime that will serve its interests in the long-run or to derive some other benefits (prestige, future influence, etc.), but it does not necessarily exploit other members either. For this more qualified version, see Charles P. Kindleberger (1981) "Dominance and leadership in the international economy", International Studies Quarterly, no.25, 242-254; and Charles P. Kindleberger (1986) "International public goods without international government", American Economic Review, no.76, 1-13.

18 See Oran R. Young (1994) International Governance: Protecting the Environment in a Stateless Society, Ithaca, Cornell University Press.

19 Owen Greene (1996) "Environmental regimes: effectiveness and implementation review" in John Vogler and Mark F. Imber, The environment and international relations, London, Routledge, 198. For an example of a case, see Anne Fikkan, Gail Osherenko, and Alexander Arikainen (1993) "Polar Bears: The Importance of Simplicity" in Oran R. Young and Gail Osherenko, eds., Polar Politics: Creating International Environmental Regimes, Icatha, Cornell University Press, 96-151. With the exception of the ozone regime, none of the cases analysed in this book showed the presence of an hegemonic state to be required for regime formation (see page 229-231).

20 Oran R. Young (1994) International Governance: Protecting the environment in a stateless society, Ithaca and London, Cornell University Press, 89-91; and Elizabeth Riddell-Dixon (1997) "Individual leadership and structural power", Canadian Journal of Political Science, 30:2, 257-283.

21 In this case, costs come not only in the form of sanctions or retaliation from other states but also simply attached to the inability to capture potential benefits without engaging in cooperative behaviour. For a review of compliance mechanisms, see Oran R. Young (1989) International Cooperation, Icatha, Cornell University Press, chapter 3.

22 Ernest B. Haas (1983) "Words can hurt you; or who said what to whom about regimes", in S.D. Krasner, ed., International Regimes, Icatha, Cornell University Press, 26-27.

23 Donald J. Puchala and Raymond F. Hopkins (1983) "International regimes: Lessons from inductive analysis" in S.D. Krasner, ed., International Regimes, Icatha, Cornell University Press, 89.

24 Rational choice scholars would also emphasise the excessive information costs in making these decisions. See Robert O. Keohane (1983) "The demand for international regimes" in S.D. Krasner, ed., International Regimes, Icatha, Cornell University Press, 153-155. However, one could also argue that working under such a "veil of ignorance" (even if imperfect) would predispose states toward mutually-beneficial cooperation as they remain unsure about the ultimate distributive outcomes of the settlement.

25 Robert O. Keohane (1983) "The demand for international regimes" in S.D. Krasner, ed., International Regimes, Icatha, Cornell University Press, 141-171; and Oran R. Young (1983) "Regime dynamics: the rise and fall of international regimes" in S. D. Krasner, International Regimes, Ithaca and London, Cornell University Press, 103. This point has an added implication. Regimes do not solely serve to solve collective action problems. They also constitute an institutional response to the problem of managing growing social complexity.

26 Alexander Wendt (1994) "Collective Identity Formation and the International State", American Political Science Review, vol.88, 384-96. See also Oran R. Young (1997) "Global Governance: Toward a theory of decentralized world order" in Oran R. Young, ed., Global Governance: Drawing insights from the environmental experience, Cambridge, The MIT Press, 275-277.

27 For a useful review, see "Appendix" in Oran R. Young and Gail Osherenko, eds., Polar Politics: Creating International Environmental Regimes, Icatha, Cornell University Press, 263-266.

28 O. Young (1999) Governance in World Affairs, Ithaca, Cornell University Press, chapter 6.

29 O. Young (1999) Governance in World Affairs, Ithaca, Cornell University Press, chapter 6.

30 See Mathew Paterson (1996) "IR theory: Neorealism, neoinstitutionalism, and the Climate Change Convention" in John Vogler and Mark F. Imber, eds., The environment and International Relations, London, Routledge, 68-70; and Peter Willetts (1996) "Who cares about the environment?" in John Vogler and Mark F. Imber, eds., The environment and International Relations, London, Routledge, 120-137.

31 One of the most determined advocates of this narrow focus on sovereign states is neorealist Kenneth Waltz. See Kenneth Waltz (1979) Theory of World Politics, Reading (Massachusetts), Addison-Wesley.

32 A good example is O. Young (1999) Governance in World Affairs, Ithaca, Cornell University Press, 8-11.

33 John Vogler (1996) "The environment in International Relations: legacies and contentions" in John Vogler and Mark F. Imber, eds., The environment and International Relations, London, Routledge, 10.

34 Martin List and Volker Rittberger (1992) "Regime theory and international environmental management" in Andrew Hurrell and Benedict Kingsbury, eds., The International Politics of the Environment, Oxford, Clarendon Press, 86-87. Interestingly, in critically reviewing game-theoretical explanations of regime formation, they point out that the assumption of rational actors ignores the fact that states are internally divided and that they must compose with societal pressures in making decisions (see page 100).

35 Olav S. Stokke (1997) "Regimes as Governance Systems" in Oran R. Young, ed., Global Governance: Drawing Insights form the Environmental Experience, Cambridge, The MIT Press, 27-63. Stokke also believes that regime theorists are slowly moving in this direction. On page 35, he writes "regime analysis is gradually taking a more inclusive approach in dealing with both the locus and mechanisms of governance, hence moving closer to the study of global governance". See also, among others, Éric Laferrière and Peter J. Stoett (1999) International Relations Theory and Ecological Thought, London, Routledge, 140; Marc Williams (1996) "International political economy and global environmental change", in J. Vogler and M. F. Imber, eds., The environment and international relations, London, Routledge, 51; Karen Liftin (1993) "Ecoregimes: Playing Tug of War with the Nation-State" in R. D. Lipschutz and K. Conca, eds., The State and Social Power in Global Environmental Politics, New York, Columbia University Press, 94-117; Matthew Paterson (1996) "IR Theory: Neorealism, neoinstitutionalism and the Climate Change Convention", in J. Vogler and M. F. Imber, eds., The environment and international relations, London, Routledge, 68; and Peter Willets (1996) "Who cares about the environment?", in J. Vogler and M. F. Imber, eds., The environment and international relations, London, Routledge, 126.

36 For example, see the determinant role of the International Union for the Conservation of Nature and Natural Resources (IUCN) in the formation of the polar bear regime in the 1973 in Anne Fikkan, Gail Osherenko, and Alexander Arikainen (1993) "Polar Bears: The Importance of Simplicity" in Oran R. Young and Gail Osherenko, eds., Polar Politics: Creating International Environmental Regimes, Icatha, Cornell University Press, 139-140. See also Elen C. Singh, Artemy A. Saguirian (1993) "The Svalbard Archipelago: The role of surrogate negotiators" in Oran R. Young and Gail Osherenko, eds., Polar Politics: Creating International Environmental Regimes, Icatha, Cornell University Press, 56-95. In the case of the Convention on the International Trade of Endangered Species (CITES), non-governmental organisations have even been entrusted with some of the responsibility of assuring state and non-state actors' compliance with the rules of international environmental regimes. See Lynton Caldwell (1996) International Environmental Policy, third edition, Durham, Duke University Press, 189-192. On the maritime regulation regime, see Paul Bennett (2000) "Environmental governance and private actors: enrolling insurers in international maritime regulation", Political Geography, vol. 19, 875-899.

37 See Claire Cutler, Virginia Haufler and Tony Porter, eds., (1999) Private Authority and International Affairs, New York, SUNY Press; and O. Young (1999) Governance in World Affairs, Ithaca, Cornell University Press, 8-11. These examples can be linked to a broader literature on the possibility of "governance without government" both locally and internationally. See James N. Rosenau and Ernst-Otto Czempiel, eds. (1992) Governance without Government: Order and Change in World Politics, New York, Cambridge University Press, especially chapter 1; Elinor Ostrom (1990) Governing the Commons: The Evolution of Institutions for Collective Action, Cambridge, Cambridge University Press; and Robert Ellickson (1991) Order Without Law: How Neighbors Settle Disputes, Cambridge, Harvard University Press.

38 See, for examples, Anne Hawkins (1993) "Contested Ground: International Environmentalism and Global Climate Change" in R. D. Lipschutz and K. Conca, eds., The State and Social Power in Global Environmental Politics, New York, Columbia University Press, 221-245; and the role of non-state actors in official delegations at the

International Whaling Commission in Peter Stoett (1997) The Politics of Whaling, Vancouver, University of British Columbia Press.

39 See the example of the influence of domestic developments affecting the U.S. position during the negotiation of the ozone regime in the mid-1980s in Peter Haas (1993) "Stratospheric ozone: regime formation in stages", in Oran R. Young and Gail Osherenko, eds., Polar Politics: Creating International Environmental Regimes, Icatha, Cornell University Press, 168-169.

40 For an extensive consideration of the domestic concerns of diplomats during international negotiations, see P. Evans, H. Jacobson, and R. Putnam, eds, (1993) Double-Edged Diplomacy: International Bargaining and Domestic Politics, Berkeley, University of California Press.

41 For an interesting consideration of the nature of contemporary state-society relations, see Alan C. Cairns (1986) "L'État omniprésent : les relations entre l'État et la société au Canada", in K. Banting, ed., L'État et la société : le Canada dans une optique comparative, Toronto, University of Toronto Press, 59-96. For more recent discussions, see Michael M. Atkinson et William D. Coleman (1992) "Policy Networks, Policy Communities and the Problems of Governance", Governance, no.5, 154-180; and William D. Coleman et Grace Skogstad (1990) Organized Interests and Public Policy, Toronto, Copp-Clark.

42 I should point out that some efforts have been made to apply policy network analysis to international policy-making by examining the influence of different networks of scientists and experts. See, for example, Peter Haas (1992) "Banning chlorofluorocarbons: epistemic community efforts to protect stratospheric ozone", International Organization, 46:1, 187-222; and O. Singer (1990) "Policy Communities and Discourse Coalitions", Knowledge, 11, 428-458.

43 Joseph A. Camilleri (1990) "Rethinking Sovereignty in a Shrinking, Fragmented World" in R. B. J. Walker and S. H. Mendlovitz, eds, Contending Sovereignties: Redefining Political Community, Boulder, Lynne Reinner, 13-44; G. Mairet (1996) Le principe de souveraineté, Paris, Gallimard; and K. T. Liftin, ed., (1998) The Greening of Sovereignty in World Politics, Cambridge, The MIT Press.

44 See Robert Cox (1991) "The Global Political Economy and Social Choice" in D. Drache and M. Gertler, eds., The New Era of Global Competition: State Policy and Market Power, Montreal and Kingston, McGill-Queen's University Press, 335-350; and Robert Cox (1993) "Global Restructuring: Making Sense of the Changing International Political Economy" in R. Stubbs and G. Underhill, eds., Political Economy and the Changing Global Order, Toronto, McClelland and Stewart, 45-59.

45 Susan Strange (1993) "Rethinking Structural Change in the International Political Economy: States, Firms, and Diplomacy" in R. Stubbs and G. Underhill, eds., Political Economy and the Changing Global Order, Toronto, McClelland and Stewart, 104-105.

46 James N. Rosenau (1992) "Citizenship in a Changing Global Order" in J. N. Rosenau and E.-O. Czempiel, eds., Governance without Government: Order and Change in World Politics, Cambridge, Cambridge University Press, 272-294.

47 For an extensive exploration of this trend, see James N. Rosenau (1997) Along the Domestic-Foreign Frontier: Exploring Governance in a Turbulent World, Cambridge, Cambridge University Press.

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48 See the discussion in Lamont C. Hempel (1996) Environmental Governance: The Global Challenge, Washington, D.C., Island Press, 209-213.

49 Mark W. Zacher (1992) "The decaying pillars of the Westphalian temple" in James N. Rosenau and Ernst-Otto Czempiel, eds., Governance without government: Order and change in world politics, Cambridge, Cambridge University Press, 100-101.

50 See Miranda A. Schreurs and Elizabeth C. Economy, eds., The Internationalization of Environmental Protection, Cambridge, Cambridge University Press, 1997.

51 Marxist political economists, most notably Robert Cox, have rightfully noted that the changing parameters of the international economy have led national states to fulfil new functions in a globalized society. No longer acting as a buffer protecting the national socio-economy from the turbulence of the international economy, national states are now effectively negotiating the integration of domestic markets into global markets, working to adapt the domestic economy to the demands of the global economy. See Robert Cox (1991) "The Global Political Economy and Social Choice" in D. Drache and M. Gertler, eds., The New Era of Global Competition: State Policy and Market Power, Montreal and Kingston, McGill-Queen's University Press, 337.

52 Benjamin Barber (1995) Djihad vs McWorld, New York, Times Book.

53 Robert Cox (1990) "Globalization, Multilateralism, and Social Choice", Work in Progress, New York, United Nations University Press, 2.

54 See James N. Rosenau (1997) Along the Domestic-Foreign Frontier: Exploring Governance in a Turbulent World, Cambridge, Cambridge University Press.

55 In the field of environmental politics, the concept of a global civil society is used by Paul Wapner and Ronnie Lipshutz to refer to the dense networks of international non-governmental organizations that populate the world scene. According to these authors, these networks effectively constitutes a civil society in the making because they not only seek to influence international governance by lobbying states but also by developing governance initiatives furthering their values entirely independent of national states. See Paul Wapner (1997) "Governance in Global Civil Society", in Oran R. Young, ed., Global Governance: Drawing Insights from the Environmental Experience, Cambridge, The MIT Press, 65-84; Paul Wapner (1996) Environmental Activism and World Civic Politics, New York, State University of New York Press; Paul Wapner (1995) "Politics Beyond the State: Environmental Activism and World Civic Politics", World Politics, no. 47, 311-340; Ronnie D. Lipschutz (1996) Global Civil Society and Global Environmental Governance, New York, State University of New York Press; and the discussion in Oran R. Young (1997) "Global Governance: Toward a Theory of Decentralized World Order" in Oran R. Young, ed., Global Governance: Drawing Insights from the Environmental Experience, Cambridge, The MIT Press, 282-284.

56 See Ronnie D. Lipschutz (1996) Global Civil Society and Global Environmental Governance, New York, State University of New York Press, 60-62; and Ronnie D. Lipschutz and Judith Mayer (1993) "Not Seeing the Forest for the Trees: Rights, Rules, and the Renegotiation of Resource Management Regimes" in R. D. Lipschutz and K. Conca, eds., The State and Social Power in Global Environmental Politics, New York, Columbia University Press,252; and Karen T. Liftin (1999) "Constructing Environmental Security and Ecological Interdependence", Global Governance, vol. 5, 359-377.

57 See Nayef H. Sambat (1997) "International Regime as Political Community", Millennium, 26:2, 349-378.

58 See James N. Rosenau (1990) Turbulence in World Politics: A Theory of Change and Continuity, Princeton, Princeton University Press, chapter 13; and James N. Rosenau (1997) Along the Domestic-Foreign Frontier: Exploring Governance in a Turbulent World, Cambridge, Cambridge University Press.

59 For an attempt at a systematic validation of this claim, and a taste of the difficulties involved, see empirical examination of preliminary attempt at empirically validating this rise in skills and for a taste of the difficulty of empirically validating this hypothesis, see James N. Rosenau and W. Michael Fagen (1997) "A Dynamism in World Politics: Increasingly Skillful Individuals?", International Studies Quarterly, vol. 41, 655-686.

60 Margaret Keck and Kathryn Sikkink (1998) Activists beyond Borders: Advocacy Networks in International Politics, Ithaca, Cornell University Press, 11.

61 Margaret Keck and Kathryn Sikkink (1998) Activists beyond Borders: Advocacy Networks in International Politics, Ithaca, Cornell University Press, 129.

62 For examples of cases in environmental policy, see T. Princen (1995) "Ivory, conservation, and environmental transnational coalitions", in T. Risse-Kappen, ed., Bringing Transnational Relations Back In: Non-state actors, domestic structures and international institutions, Cambridge, Cambridge University Press, 227-256; M.J. Peterson (1992) "Whalers, cetologists, environmentalists, and the international management of whaling", International Organization, 46:1, 147-185; or the essays in T. Princen and M. Finger, eds, (1994) Environmental NGOs in World Politics, London, Routledge. For a broader perspective, see J.M. Ayres (1997) "From National to Popular Sovereignty? The Evolving Globalization of Protest Activity in Canada", International Journal of Canadian Studies, 16, 107-123; and M.E. Keck and K. Sikkink (1998) Activists Beyond Borders: Advocacy Networks in International Politics, Icatha, Cornell University Press.

63 M.E. Keck and K. Sikkink (1998) Activists Beyond Borders: Advocacy Networks in International Politics, Icatha, Cornell University Press.

64 Mark W. Zacher (1992) "The Decaying Pillars of the Westphalian Temple: Implications for International Order and Governance", in J. N. Rosenau and E.-O. Czempiel, eds., Governance without Government: Order and Change in World Politics, Cambridge, Cambridge University Press, 58-101.

65 R. Stubbs and G. Underhill (1993) "State Policies and Global Changes" in R. Stubbs and G. Underhill, eds., Political Economy and the Changing Global Order, Toronto, McClelland and Stewart, 423.

66 It is important to note that these theoretical efforts do not exhaust all the potentially relevant literature that could inform and inspire new approaches to account for the role of these factors in international regime change. For example, the work of critical theorist Robert Cox could serve to focus our attention on the role of transnational corporations in shaping hegemonic discourses that serve to define the conventional realm of possibilities for social change and to reproduce dominant production relations. But this is a road not taken in this dissertation.

67 In his original 1988 article, Putnam argues that diplomats constitute prominent actors in treaty-making not because they independently define state preferences and strategies

(and as such are rational actors insulated from domestic politics) but because they act as the key mediators between the international and domestic realms of politics. The necessity of formal ratification by domestic legislative institutions and the possibility of involuntary defection (due to insufficient domestic support for effective implementation) serve to constrain the "win-set" of feasible international agreements that would be supported and implemented by a majority of constituents at home. This political reality means that international negotiators must play simultaneously two interdependent games at once: they must attempt to negotiate a favourable agreement at the international level and, at the same time, attempt to assure sufficient support for the resulting agreement at home. In effect, the resulting two-level game is one where the international negotiators seek compromises situated in the area where their respective win-sets overlap. Any alternative agreement that would not be contained in the overlapping win-set area would either fail to gain the agreement of international negotiators or, if signed, would fail to be ratified by the domestic institutions of one of the signatories.

Putnam's model offers some original insights. Firstly, it recognises the possibility that negotiators may seek to act upon the win-set of the opposing party in order to increase the chances of reaching an acceptable agreement. In other words, it accounts for the fact that state negotiators may seek to influence the domestic politics of their counterpart. In Putnam's writings, this is commonly done by changing negotiating positions in the hope of broadening the counterpart's win-set. Moreover, it suggests that, paradoxically, domestic institutions that strengthen decision-makers at home may weaken their position in international negotiations by widening their domestic win-set. In sum, greater control over the domestic policy process leaves more room for making concessions abroad while maintaining the capacity to assure ratification and implementation of the resulting agreement. In contrast, an international negotiator whose hands are tied at home deals from a position of relative strength abroad (because she can make credible claims about the impossibility of making more concessions without making ratification of the agreement impossible). This consideration of domestic institutions in international policy-making, even if only through their impact on diplomats' strategic concerns, appears an important step in a more comprehensive assessment of international-domestic linkages.

For a discussion of the theory and some empirical applications, see Robert D. Putnam (1988) "Diplomacy and domestic politics: the logic of two-level games", International Organization, 42:3, 427-460; P. Evans, H. Jacobson, and R. Putnam, eds, (1993) Double-Edged Diplomacy: International Bargaining and Domestic Politics, Berkeley, University of California Press; H. Lehman and J. McCoy (1991) "The dynamics of the two-level bargaining game: the 1988 Brazilian debt negotiations", World Politics, 43:4, 600-634; F. Mayer (1992) "Managing domestic differences in international negotiations: the strategic use of internal side-payments", International Organization, 46:4, 793-818; P. Cowhey (1993) "Domestic institutions and the credibility of international commitments: Japan and the United States", International Organization, 47:2, 299-329; and J. Goldstein (1996) "International law and domestic institutions: reconciling North American "unfair" trade laws", International Organization, 50:4, 541-564.

68 The two-level game framework still has the insidious effect of seeing the world of international politics solely through the eyes of diplomats. The possibility of direct transnational action by domestic actors, such as lobbying international organizations or foreign governments on international issues, is excluded. Domestic actors and institutions have an effect on international relations only in as much as they constrain or

influence the behaviour of state negotiators by impacting on domestic ratification processes. While the direct influence of transnational coalitions is not formally addressed by Putnam, it is not incompatible with his framework as long as one is ready to entertain these coalitions' direct influence on the respective win-sets of negotiating parties. And as a result, from our perspective, it maintains the domestic-international division that it is explicitly seeking to overcome.

69 In this literature, the emphasis is clearly placed on informal transnational networks of non-state and state actors who share common values, policy objectives and "causal beliefs about how the world works". The analytical emphasis is also clearly placed on the existence of transnational coalitions of actors who have access to the decision-making process. These transnational networks of specialists shape international agreements or influence the international co-ordination of domestic policies on common problems. Epistemic communities' influence on regime formation is the result of their ability to shape the contours and terms of policy debates in international and domestic circles. They essentially act as conduits for advancing knowledge claims within international and domestic organisations and for imposing policy prescriptions derived from the interaction between their shared causal beliefs and principled values. Such shared knowledge is generally acknowledged as being beneficial or even a precondition (but not a sufficient factor by itself) for the establishment of regimes.

The influence of transnational epistemic communities is then largely discursive: it is by successfully framing problems in the minds of the main actors that these networks influence international policy. The members of epistemic communities define problems and set the terms of debates about them. In doing so, they help define state interests because how one perceives its interests in a given situation depends on one's causal beliefs about the impact of alternative courses of action. This work has the advantage of moving beyond the "non-governmental organisations versus states" approach common in the literature on environmental non-governmental organisations in world politics. The state is "unpacked" to reveal a more fragmented organisation occupied by policy actors with often contradictory preferences. Policy networks, including epistemic communities, are generally composed of both state and non-state actors as they permeate state apparatuses.

See Peter Haas (1992) "Banning chlorofluorocarbons: epistemic community efforts to protect stratospheric ozone", International Organization, 46:1, 187-222; Peter Haas (1992) "Epistemic Communities and International Policy Co-ordination", International Organization, 46, 1-35; Peter M. Haas (1990) Saving the Mediterranean: The Politics of International Environmental Cooperation, New York, Columbia University Press; and Peter M. Haas (1989) "Do regimes matter? Epistemic Communities and Mediterranean Pollution Control", International Organisation, no.43, 377-403. For an early example of the importance of shared knowledge in the formation of international regimes, see John G. Ruggie, "International Response to Technology: Concepts and Trends", International Organisation, no.29, 557-583.

70 It should be noted that the promoters of the epistemic communities perspective do not claim it to be a comprehensive theory of world politics and they not explicitly present it as a means to bridge domestic and international factors. They point out themselves that the concept should be used in a plurality of contexts and in conjunction with other theoretical perspectives (including Putnam's two-levels game model). See E. Adler and

P.M. Hass (1992) "Epistemic communities, world order, and the creation of a reflective research program", International Organization, 46:1, 373.

71 List and Rittberger consider them a precondition to regime formation in Martin List and Volker Rittberger (1992) "Regime theory and international environmental management" in Andrew Hurrell and Benedict Kingsbury, eds., The International Politics of the Environment, Oxford, Clarendon Press, 103-104; while they are found to be unnecessary in Oran R. Young and Gail Osherenko, eds., Polar Politics: Creating International Environmental Regimes, Icatha, Cornell University Press, 244.

72 M. Evangelista (1995) "The paradox of state strength: transnational relations, domestic structures, and security policy in Russia and the Soviet Union", International Organization, 49:1, 1-38; T. Risse-Kappen (1991) "Public Opinion, Domestic Structure, and Foreign Policy in Liberal Democracies", World Politics, 43:4, 479-512; T. Risse-Kappen (1994) "Ideas do not float freely: transnational coalitions, domestic structures, and the end of the cold war", International Organization, 48:2, 185-214; T. Risse-Kappen, ed., (1995) Bringing Transnational Relations Back In: Non-state actors, domestic structures and international institutions, Cambridge, Cambridge University Press.

73 In Risse-Kappen's work, domestic structures suggest a broader set of factors than domestic political institutions and generally include cultural factors such as political culture and state traditions. My analysis will only be concerned with institutions associated with constitutional structures and procedures, such as the prerogatives of legislatures and executives.

74 Thomas Risse-Kappen (1994) "Ideas do not float freely: transnational coalitions, domestic structures, and the end of the cold war", International Organization, 48:2, 196; and Thomas Risse-Kappen (1995) "Bringing Transnational Relations Back In", in T. Risse-Kappen, ed., Bringing Transnational Relations Back In: Non-state actors, domestic structures and international institutions, Cambridge, Cambridge University Press, 8.

75 Margaret Keck and Kathryn Sikkink (1998) Activists beyond Borders: Advocacy Networks in International Politics, Ithaca, Cornell University Press, 8-25.

76 For a discussion of such strategic considerations by state actors, see Peter B. Evans, Harold K. Jacobson, and Robert D. Putnam, eds., (1993) Double-Edged Diplomacy: International Bargaining and Domestic Politics, Berkeley, University of California Press.

77 Andrew Moravcsik (1993) "Integrating International and Domestic Theories of International Bargaining" in Peter B. Evans, Harold K. Jacobson, and Robert D. Putnam, eds., (1993) Double-Edged Diplomacy: International Bargaining and Domestic Politics, Berkeley, University of California Press, 24-26.

78 See, for example, K. Weaver and B. Rockman, eds, (1993) Do Institutions Matter?, Washington, The Brookings Institution; E. Immergut (1992) Health Politics: Interests and institutions in Western Europe, Cambridge, Cambridge University Press; and G. Tsebelis (1995) "Decision-Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism", British Journal of Political Science, 25, 289-325. For a more limited discussion, but one applied to transnational relations, see Thomas Risse-Kappen (1994) "Ideas do not float freely: transnational coalitions, domestic structures, and the end of the cold war", International Organization, 48:2, 185-214.

79 It should be obvious that a more fragmented political system is not synonym of a more democratic one. For example, Congressional systems, and those with direct democracy procedures, are frequently accused of being easily captured by narrow constituencies, such as influential business sectors, to the detriment of the "common good". Meanwhile, Westminster systems, allegedly more impermeable to such influences, are also accused of being irresponsive and insufficiently accountable to citizens. In this dissertation, fragmented institutions are not associated with a normative value.

80 See, for example, K. Shepsle, "Studying institutions: Some lessons from the rational choice approach", Journal of Theoretical Economics, 1:2, 1989, 131-147; K. Thelen and S. Steinmo, "Historical institutionalism in comparative politics", in S. Steinmo et al., Structural Politics: Historical Institutionalism and Comparative Analysis, New York, Cambridge University Press, 1992, 1-31; K. Weaver and B. Rockman, eds, Do Institutions Matter?, Washington, The Brookings Institution, 1993; W. Riker, The Art of Political Manipulation, New Haven, Yale University Press, 1986; and P. Hall, ed, The Political Power of Ideas: Keynesianism across Nations, Princeton, Princeton University Press, 1989.

81 See K. Thelen and S. Steinmo, "Historical institutionalism in comparative politics", in S. Steinmo et al., Structural Politics: Historical Institutionalism and Comparative Analysis, New York, Cambridge University Press, 1992, 1-31.

82 In particular, in an unpublished paper, Kent Weaver has recently started to investigate the significance of domestic institutions for the management of interdependence in North America. However, in contrast to this chapter, Weaver does not focus on regime building and treaty-making per se but on the broader issue of international relations, especially how domestic institutions might affect the types of bilateral conflicts that emerge and the dynamics of conflict management. His work also lacks an historical perspective on the evolution of the institutional frameworks of both countries. See K. Weaver, "Domestic Political Structures and the Management of Complex Interdependence", Unpublished paper presented at the 1998 annual meeting of the Canadian Political Association, Ottawa, May 31 - June 2, 1998. The chapter also markedly differs from the work of Thomas Risse-Kappen et al. by its double focus on Canada-U.S. relations and on treaty-making as opposed to transnational lobbying generally. See T. Risse-Kappen, ed, Bringing Transnational Relations Back In: Non-State Actors, Domestic Structures and International Institutions, Cambridge, Cambridge University Press, 1995.

83 See, for example, K. Shepsle, "Studying institutions: Some lessons from the rational choice approach", Journal of Theoretical Economics, 1:2, 1989, 131-147; K. Thelen and S. Steinmo, "Historical institutionalism in comparative politics", in S. Steinmo et al., Structural Politics: Historical Institutionalism and Comparative Analysis, New York, Cambridge University Press, 1992, 1-31; K. Weaver and B. Rockman, eds, Do Institutions Matter?, Washington, The Brookings Institution, 1993; W. Riker, The Art of Political Manipulation, New Haven, Yale University Press, 1986; and P. Hall, ed, The Political Power of Ideas: Keynesianism across Nations, Princeton, Princeton University Press, 1989.

84 This stronger version of neoinstitutionalism, which postulates a more direct link between institutions, preferences and social outcomes, is mostly associated with the organisational strand of political science or with neoinstitutional sociology. See, in particular, J. March and J. Olsen, Rediscovering Institutions, New York, Free Press,

1989; and W. Powell and P. DiMaggio, eds., The New Institutionalism in Organizational Analysis, Chicago, Chicago University Press, 1991. For a direct application to policy studies, see J. I. Gow, "L'état, le citoyen et l'industrie: le cas de la MIUF", Revue canadienne de science politique, 29:2, 1996, 335-364.

85 See, for example, Douglass C. North, Institutions, Institutional Change and Economic Performance, Cambridge, Cambridge University Press, 1990; J. March and J. Olsen, Rediscovering Institutions, New York, Free Press, 1989; and W. Powell and P. DiMaggio, eds., The New Institutionalism in Organizational Analysis, Chicago, Chicago University Press, 1991.

86 Giovanni Sartori, Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes, second edition, New York, New York University Press, 1997.

87 Juan Linz, "The Perils of Presidentialism", Journal of Democracy, 1:1, 51-69.

88 T. Moe and M. Caldwell, "The Institutional Foundations of Democratic Government: A Comparison of Presidential and Parliamentary Systems", Journal of Institutional and Theoretical Economics, 150:1, 1994, 171-191.

89 P. Pierson and K. Weaver, "Imposing Losses in Pension Policy", in K. Weaver and B. Rockman, eds., Do Institutions Matter?, Washington, The Brookings Institution, 1993, 110-150.

90 P. Hall, "The movement from Keynesianism to monetarism: Institutional analysis and British economic policy in the 1970s", in in S. Steinmo et al., Structural Politics: Historical Institutionalism and Comparative Analysis, New York, Cambridge University Press, 1992, 90-113; P. Hall, The Political Power of Ideas: Keynesianism across Nations, Princeton, Princeton University Press, 1989; M. Weir and T. Skocpol, "State structures and the possibilities for Keynesian responses to the Great Depression in Sweden, Britain, and the United States", in p. Evans, D. Reuschemeyer, and T. Skocpol, eds., Bringing the State Back In, Cambridge, Cambridge University Press, 107-168.

91 S. Steinmo, "Political Institutions and Tax Policy in the United States, Sweden, and Britain", World Politics, 41, 1988, 500-531.

92 See, in particular, E. Immergut, Health Politics: Interests and Institutions in Western Europe, Cambridge, Cambridge University Press, 1992; K. Weaver and B. Rockman, eds, Do Institutions Matter?, Washington, The Brookings Institution, 1993; and G. Tsebelis, "Decision-Making in political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism", British Journal of Political Science, 25, 1995, 289-325.

93 G. Tsebelis, "Decision-Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism", British Journal of Political Science, 25, 1995, 293.

94 K. Thelen and S. Steinmo, "Historical institutionalism in comparative politics", in S. Steinmo et al., Structural Politics: Historical Institutionalism and Comparative Analysis, New York, Cambridge University Press, 1992, 7.

95 G. Tsebelis, "Decision-Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism", British Journal of Political Science, 25, 1995, 293.

96 E. Immergut, Health Politics: Interests and institutions in Western Europe, Cambridge, Cambridge University Press, 1992, 25-28.

97 P. Hall, Governing the Economy: The Politics of State Intervention in Britain and France, New York, Oxford University Press, 1986, 30.

98 E. Immergut, "The rules of the game: The logic of health policy-making in France, Switzerland, and Sweden", in S. Steinmo et al., Structural Politics: Historical Institutionalism and Comparative Analysis, New York, Cambridge University Press, 1992, 59.

99 G. Tsebelis, "Decision-Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism", British Journal of Political Science, 25, 1995, 313.

100 E. Immergut, Health Politics: Interests and institutions in Western Europe, Cambridge, Cambridge University Press, 1992, 28.

101 See E. Immergut, Health Politics: Interests and institutions in Western Europe, Cambridge, Cambridge University Press, 1992, 129-178.

102 M. Weir, "Ideas and the politics of bounded innovation", in S. Steinmo et al., Structural Politics: Historical Institutionalism and Comparative Analysis, New York, Cambridge University Press, 1992, 188-216.

103 See K. Thelen and S. Steinmo, "Historical institutionalism in comparative politics", in S. Steinmo et al., Structural Politics: Historical Institutionalism and Comparative Analysis, New York, Cambridge University Press, 1992, 7-9

104 L. Wildhaber, Treaty-Making Power and Constitution, Stuttgart, Helbing and Litchtenham, 1971, 9.

105 Even more interesting is the fact that, under the Continental Congress, the Senate had the sole responsibility for conducting foreign relations and negotiating treaties. In fact, at the beginning of the Constitutional Convention, it was expected that the Senate alone would continue to have this responsibility. The President was conferred a role only towards the end of the Convention's debate and whether to let the House of Representatives play a role or maintain Senate exclusivity was the more contentious issue, not whether the Executive should share this responsibility with the legislative branch. See Arthur Bestor, "Respective Roles of Senate and President in the Making and Abrogation of Treaties - The Original Intent of the Framers of the Constitution Historically Examined", Washington Law Review, 55:1, 1979, 73-132.

106 While this provision requires without a doubt the consent of the Senate for the approval of treaties, it should be pointed out immediately that the President alone is allowed to negotiate with other nations. This issue was decided in U.S. Supreme Court, United States v. Curtiss-Wright Export Corp., no.299, 1936.

107 Reportedly, the better disposition of the Senate to act in an expedient, secretive and even-tempered manner, because it is a smaller institution than the House of Representatives and was composed at the time of state appointed members thought to be more knowledgeable and experienced, was an important argument for excluding the House from the making of international treaties. Moreover, the senators, holding six years terms instead of the short two years for representatives, would be better positioned to look at foreign policy from a longer term perspective. All of these features would

allow the second chamber to lead effectively the nation in its relations with foreign countries.

The case in favour of the Senate and against involvement of the House because of the respective characteristics of these legislative chambers is presented, for example, by Hamilton in the essay no.75 of The Federalists. As we will see in the next section, Senate involvement in treaty-making should also be understood as a compensation against the participation of the States themselves in the foreign affairs of the nation.

108 L. Wildhaber, Treaty-Making Power and Constitution, Stuttgart, Helbing and Litchtenham, 1971, 60. We should note that the "appointed Senate as executive body" argument shows that the Framers did not intend to democratize treaty-making but rather sought to ensure State involvement in the conduct of foreign policy and thereby protect regional minority interests.

109 In 1789, President Washington went personally to the Senate in order to discuss the desirability of making treaties with Aboriginal peoples. The Senate, instead of deliberating and acting as an executive body, undertook to study and debate the matter as a legislative chamber and proposed to refer the issue to a committee. Disconcerted by this approach, Washington reportedly swore that he would never return to the Senate for advice. See L. Wildhaber, Treaty-Making Power and Constitution, Stuttgart, Helbing and Litchtenham, 1971, 61.

110 Due to the rather technical nature of some of these issue, a point of clarification on terminology may be useful for the reader. Despite popular talk of "Senate ratification", ratification is solely an executive act in international law. Ratification expresses formally that the states now consider themselves bound by the terms of the international agreement and it usually occurs through the exchange of letters or instruments of ratification among the relevant parties. Whether internal constitutional law requires the approval of the treaty by the cabinet or a legislative chamber before the exchange of instruments of ratification can lawfully take place is another matter. In the context of this study, in keeping with the terminology of international law, I will use "approval" to designate the expression of consent by the U.S. Senate.

111 L. Wildhaber, Treaty-Making Power and Constitution, Stuttgart, Helbing and Litchtenham, 1971, 63.

112 L. Wildhaber, Treaty-Making Power and Constitution, Stuttgart, Helbing and Litchtenham, 1971, 64.

113 L. Wildhaber, Treaty-Making Power and Constitution, Stuttgart, Helbing and Litchtenham, 1971, 78.

114 See D.F. Fleming, "The Role of the Senate in Treaty-Making: A Survey of Four Decades", American Political Science Review, 28, 1934, 583-598; and Q. Wright, "The United States and International Agreements", American Journal of International Law, 38, 1944, 350-354. We should also note that, from a comparative perspective, no other country has had a legislature vote down so many international treaties. L. Wildhaber, Treaty-Making Power and Constitution, Stuttgart, Helbing and Litchtenham, 1971, 66.

115 For the sake of clarity, I wish to point out that congressional-executive agreements are considered here to be solely international agreements concluded by the executive and that require the ex-post approval of Congress before ratification. As such, they do not include purely presidential agreements concluded by the President under its own

independent powers as Head-of-State (e.g. military decisions, settlement of private claims, or modus vivendi agreements) I also exclude agreements concluded by the President in the context of a framework legislation adopted by Congress ex ante, within the realm of its legislative competence. These agreements are of another nature as they can be undone internationally and domestically simply by legislative change.

116 The congressional-executive agreement was born out of growing dissatisfaction with the isolationist stance of a good proportion of American senators which was perceived as detrimental to an effective U.S. foreign policy in the aftermath of both world wars as well as during the New Deal era. While building on a more timid innovation of the 1930s (i.e. to have the President conclude trade agreements within the parameters of an ex ante approval offered by a double Congressional majority), the real congressional-executive agreement was born in the mid-1940s. Still haunted by the Senate's rejection of the Treaty of Versailles at the end of the First World War, by the mid-1940s, many Americans were actively seeking a new treaty process that would not be prejudicial to the more active foreign policy required in the aftermath of the Second World War. The Senate, still composed of many isolationists, was then clearly perceived as a potential impediment to an effective foreign policy. As one important commentator put it at the time: "Every government in the world doubts the ability of the United States to help organize the coming victory, because all know that the Constitution of the United States contains a fatal defect. They know that, so far as constructive effort to build a better world goes, our government is permanently deadlocked within itself by a division of the power to make and execute foreign policy between the President and the Senate. They must calculate that the constructive plans of the executive are always at the mercy of a self-assertive minority in the Senate." (D. F. Fleming, The United States and the World Court, 1945, 156.)

It is in this context of a new emerging international order that politicians, legal scholars and newspaper editorialists began advocating the use of a majority of both Congressional chambers as an alternative to the traditional Senate veto for the approval of international agreements. For example, in less than a year, The Washington Post published seven editorials calling for an end to Senate monopoly over treaty approval. The New York Times repeatedly expressed the same editorial opinion. In 1943, 54% of polled Americans were in favour of adopting a new double majority rule while only 25% favoured the traditional Senate supermajority. The following year, polls showed 60% in favour of a double majority while support for the traditional rule had declined to 19%. (See other data in Bruce Ackerman and David Golove, Is NAFTA Constitutional?, Cambridge, Harvard University Press, 1995, 62-64.)

With substantial support in public opinion, and after the defeat of many isolationist senators in the 1944 election, members of Congress began discussing seriously a constitutional amendment that would have stripped away the Senate's exclusive legislative prerogative with respect to treaty-making. While the Presidency never formally endorsed the amendment, it increasingly asserted its opinion that the majority of both chambers of Congress was now an acceptable procedure for treaty approval. After a transitional period during which the Senate joined the House of Representatives in approving agreements while warning that its actions should not be construed as a surrender of its constitutional prerogatives, the warnings progressively ceased: the congressional-executive agreement was now part of the living constitution.

For an outstanding book-length account of this constitutional evolution, providing great insights into both the legal and political dynamics at play, see Bruce Ackerman and David Golove, Is NAFTA Constitutional?, Cambridge, Harvard University Press, 1995.

117 It seems hard to imagine how the Senate would agree to lose its exclusive prerogative with respect to treaty-making and, in effect, it never did explicitly. Even while joining the House of Representatives in approving specific congressional-executive agreements, the Senate warned that it was not abandoning its prerogative over international agreements and that any curtailment of its constitutional powers was unacceptable. However, over time, the new practice set in. Advocates of the congressional-executive agreements point out that, even if the Constitution does not explicitly provide for them, an expansive reading of it does not preclude them. They also emphasise the more democratic nature of the double majority rule over the two-third vote of a single chamber and argue that the original concept of the Senate as an executive council representing state interests has lost much of its credibility over the years.

118 See Article I, section 10, clauses 1 and 3.

119 Article VI, section 2.

120 Federal supremacy is the case in India, Austria and probably Australia.

121 Thomas Jefferson, for instance, argued against it at the Convention and other statesmen present supported his views. Jefferson espoused the view that extensive federal treaty implementation powers were antithetical to the spirit of federalism and would be inconsistent with other aspects of the Constitution. The President and the Senate, he argued, should not be able to do by treaty what the Constitution prohibited the entire federal state to do otherwise. Federalism required the protection of State jurisdictions.

But in 1787, Jefferson's views were those of a minority. The years preceding the Convention had illustrated the potentially disastrous effect of a lack of State cooperation in the conduct of the nation's international affairs. Several States were failing to live up to the terms of the Treaty of Peace that ended the Revolutionary War with England by making it difficult for British creditors to recover their loans within their territory. It has even been argued that this failure by some States to respect the federal commitment to the British government was in fact one of the main problems that led to the convening of the 1787 Convention and that, without the introduction of the supremacy clause, the federal government could not have effectively ended the war. Accordingly, soon after the adoption of the new constitution, one of the first applications of the treaty implementation power was the invalidation of a Virginian law violating the Peace Treaty. But the arguments in favour of the supremacy clause went beyond political expediency. Advocates of the new union mostly expressed concerns about the future danger of an ineffective foreign policy if the nation was not permitted to speak from one, cohesive voice and if the nation's allies and enemies could be assured that the country's promises would be kept. Moreover, they pointed out that the requirement for Senate advice and consent constituted a sufficient and important avenue for assuring that State interests were taken into account in the conduct of international relations. There seems to be extensive evidence that the Framers were intending to entrench the senatorial veto for the purpose of protecting regional minority interests. No doubt that this argument carried even greater strength during the period when senators were still appointed by the State governments themselves. In the end, the combination of the supremacy clause and the Senate "advice and consent" provision appeared to provide a more effective compromise to ensure the protection of State interest and the conduct of an effective foreign policy.

While forced to remain sensitive to State interests by the Senate veto, the federal government could still offer a more unified and cohesive voice in international affairs than if it had had to negotiate implementation with every State.

For a brief discussion and other references, see J. Friesen, "The distribution of treaty-implementing powers in constitutional federations: Thoughts on the American and Canadian models", Columbia Law Review, vol. 94, 1419-1424. For a discussion of the Senate's active role in protecting State interests in relation to treaty-making, see John B. Whitton and J. Edward Fowler, "Bricker Amendment - Fallacies and Dangers", American Journal of International Law, no. 48, 36-37.

122 Most of these judicial attempts relied on arguments about the Tenth Amendment (i.e. the residual clause). Since the Constitution allows Congress to act solely in accordance to its limited and delegated powers, and grants everything else to the States, should it be allowed to make legislation implementing treaties even when these treaties deal with subject matters implicitly reserved to the States? From the very beginning, the answer appeared to be affirmative. Advocates of the federal supremacy clause argued that, if the Framers had specifically granted treaty powers to Congress, surely they did not intend to leave it incapable to live up to its international commitments. Moreover, since treaty powers were explicitly granted to Congress by the constitution, whatever fell within these powers was not reserved to the States under the residual clause. This view was soon given legal credence as, in a series of early cases, the U.S. Supreme Court consistently upheld the supremacy of treaties or federal treaty implementation legislation over conflicting State laws.

For a list of these early cases, see footnote 40 in J. Friesen, "The distribution of treaty-implementing powers in constitutional federations: Thoughts on the American and Canadian models", Columbia Law Review, vol. 94, 1994, 1419-1420.

123 U.S. Supreme Court, Missouri v. Holland, no. 252, 1920.

124 J. Friesen, "The distribution of treaty-implementing powers in constitutional federations: Thoughts on the American and Canadian models", Columbia Law Review, vol. 94, 1994, 1421.

125 We should note however that this doctrine has become less important over the years as a result of the expansion of the commerce clause by other constitutional decisions. The expansive powers read into the commerce clause by the Supreme Court has provided the federal government with a more effective tool to legislate on matters which were previously thought to fall with the realm of State jurisdiction, making the recourse to the treaty supremacy clause unnecessary in many cases.

126 U.S. Senate Committee on the Judiciary, Resolution no.1, 83rd Congress, 1st session, 1953. There were several versions of the amendment submitted and discussed from 1951 to 1954. This version was the first one to be favourably considered by the Judiciary Committee. Other parts of the recommended amendment included that self-executing treaties should not become the supreme law of the land without requiring implementing legislation and that Congressional-executive agreements should not be used in lieu of treaties. A less extensive amendment was also voted upon by the Senate floor in 1954 and was defeated by only one vote short of the two-thirds majority required for adoption. See L. Wildhaber, Treaty-Making Power and Constitution, Stuttgart, Helbing and Litchtenham, 1971, 88-89.

127 The amendment championed by Senator Bricker was in fact drafted by a committee of the American Bar Association and actively advocated by its drafters. See Vermont Hatch et al., "The Treaty Power and the Constitution: The Case for Amendment", Journal of the American Bar Association, 40, 1954, 207-208.

128 Bruce Ackerman and David Golove, Is NAFTA Constitutional?, Cambridge, Harvard University Press, 1995, 98; Brunson MacChesney et al., "The Treaty Power and the Constitution: The Case Against Amendment", Journal of the American Bar Association, 40, 1954, 204.

129 It has been argued that, even if defeated, the Bricker amendment nevertheless contributed to the timid approach of the Eisenhower administration toward the covenants on human rights and the political rights of women. See L. Wildhaber, Treaty-Making Power and Constitution, Stuttgart, Helbing and Litchtenham, 1971, 336.

130 See J. Friesen, "The distribution of treaty-implementing powers in constitutional federations: Thoughts on the American and Canadian models", Columbia Law Review, vol. 94, 1994, 1425-1427.

131 Vermont Hatch et al., "The Treaty Power and the Constitution: The Case for Amendment", Journal of the American Bar Association, vol. 40, 1954, 256-257; and Joseph L. Call, "Should the Constitution Be Amended to Limit the Treaty-Making Power?", Southern California Law Review, vol.26, 1953, 368-371.

132 John B. Whitton and J. Edward Fowler, "Bricker Amendment - Fallacies and Dangers", American Journal of International Law, vol.48, 1954, 23-38; and J. Friesen, "The distribution of treaty-implementing powers in constitutional federations: Thoughts on the American and Canadian models", Columbia Law Review, vol. 94, 1994, 1427.

133 For indications that it intended to continue doing so for quite some time, see the comments in R. J. Delisle, "Treaty-Making Power in Canada", in Ontario Advisory Committee on Confederation, Background Papers and Reports, Toronto, The Queen's Printer of Ontario, 1967, 122.

134 See R. MacGregor Dawson, The Development of the Dominion Status, 1900-1936, Toronto, University of Toronto Press, 1937.

135 For example, in 1895, the Colonial Office issued a policy statement that would forbid any direct contact between colonial and foreign governments for the purposes of making treaties. Participation by the colonies would take the form of a second or subordinate plenipotentiary, at the discretion of the British government. The policy appear to have been a failure since the role of the British Ambassador continue to decline in comparison to Canadian delegates in the negotiations that took place in the years that followed. See R. J. Delisle, "Treaty-Making Power in Canada", in Ontario Advisory Committee on Confederation, Background Papers and Reports, Toronto, The Queen's Printer of Ontario, 1967, 127.

136 The end of the preferential tariff for British colonies by London in 1846-1849 created significant pressures to leave the dominions more leeway in seeking alternative trade arrangements by dealing directly with foreign powers. As a consequence, in the 1850s, British colonies in North America were already demanding more control over the commercial dealings of their territories. As a result of intense pressure, in 1865, the Colonial Office set up what amounted to an interprovincial council on trade to advise British diplomats negotiating commercial treaties regarding the colonies. The following

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year, on the recommendation of the council, Alexander Galt and three other Canadian delegates were sent to Washington to discuss directly the possibility of a commercial agreement with the members of the Ways and Means Committee of the U.S. House of Representatives. Finally, in 1871, John A. Macdonald became the first Canadian representative to be appointed as a plenipotentiary of the British Crown to negotiate the Treaty of Washington. Although Macdonald did not attend all meetings, he became the first Canadian to co-sign a treaty with the British minister.

On the strength of this precedent, starting in the 1870s, representatives of the Canadian government began to be included in British delegations negotiating imperial treaties with foreign countries, when these agreements would impact Canada. Over the years, authority progressively shifted from the British to the Canadian representatives serving as plenipotentiaries of the Empire in these treaty negotiations and the Canadian government came to exert effective control over commercial treaties, which were eventually entirely negotiated by Canadian delegates and required ratification by both British and Canadian executives to be internationally binding.

See R. J. Delisle, "Treaty-Making Power in Canada", in Ontario Advisory Committee on Confederation, Background Papers and Reports, Toronto, The Queen's Printer of Ontario, 1967, 115-148.

137 When the First World War erupted in 1914, the Canadian executive had succeeded in progressively wrestling authority from the British executive for the conduct of international commercial relations. However, the country was still lacking the autonomy required to negotiate more political (as opposed to commercial) agreements with other nations. Incidentally, when Great Britain went to war, Canada found herself legally at war without having been consulted.

However, the war effort of the British colonies were accompanied by greater demands for recognition of their international status within the Empire and, in the early part of the war, Sir Robert Borden played an important role in articulating these aspirations for Canada. In 1917, in recognising the validity of these aspirations, the British government invited the representatives of the dominions' governments to take part in a meeting of the Imperial War Cabinet where they discussed the general conduct of the war. Benefiting from the momentum, Borden and Jan Christiaan Smuts of South Africa obtained the adoption of a resolution at the Imperial Conference, which took place the same year, that committed the British government to holding similar "permanent consultations" in the development of the imperial foreign policy after the war. Such a common imperial policy was attempted in the years following the end of the war. However, in light of the inability to keep a common front, it was abandoned in failure in the early 1920s.

But, when the war ended, the British colonies were able to obtain a more autonomous status. In an important constitutional innovation, the British dominions, including Canada, signed separately the 1919 Treaty of Versailles, which established peace with Germany, while the British government signed the agreement on behalf of the Empire. The treaty was then ratified by each country before the British Crown ratified it on behalf of the whole Empire. This development was a clear symbol of newly-found autonomy. The same year, Borden also led a separate delegation to the Paris Peace Conference, where the Covenant of the League of Nation was negotiated and where it was decided that the British dominions would hold separate memberships in the future Council. These steps were undoubtedly significant in the British dominions' slow

evolution towards international independence but they also illustrated the difficulty of reconciling their desire for autonomy with their loyalty to the Empire. The double ratification of the Treaty of Versailles as well as the obvious paradox between maintaining a common imperial policy and separate membership in the Council of the League of Nations suggested that the dominions stood at a critical time in their historical development.

See R. MacGregor Dawson, The Government of Canada, fifth edition, revised by Norman Ward, Toronto, University of Toronto Press, 1970, 48-49; Craig Brown, ed., Histoire générale du Canada, Montréal, Boréal, 1990, 502-503; and A. Gotlieb, Canadian Treaty-Making, Toronto, Butterworths, 1968, 8.

138 In 1920, the Canadian government gained the right to appoint its own ambassador to Washington as part of the British delegation to the United States. In 1927, the Canadian government appointed its first ambassador to the United States who was not part of a British mission. A. Gotlieb, Canadian Treaty-Making, Toronto, Butterworths, 1968, 9.

139 In 1923, the Halibut Fisheries Treaty with the United States was signed by Ernest Lapointe, a Canadian minister serving as plenipotentiary, without being accompanied by the signature of a British counterpart. This agreement constituted the first case of an international treaty signed solely by a Canadian representative. See R. R. Wilson, "Canada-United States Treaty Relations and International Law", in D. R. Deneer, Canada-United States Treaty Relations, 1963, 12-13. The British government had demanded to their ambassador to co-sign the treaty but retreated after the Canadian government objected to the co-signature.

140 The Statute of Westminster simply constituted the legal translation and affirmation of the political decision taken at the Imperial Conference five years earlier. The Statute of Westminster affirmed that the dominions were "autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations".

141 Particularly important among these preceding political developments was the Balfour Declaration. The Balfour Declaration at the Imperial Conference of 1926 first endorsed equality of status among the members of the Commonwealth as a general principle applying to the negotiation, signature and ratification of all bilateral treaties by British dominions. It was a political watershed in the evolution of the colonies and it established international autonomy for all practical purposes. We should note however that, under the 1926 and 1931 formula, treaties were still concluded in Heads-of-State form, i.e. as agreements between the heads-of-state of contracting parties as opposed to agreements between governments. As such, they still had to be formally ratified by the British Crown, even if under the sole advice of the Canadian Privy Council. However, in the years that followed, the British monarch would ratify treaties concluded by its dominions using separate instruments of ratification, each specifying that the monarch was acting solely in respect of the relevant dominion and not with respect to the entire Commonwealth. It would take the new Letters Patent of 1947 issued to the Governor General of Canada to officially transfer the authority to ratify Canadian treaties without going to London.

142 Supreme Court of Canada, Reference re Ownership of Offshore Mineral Rights, 65 D.L.R., 1968, 353.

In 1947, a final transfer of authority from London to Ottawa took place. While the Statute of Westminster had authorized Canada to conduct its foreign affairs in an independent fashion, the Governor General still lacked the formal authority to represent the British Crown in some matters, including the signature and ratification of international treaties. Consequently, while the Queen now acted solely on the advice of the Canadian Privy Council in these matters, the Canadian government still had to resort to London. On October 1, 1947, the British Crown issued new Letters Patent to the Governor General. While the new Letters Patent did not reduce the prerogatives of the British Crown, it delegated new powers to the Governor General of Canada, including the power to sign and ratify treaties as well as issuing Letters of Credence for Canadian ambassadors. In effect, the Canadian government was now at liberty to choose whether it would submit its advice to the Queen or to the Governor General for actions relating to international treaties. See R. MacGregor Dawson, The Government of Canada, fifth edition, revised by Norman Ward, Toronto, University of Toronto Press, 1970, 148-149.

Interestingly enough, this new power by the Governor General of Canada has never been used because, as we will see in the next section, Canada has stopped concluding treaties in Head-of-State form since 1944. Nowadays, all treaties are agreements among governments and their ratification no longer requires an act by the personal representative of the Crown. A. Gotlieb, Canadian Treaty-Making, Toronto, Butterworths, 1968, 39-40.

143 Crown prerogatives differ from the other broad category of powers, statutory powers, which are derived from the statutes approved by Parliament. See R. MacGregor Dawson, The Government of Canada, fifth edition, revised by Norman Ward, Toronto, University of Toronto Press, 1970, 144-150. For a more classic statement on the source of these powers, see A. V. Dicey, The Law of the Constitution, 8th edition, London, 420. In fact, the prerogatives of the Canadian executive in the field of foreign affairs are more extensive than treaty-making and include the power to declare war and peace as well as to establish or terminate diplomatic relations. A. Gotlieb, Canadian Treaty-Making, Toronto, Butterworths, 1968, 4.

144 Almost all of these prerogatives are obviously exercised on the advice and on the responsibility of ministers. However, there also remain some elements of independent authority exercised by the Governor General. Among these, we find, for example, the right to appoint the Prime Minister and, although more controversial, the right to refuse to grant the dissolution of Parliament. See the discussion in J.R. Mallory, The Structure of Canadian Government, revised edition, Toronto, Gage Publishing, 1984, 48-62.

145 However, one should note that these powers are nowadays exercised by the Governor General in Council, on the advice of the cabinet. Given that the legitimacy and the exercise of power by the cabinet depends on its continued support by the House of Commons, Parliament theoretically retains the possibility to sanction the government if the treaty power is not used to its satisfaction. As such, parliamentary control over the use of the treaty power is exercised through the continued criticism of the opposition, the subtler lobbying of government backbenchers, and the more unlikely (given the norm of majority government), but still available tool, of a vote of confidence.

146 House of Commons, Sessional Papers, Special Session, no.41 (j), 1919, II.

147 In 1924, Mr. Ponsonby, then Under-Secretary of State for Foreign Affairs, introduced in England the new constitutional practice of tabling, for discussion, all treaties in both Houses of Parliament and to wait 21 days before ratifying them in order to allow for

debate. While the practice was subsequently abandoned by the new government, it was re-introduced in 1929 and has become the norm. One should note however that Ponsonby's rule does not entail parliamentary approval but solely concerns the tabling and discussion of treaties in Parliament. See L. Wildhaber, Treaty-Making Power and Constitution, Stuttgart, Helbing and Litchtenham, 1971, 29.

148 Parliament of Canada, House of Commons Debates, vol.2, 1928, 1974.

149 Parliament of Canada, House of Commons Debates, vol.5, June 21, 1926, 4758.

150 A. Gotlieb, Canadian Treaty-Making, Toronto, Butterworths, 1968, 16-17.

151 R. MacGregor Dawson, The Government of Canada, fifth edition, revised by Norman Ward, Toronto, University of Toronto Press, 1970, 205. Emphasis added.

152 In its submission to the United Nations in 1952, in the context of its work on the codification of the law of treaties, the Canadian government stated that: "there is no law imposing any obligation on the Government of Canada for approval prior to ratification. International obligations are entered into in many instances without reference to Parliament. The negotiation and conclusion of a treaty or other international agreement is an executive act." See United Nations, "Law and Practices concerning the Conclusion of Treaties", U.N. Legislative Series, St/Leg/Series B/no.3, 1953, 24.

153 For example, in the Labour Conventions Case, Lord Atkin of the Privy Council pointed out that: "Within the British Empire, there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. [..] but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone." A.-G. for Canada v A.-G. for Ontario, A.C. 326, 1937, 347-348.

154 In fact, according to some authors, the law of treaties goes further: a state can be considered to be bound by its international commitments even when those commitments were made by officials who were not constitutionally entitled to make them. For them, the international competence of the agent does not need to be coextensive with her domestic competence; otherwise, the security of international transactions may be compromised. For the supporters of this view, a landmark case involves the Norwegian occupation of Eastern Greenland in the early 1930s. When Denmark protested, the Norwegian government responded that the Danish Foreign Minister had given oral assurance that Denmark would not make any difficulties in the settlement of the territorial question. The Danish government replied that the Foreign Minister was not constitutionally entitled to give such assurances and that only the Council of Ministers could have bound the country on a matter of such special importance. In its landmark decision, the Permanent Court of International Justice decided in 1933 that the reply by the Foreign Minister, given to the diplomatic representative of another country, to a question falling within its province, was binding upon Norway, notwithstanding the internal constitutionality of his decision. On the potential separation between international and constitutional law on this point, see the discussion in L. Wildhaber, Treaty-Making Power and Constitution, Stuttgart, Helbing and Litchtenham, 1971, 15-21.

155 In the legal literature, these informal agreements are also often designated as "agreements in simplified form".

156 A. Gotlieb, Canadian Treaty-Making, Toronto, Butterworths, 1968, 40.

157 A. Gotlieb, Canadian Treaty-Making, Toronto, Butterworths, 1968, 42-44.

158 A. Gotlieb, Canadian Treaty-Making, Toronto, Butterworths, 1968, 18.

159 A. Gotlieb, Canadian Treaty-Making, Toronto, Butterworths, 1968, 57.

160 Bora Laskin, "The Provinces and International Agreements" in Ontario Advisory Committee on Confederation, Background Papers and Reports, Toronto, The Queen's Printer of Ontario, 1967, 103.

161 See the rationale exposed in the Labour Conventions Case, by the Supreme Court of Canada in A.-G. for Canada v A.-G. for Ontario, S.C.R. 461, 535; and by the Privy Council in its appeal decision in A.-G. for Canada v A.-G. for Ontario, A.C. 326, 1937.

162 The province of Québec has historically claimed the right to negotiate and sign international agreements on its own, within the realm of its constitutional competence. The 1960s were particularly contentious in this regard when Mr. Guérin-Lajoie, Minister of Éducation in the Québec government, signed a series of cooperation agreements with France. Upon signature of these agreements, the Canadian government promptly exchanged a note with the French Ambassy, endorsing the agreements. The situation heated up in the late 1960s when the Québec government was invited alone to an international education meeting held in Gabon. In marking its disapproval, the Canadian government subsequently severed its diplomatic ties with the African country. On this subject, see L. Sabourin, "Politique étrangère et État du Québec", International Journal, XXX, 1965, 352-353; Paul Martin, Federalism and International Relations, Ottawa, Queen's Printer, 1968; and Mitchell Sharp, Federalism and International Conferences on Education, Ottawa, Queen's Printer, 1968.

163 See Howard A. Leeson, "Foreign Relations and Québec", 514-515.

164 See R. J. Delisle, "Treaty-Making Power in Canada", in Ontario Advisory Committee on Confederation, Background Papers and Reports, Toronto, The Queen's Printer of Ontario, 1967, 119-121; and H. Lauterpacht, Report of the International Law Commission on the Law of Treaties, U.N. Document, A/CN, 4-63, 1953, 139. We should note that the exclusive nature of federal treaty-making powers do not prevent provinces from pursuing an active international policy through other means. In practice, provinces can negotiate formal treaties as long as these agreements receive the formal approval of the federal government. More importantly, provinces can conclude administrative agreements which are essentially treated as private contracts by international law and there are now a plethora of direct provincial commercial and cultural representation abroad.

165 A.-G. of British-Columbia v. A.-G. of Canada, Appeal Case 203, 1924.

166 For a brief discussion of the case, see Frederick P. Varcoe, The Distribution of Legislative Power in Canada, Toronto, The Carswell Company, 1954, 159-160.

167 In the 1932 *Aeronautics* decision, the Judicial Committee of the Privy Council first confirmed that, with respect to imperial treaties, federal powers were not limited by the constitutional division of powers. This 1919 convention on the regulation of aircraft and air transportation had been signed in the context of the 1919 Paris Peace Conference and it had been ratified in 1922 by the British Crown on behalf of the Empire. As such, it constituted clearly an Empire treaty in the sense of section 132 of the Constitution Act,

1867. Consequently, the Privy Council upheld the validity of the federal statute implementing the convention in Canada. In *re Regulation and Control of Aeronautics*, Appeal Case 54, 1932.

168 In *re Regulation and Control of Radio Communication*, Appeal Case 304, 1932.

169 See Gil Rémillard, Le fédéralisme canadien, tome 1: La loi constitutionelle de 1867, Montréal, Québec/Amérique, 1983, 458.

170 Frederick P. Varcoe, The Distribution of Legislative Power in Canada, Toronto, The Carswell Company, 1954, 161-162.

171 Diverging interpretations of the rationale behind the Radio decision seem to remain. Varcoe, MacDonald and Leeson, for example, state that the Privy Council essentially found that the residual powers covered the treaty implementation power itself. In the decision in the Labour Conventions case, Lord Atkin clearly states that the rationale behind the Radio decision was that radio communications (and not treaty implementation), as a head of power, was found to be covered by the residual power. See Frederick P. Varcoe, The Distribution of Legislative Power in Canada, Toronto, The Carswell Company, 1954, 161-162; Howard A. Leeson, "Foreign Relations and Québec", 511-512; and Vincent C. MacDonald, "Canada's Power to Perform Treaty Obligations", Canadian Bar Review, XI, 1933, 667-668.

172 The three conventions, negotiated in the context of the institutions established by the Treaty of Versailles, dealt with such topics as the eight hour work day and minimum wages and they were signed by the federal government in 1919, 1921 and 1928.

173 A.-G. for Canada v A.-G. for Ontario, Appeal Case 326, 1937, 328.

174 A.-G. for Canada v A.-G. for Ontario, Appeal Case 326, 1937, 352.

175 While supported by the more stringent advocates of the federal principle (and particularly by the defenders of Quebec's autonomy), the *Labour Conventions* decision has been solidly condemned by most Canadian legal commentators. See, for example, H.F. Angus, "The Canadian Constitution and the United Nations Charter", Canadian Journal of Economics and Political Science, XII:2, 1946, 127-135; J. Eayrs, "Canadian Federalism and the U. N.", Canadian Journal of Economics and Political Science, XVI:2, 1950, 172-182; and F. H. Soward, "External Affairs and Canadian Federalism", in A.R.M. Lower et al., eds., Evolving Canadian Federalism, Durham, Duke University Press, 1958, 146-150.

Interestingly enough, it seems that the Lordships who made the decision themselves came to express some regrets. Eighteen years after the decision, Lord Wright stated his dissent from the principle laid down at the time and, a year later, Chief Justice Kerwin stated, in his decision in the case Francis v. The Queen that it may be necessary to re-examine the judgement of the Privy Council in the Labour Conventions case. See Bora Laskin, "The Provinces and International Agreements" in Ontario Advisory Committee on Confederation, Background Papers and Reports, Toronto, The Queen's Printer of Ontario, 1967, 111.

176 In protecting provincial autonomy, many writers believe that the Judicial Committee severely impaired Canada's international policy. Some authors have argued that the federal government has subsequently shied away from international treaties lying outside its areas of jurisdiction or that, because of provincial opposition, it has failed to ratify crucial international treaties, such as a series of declarations on women and human

rights. However, there is no consensus on this point. For example, Gotlieb argues that, despite the constitutional limitations, the Canadian government has maintained an honourable record regarding international treaties. See A. Gotlieb, Canadian Treaty-Making, Toronto, Butterworths, 1968, 82-83.

177 In practice, the main consequence of the *Labour Conventions* decision might be the greater involvement of provincial governments in the negotiation of international treaties. In the hope of avoiding difficulties in the implementation of international obligations at home, the federal government has increasingly been forced to seek provincial approval before treaty ratification and hence to concede provincial governments greater influence over the negotiation of these international agreements. As a result, despite its stronger legal position with respect to treaty-making, its weak position regarding treaty implementation has forced the federal government to relinquish some of its control in the negotiation phase as well. The overall result is a more fragmented institutional framework than we might have expected given Canada's parliamentary system.

178 The reader will have noted that I have chosen to consider legislative committees as an integral part of the chamber veto instead of treating them as a lower-level, separate veto. This choice is questionable since the agenda power of committee chairpersons could be used to prevent an approval vote on the floor. Moreover, an unfavourable report to the floor could also curtail the chances that a treaty will be approved by the floor. On the other hand, floor majorities are not without procedural controls over the work of committees and, despite the fact that experience underscores the autonomy and power of congressional committees, several scholars question the need to treat them as entirely separate from the floor. This debate is an important, and seemingly unresolved, one in American legislative studies and political economy. For a critical discussion of the treatment of committees as completely autonomous entities from floor majorities and party caucuses, see G. W. Cox and M. D. McCubbins, Legislative Leviathan: Party Government in the House, Berkeley, University of California Press, 1993; and R. D. Kiewet and M. D. McCubbins, The Logic of Delegation, Chicago, University of Chicago Press, 1991.

179 We consider here only the period in which the Canadian government exercised significant autonomy in the conduct of its foreign policy. When treaties were still directly negotiated and ratified by the British government, the British cabinet itself could be considered a veto point and would have been (and was) the object of pressure and influence by Canadian actors.

180 From a transnational politics perspective, it is possible to draw some conclusions about the general difficulty of policy change by considering the continental political space as a unified space of political activity. Since the ratification of treaties requires that these agreements be duly processed through both institutional frameworks, the institutional configuration faced by state and non-state actors in both countries can be seen as the result of the merger of both national institutional configurations. It could then be hypothesized that the greater the overall number of veto points, the more difficult and unlikely the success of policy change. In this perspective, for international treaties and congressional-executive agreements falling within the realm of federal jurisdiction in Canada, state and non-state actors in both countries are either facing a three vetoes configuration (the Canadian cabinet, the American Presidency, and a two-third majority of the U.S. Senate) or a four vetoes configuration (the Canadian cabinet, the American

Presidency, a majority of the House of Representatives, and a majority of the U.S. Senate). When the issue requires the legislative participation of provincial governments for effective implementation, the number of veto points could be significantly increased depending on the specific conditions. In any case, at least one significant veto point will be added to the overall institutional configuration.

181 The European Convention Concerning the Conservation of Birds Useful to Agriculture, signed in Paris in 1902, could be thought as a forbearer to the Migratory Birds Convention. However, there is no evidence that it was presented as a precedent during the debates on the negotiations and approval of the Migratory Birds Convention. In fact, it seems that the argument about the value of birds to the farm economy was first raised only in 1912 in the U.S. to help push the idea of a convention on migratory birds. On the European convention, see L. K. Caldwell (1996) International Environmental Policy, third edition, Durham, Duke University Press, 38-39. On the first link between agriculture and the protection of birds in the Migratory Birds Convention debate, see K. Dorsey (1998) The Dawn of Conservation Diplomacy: U.S.-Canadian Wildlife Protection Treaties in the Progressive Era, Seattle, University of Washington Press, 183-184.

182 While this is its official title, in Canada, the convention is generally referred to as the Migratory Birds Convention. In the United States, the convention is generally referred to as the Migratory Bird Treaty. Respective domestic statutes implementing the convention are consistent with national practices. In Canada, the Migratory Birds Convention Act is the implementing legislation; in the United States, the Migratory Bird Treaty Act is the relevant domestic legislation. Throughout the dissertation, I use "Migratory Birds Convention" to refer to the original convention.

183 History has shown that an important omission from the scope of the Migratory Birds Convention concerns raptors migrating across the two countries.

184 Birds migrate following an annual cycle, spending the summer in the North and coming back south for their wintering grounds. They can travel very long distances; some species can spend their winters in Mexico and South America and travel back to sub-arctic regions for the summer. The migration routes are generally regrouped among five broad corridors called flyways, although significant numbers of birds cross several flyways. Waterfowl species, comprising mainly ducks and geese, are largely shared by Canada and the United States. Roughly speaking, about 80% of the waterfowl population reproduce in Canada during the spring season before returning south of the border at the end of the summer, where 80% of the mortality due to hunting occurs. Very often migrating females are impregnated early in their migration. As a result, the spring harvest is often synonymous of killing females before they can raise their broods. Alternatively, females who lose their mate early in the migration often do not pair up with another male for the season. Consequently, spring shooting can exact a particularly heavy toll on waterfowl populations.

185 Scoters are dark-colored diving ducks of the genera Oidemia and Melanitta, living in northern coastal areas. They are also called coots.

186 For a review of some studies examining the importance of the subsistence harvests, see U.S. Fish and Wildlife Service (1994) Managing Migratory Bird Subsistence Hunting in Alaska - Draft Environmental Assessment, Washington, Department of the Interior. See also M. W. Wagner (1988) Domestic hunting and fishing by Manitoba Indians:

Magnitude, composition and implications for management, Winnipeg, Treaty and Aboriginal Rights Research Centre of Manitoba.

187 See C. H. Scott (1987) "The socio-economic significance of waterfowl among Canada's Aboriginal Cree: Indigenous use and local management", ICBP Technical Publication, no. 6, 49-62; R. C. Condon, P. Collings, and G. Wenzel (1995) "The best part of life: Subsistence hunting, ethnicity, and economic adaptation among young adult Inuit males", Arctic, 48:1, 31-46.

188 See Letter from Hon. G. F. Mackenzie, Gold Commissioner, Yukon Territory, to J. B. Harkin, Commissioner, Dominion Parks Branch, Department of Interior, dated 24 July 1919; and letter from Governor of Alaska to G. F. Mackenzie, Gold Commissioner, Yukon Territory, dated 27 June 1919. (Yukon Files, YRG 1, series 3, vol. 2, file 12-3a.)

189 For an interesting account of the enforcement conditions prevalent in Missouri in the early years of the Migratory Birds Convention, see L. Merovka (1984) "A Federal Game Warden" in A. S. Hawkins et al., eds., Flyways: Pioneering Waterfowl Management in North America, Washington, Department of Interior, 27-34.

190 For example, see the Letter from A.S. Williams, Departmental Solicitor, Department of Indian Affairs, to J. B. Harkin, Commissioner, Canadian National Parks, dated 17 November 1921, regarding the application of the Migratory Birds Convention Act to Aboriginal Peoples. In National Archives of Canada, Canadian Wildlife Service files (RG 109, vol. 115, Part 5).

191 The Audubon Society was an immediate success. In 1888, it already counted 50 000 members, most of them influential people, and an influential magazine. But as the growth proved too rapid to manage, George Grinnel actually closed the organisation in 1889. The organisation was then resurrected in the form of a Massachusetts chapter in 1896 and it expanded from there. It became a national organisation in 1905. See J. F. Reiger (1986) American Sportsmen and the Origins of Conservation, rev. ed., Norman, University of Oklahoma Press, 66-72.

192 K. Dorsey (1998) The Dawn of Conservation Diplomacy: U.S.-Canadian Wildlife Protection Treaties in the Progressive Era, Seattle, University of Washington Press, 174-182.

193 See J. Foster (1998) Working for Wildlife: The Beginning of Preservation in Canada, Toronto, University of Toronto Press. Despite the absence of the large naturalist organisations, we should point out that Canadians were also joining local naturalist organisations, such as the Ottawa Field-Naturalists' Club (founded 1879) or the Thomas McIlwraith Field Naturalists' Club (founded 1863), or even American organisations, such as the Audubon Society.

194 It should be noted that these authors do not represent a consistent and monolithic body of thought. On the contrary, while all quite influential, they represent different philosophical approaches to the management of the natural world. Muir was a naturalist advocating the preservation of natural spaces and wildlife for their aesthetic and spiritual value as well as for their contribution to broader ecological systems. Pinchot was resolutely utilitarian and advocated the wise use and scientific management of natural resources so as to ensure a sustained yield. Leopold, whose influence on the early conservation movement is probably unparalleled, privileged a "land ethic" which infuses resource management decisions with a respectful attitude towards the beauty and integrity of the biotic community understood as an ecosystemic whole. There is no doubt

that these authors inspired people differently. With regards to the fight for the protection of birds, many preservationists relied on more aesthetic principles for their engagement while many sportsmen advocated conservation on the basis of a mix of wise use precepts and ethical standards characterizing waste as inconsistent with a gentleman's proper reverential attitude towards nature. Despite these tensions and differences, in this chapter, I refer to all those favouring more stringent bird protection as conservationists.

195 K. Dorsey (1998) The Dawn of Conservation Diplomacy: U.S.-Canadian Wildlife Protection Treaties in the Progressive Era, Seattle, University of Washington Press, 197.

196 J. Foster (1998) Working for Wildlife: The Beginning of Preservation in Canada, Toronto, University of Toronto Press, 10.

197 The term is from S. Udall (1963) The Quiet Crisis, New York, Holt, Rinehart and Winston.

198 The last passenger pigeon died in a Cincinnati zoo in 1914.

199 F. Graham (1971) Man's Dominion: The story of conservation in America, New York, 219, 223.

200 On the feathers trade, see R. W. Doughty (1975) Feather Fashion and Bird Preservation: A study in nature protection, Berkeley, University of California Press. See also K. Dorsey (1998) The Dawn of Conservation Diplomacy: U.S.-Canadian Wildlife Protection Treaties in the Progressive Era, Seattle, University of Washington Press, 171-173, 118-179.

201 J. Foster (1998) Working for Wildlife: The Beginning of Preservation in Canada, Toronto, University of Toronto Press, 124.

202 The importance associated to spring shooting was not only cultural. In Missouri, a hotbed of opposition, private clubs were very often dependent on lands that were only inundated during this part of the year.

203 For an example of this perception of the problem, see the speech by Honoré Mercier, Minister of Colonisation, Mines and Fisheries for the Province of Quebec, given to the National Conference of the AGPPA in New York on 1 May 1917. (National Archives of Canada, Canadian Wildlife Service files (RG 109), vol. 114, WL.U.10, Part 1).

204 See K. Dorsey (1998) The Dawn of Conservation Diplomacy: U.S.-Canadian Wildlife Protection Treaties in the Progressive Era, Seattle, University of Washington Press, 179-180.

205 The Lacey Act required the appropriate labeling of the packages carrying bird parts and made it illegal to ship birds to, or from, states where their taking was illegal. Since several states still lacked protective legislation, the law was of a limited scope.

206 See K. Dorsey (1998) The Dawn of Conservation Diplomacy: U.S.-Canadian Wildlife Protection Treaties in the Progressive Era, Seattle, University of Washington Press, 199.

207 Conservationists used this argument abundantly to promote the bill. Some ornithologists estimated the annual damage done to farmers to $800 million (a questionable number given the inherent difficulty of arriving at a reliable estimate). McLean talked of the "insect tax" and argued that this wasted money could be spent on education. During the debates on the adoption of the Migratory Bird Treaty Law, the legislation implementing the Migratory Birds Convention, an important argument was even that protecting the

birds would improve the war effort by boosting agricultural production! See K. Dorsey (1998) The Dawn of Conservation Diplomacy: U.S.-Canadian Wildlife Protection Treaties in the Progressive Era, Seattle, University of Washington Press, 186-187 and chapter 8.

208 See K. Dorsey (1998) The Dawn of Conservation Diplomacy: U.S.-Canadian Wildlife Protection Treaties in the Progressive Era, Seattle, University of Washington Press, 199.

209 More precisely, the idea of an international treaty to protect migratory birds in North America was first recorded in the Senate debates in January of 1913. It is only after some debates over the course of a few months that the resolution asking the Executive branch to initiate discussions with foreign governments was adopted by the Senate floor.

210 Quoted in Letter from U.S. Secretary of State, J.B. Moore, to the British Ambassador to the U.S., Sir Cecil Arthur Spring-Rice, dated February 16, 1914.

211 United States v. Shauver, 214 F.R. 154.

212 In effect, the federal expansion into wildlife protection in the U.S. seemed to have provided the political impetus for a series of migratory bird treaties between the United States and its neighbours. After the U.S.-Canada treaty, there were similar treaties signed with Japan, Russia, and Mexico.

213 See correspondence to and from the Commissioner of Parks (National Archives of Canada, Canadian Wildlife Service files (RG 109), vol. 115, Part 1). See also the memorandum from the Commissioner of Parks to Mr. Cory, dated January 23, 1914, in which the Commissioner proposes to investigate the possibility to take action for the protection of migratory birds "only other federal authority". (National Archives of Canada, Canadian Wildlife Service files (RG 109), vol. 114, WL.U.10, Part 1).

214 American conservationists' estimates were first brought into the Canadian debates through a rough adaptation by Walter Jones in a report to the Commission on Conservation in 1913. Jones essentially divided the American rough estimates by ten to arrive at an even rougher figure for Canada. His figures were then used by other advocates of the treaty.

215 C. Walter Jones (1913) Fur Farming in Canada - Report to the Commission on Conservation, mimeo, 42 and 48.

216 Letter by Percy Taverner, to Maxwell Graham, Parks' Branch, Department of Interior, 22 March 1913. (National Archives of Canada, Canadian Wildlife Service files (RG 109)).

217 J. Foster (1998) Working for Wildlife: The Beginning of Preservation in Canada, Toronto, University of Toronto Press, 124.

218 Letter from James Harkin, Parks Commissioner , Canadian Department of Interior, to John Burnham, Director, American Game Protective and Propagation Association, 25 March 1913. (National Archives of Canada, Canadian Wildlife Service files (RG 109)).

219 North American Fish and Game Protective Association, Transactions of the 1913 Annual Meeting, Ottawa, 9 December 1913.

220 Hewitt, Gordon C. (1921) The Conservation of Wild Life in Canada, New York, Charles Scribner's Sons.

221 M. F. Girard (1994) L'écologisme retrouvé: Essor et déclin de la Commission de la conservation du Canada, Ottawa, University of Ottawa Press, 224-225.

222 See news clipping from Montreal Star (1915) in National Archives of Canada, Canadian Wildlife Service files (RG 109), vol. 115, WL.U.10, Part 1.

223 Hewitt, Gordon C. (1921) The Conservation of Wild Life in Canada, New York, Charles Scribner's Sons.

224 Letter from U.S. Secretary of State, J.B. Moore, to the British Ambassador to the U.S., Sir Cecil Arthur Spring-Rice, dated 16 February 1914.

225 In an order-in-council on the MBC, issued on May 31, 1915, the Privy Council of Canada states that, "as the matters dealt with in the proposed Convention are more immediately of provincial concern", the government invited the views of the provinces. See Privy Council of Canada, Migratory Birds Convention - Order-in-council passed 31st May 1915. (National Archives of Canada, Canadian Wildlife Service files (RG 109), vol. 114, WL.U.10, Part 1). For the views of Gordon C. Hewitt, see Gordon C. Hewitt (1921) The Conservation of the Wild Life of Canada, New York, Charles Scribner's Sons.

226 See, as an example of their thinking, Memorandum from J. B. Harkin, Commissioner, Dominion's Parks Branch, to Minister of the Interior, date 19 May 1914. (National Archives of Canada, Canadian Wildlife Service files, RG 109, vol. 114, WL. U. 10, Part 1). In the end, after gaining some assurances that provincial objections would not present "an insuperable difficulty", the cabinet adopted an order-in-council on May 31st, 1915 to announce that it was favourably disposed toward the conclusion of the treaty. See Privy Council of Canada, Migratory Birds Convention - Order-in-council passed 31st May 1915. (National Archives of Canada, Canadian Wildlife Service files (RG 109), vol. 114, WL.U.10, Part 1).

227 In fact, as early as August 1914, the Secretary of State for External Affairs wrote to the Minister of the Interior to announce that all the provinces had approved the principle of the convention. See Letter from Secretary of State for External Affairs to Minister of Interior, dated August 19, 1914. (National Archives of Canada, Canadian Wildlife Service files (RG 109), vol. 114, WL.U.10, Part 1).

228 Some of the letters are available at the National Archives of Canada (Canadian Wildlife Service files, RG 109, vol. 114, WL. U. 10, Part 1) and are dated respectively: 25 April 1914 (New Brunswick), 30 April 1914 (Prince Edward Island), 2 May 1914 (Saskatchewan), 5 September 1914 (Ontario), and 9 September 1914 (Manitoba). The Lieutenant Governor of Saskatchewan wrote again on 21 May 1914 to specify that the province's laws were "already in line" for the changes proposed by the Migratory Birds Convention.

229 See the letter from J. A. Knight, Chief Game Commissioner of Nova Scotia, to George H. Murray, Provincial Secretary of Nova Scotia, dated 27 May 1914, explaining the province's objections.

230 J. Foster (1998) Working for Wildlife: The Beginning of Preservation in Canada, Toronto, University of Toronto Press, 139-140.

231 At the time, the province had an opened season of five months for ducks and of six months for geese. These were both much longer than the three months and a half proposed by the Convention and extended into the spring.

232 British Columbia first expressed its approval of the treaty's principle but objected to some specific clauses in a letter by its Lieutenant Governor to the Under-Secretary of State, dated 14 May 1914. He then wrote a second time on 28 July 1914 to stipulate that, without some modifications, the province could not become party to the treaty. (National Archives of Canada, Canadian Wildlife Service files, RG 109, vol. 114, WL. U. 10, Part 1).

233 J. Foster (1998) Working for Wildlife: The Beginning of Preservation in Canada, Toronto, University of Toronto Press, 140.

234 A. M. Day (1969) Northern Natives, Migratory Birds, and International Treaties, Washington, Bureau of Sport Fisheries and Wildlife, 82.

235 K. Dorsey (1998) The Dawn of Conservation Diplomacy: U.S.-Canadian Wildlife Protection Treaties in the Progressive Era, Seattle, University of Washington Press, 209.

236 J. Foster (1998) Working for Wildlife: The Beginning of Preservation in Canada, Toronto, University of Toronto Press, 141-142.

237 The Migratory Birds Convention was approved by the U.S. Senate on 29 August 1916 and the President signed it on 2 September 1916. Due to delays caused by the burden of the war, the King signed the Convention only in 20 October 1917.

238 In practical terms, the confirmation of the Migratory Birds Convention as the constitutional foundation of the federal regime for the protection of migratory birds gives the Convention a quasi-constitutional status with regards to justifying federal conservation policy on birds. What made the negotiation of the Convention necessary and attractive for supporters of federal intervention in both countries is precisely what would make the potential loss of the Convention such a dire prospect seventy years later. The termination of the Migratory Birds Convention would not only mean the end of international cooperation; it would also signify the end of federal jurisdiction over birds. As we will see in chapters six and seven, this constitutional reality will come to play a significant role in furthering the amendment of the Convention to acknowledge Aboriginal rights.

239 The issue having become moot after the ratification of the Convention, the Court decided to abstain from making a decision. This decision came after the Court had unexpectedly asked for the case to be argued a second time, apparently to break a deadlock. In effect, the delay provided some needed time to the treaty's negotiators to conclude an agreement.

240 See Janet Foster (1971) Working for Wildlife: The Beginning of Preservation in Canada, Toronto, University of Toronto Press, 127.

241 PEI Supreme Court (1920) The King v. Russell C. Clarke. Note that this was before Canada's slow evolution as an independent foreign power would undermine the federal government's authority to implement the terms of treaties at home in provincial jurisdictions.

242 U.S. Fish and Wildlife Service (1994) Managing Migratory Bird Subsistence Hunting in Alaska - Draft Environmental Assessment, Washington, Department of the Interior, A-9.

243 Regina v. Sikyea (1964) S.C.R. 642.

244 Janet Foster (1971) Working for Wildlife: The Beginning of Preservation in Canada, Toronto, University of Toronto Press, 134.

245 Janet Foster (1971) Working for Wildlife: The Beginning of Preservation in Canada, Toronto, University of Toronto Press, 134.

246 United States (1916) Memorandum of Suggested Changes in the Convention Between the United States and Great Britain for the Protection of Migratory Birds in the United States and Canada, 2. (National Archives of Canada, Canadian Wildlife Service files, RG 109, vol.115, WL.U. 10, Part 1).

247 Report to the Privy Council on the Negotiation of a Convention Between the United States and Great Britain for the Protection of Migratory Birds in the United States and Canada, dated 28 June 1916. (National Archives of Canada, spool C-4385, 102789). An unsigned and undated document found in the archives, but seemingly written by a federal official to describe the changes made to the negotiated draft of the Convention to please British Columbia, suggests that the exception for scoters may have been made to allow the Aboriginal Peoples of the province to take these ducks. See document entitled Objections of British Columbia in (National Archives of Canada, Canadian Wildlife Service files, RG 109, vol.115, WL.U. 10, Part 1).

248 As Albert Day pointed out when he studied the problem in the late 1960s, the seabirds designated by the exception feed and sleep on the open sea. As such, they are only available to a few Aboriginal communities living in coastal areas and not the bulk of Inuit and First Nations Peoples living inland. A. M. Day (1969) Northern Natives, Migratory Birds, and International Treaties, Washington, Bureau of Sport Fisheries and Wildlife, 78-79.

249 As an indication of his influence, the Nelson Lagoon in Alaska and the Nelson Island at the mouth of the Yukon river bear his name.

250 M. F. Girard (1994) L'écologisme retrouvé: Essor et déclin de la Commission de la conservation du Canada, Ottawa, University of Ottawa Press, 232.

251 D. Gottesman (1983) "Indigenous hunting and the Migratory Birds Convention Act: Historical, political and ideological perspectives", Journal of Canadian Studies, 18:3, 75-80.

252 D. Gottesman (1983) "Indigenous hunting and the Migratory Birds Convention Act: Historical, political and ideological perspectives", Journal of Canadian Studies, 18:3, 67-89.

253 D. Gottesman (1983) "Indigenous hunting and the Migratory Birds Convention Act: Historical, political and ideological perspectives", Journal of Canadian Studies, 18:3, 80.

254 D. Gottesman (1983) "Indigenous hunting and the Migratory Birds Convention Act: Historical, political and ideological perspectives", Journal of Canadian Studies, 18:3, 84-85.

255 D. Gottesman (1983) "Indigenous hunting and the Migratory Birds Convention Act: Historical, political and ideological perspectives", Journal of Canadian Studies, 18:3, 85.

256 C. G. Hewitt (1916) "La conservation des mammifères du nord", in Commission de la conservation du Canada, Rapport annuel, Ottawa, Imprimeur de la Reine pour le Canada, 35-41.

257 M. F. Girard (1994) L'écologisme retrouvé: Essor et déclin de la Commission de la conservation du Canada, Ottawa, University of Ottawa Press, 231-232.

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258 Meighen's motivations were not strictly ecological. For him, allowing the continuing presence of Aboriginal Peoples in the far north by preserving their subsistence lifestyle also served to establish the sovereignty of Canada over these areas. See M. F. Girard (1994) L'écologisme retrouvé: Essor et déclin de la Commission de la conservation du Canada, Ottawa, University of Ottawa Press, 233-234.

259 Janet Foster (1971) Working for Wildlife: The Beginning of Preservation in Canada, Toronto, University of Toronto Press, 176-177.

260 See the interventions by provincial representatives in Commission of Conservation (1919) National Conference, Ottawa, Queen's Printer, 26-32.

261 Letter from Ernest Gruening, U.S. Senator for Alaska, to Dean Rusk, U.S. Secretary of State, dated 13 June 1961.

262 See Letter by Governor of Alaska to Hon. G. F. Mackenzie, Gold Commissioner for the Yukon Territory, dated 27 June 1919; and Letter from the Hon. G. F. Mackenzie, Gold Commissioner for the Yukon Territory, to J. B. Harkin, Commissioner, Dominion Parks Branch, dated 24 July 1919. (National Archives of Canada, YRG 1, Series 3, Volume 2, File 12-3A.)

263 See Letter by Governor of Alaska to Hon. G. F. Mackenzie, Gold Commissioner for the Yukon Territory, dated 27 June 1919.

264 The legal opinions were conveyed in two letters: Letter from A. S. Williams, Departmental Solicitor for Department of Indian Affairs, to J. B. Harkins, Commissioner of Canadian National Parks, dated 17 November 1921 (National Archives of Canada, RG 109, vol. 115, Part 5); and Letter from Departmental Solicitor for Department of Indian Affairs to J. B. Harkins, Commissioner of Canadian National Parks, dated 10 July 1922 (National Archives of Canada, RG 109, vol. 115, Part 4). It is interesting to note that, after reiterating the federal government's power to make laws regarding Indians and their lands, the lawyers argue that, because some modest exceptions are made for Aboriginal peoples in the Migratory Birds Convention, the Convention must have been intended to otherwise apply to indigenous peoples. As a result, the presence of the minor exceptions was precisely the exception that confirmed the rule against Aboriginal spring hunting and gave some legal certainty to the ban.

265 See, in particular, letter from W. C. Henderson, Acting Chief of the U.S. Bureau of Biological Survey, to J. B. Harkin, Commissioner of Canadian National Parks, dated 10 March 1923.

266 F. D. Caswell and K. M. Dickson (1997) "Evaluating the status of waterfowl populations in Canada", in Canadian Wildlife Service, Occasional Papers, no. 95, chapter 2, 12. The paper is available at http://www2.ec.gc.ca/cws-scf/pub/op95/chpt.html.

267 The cross-jurisdictional, all-encompassing character of the natural environment, the systemic nature of ecological relations, and the diffuse quality of many sources of ecological change pose significant challenges for the collection of detailed, comprehensive and accurate data about environmental changes. In the field of wildlife management, tracking the status of species and populations with accuracy and over long periods of time offer many of these challenges. Monitoring accurately the status of populations of many bird species as well as other animals that migrate to remote locations, crossing the entire continent (and sometimes a few of them), with limited resources constitutes a difficult task for wildlife management officials. As a result,

information is often incomplete and policy decisions are typically made under conditions of uncertainty both with regards to current status and future trends.

In this context, waterfowl species stand out as some of the most intensely and widely studied populations of wild animals. Because they have been harvested for a long time, and as such represent both a valued economic activity and an important source of food for many communities, wildlife managers have been acquiring better data on geese and ducks than on most other species. Since the late 1930s, an impressive collaborative effort has been co-ordinated across the continent, involving wildlife professionals, hunters and bird watchers, to track population numbers in order to assure a sustained yield to consumptive users. Techniques used in this massive effort include tracking studies done by banding some specimens, population counts done through aerial surveys, monitoring of the annual harvest by hunters, and population surveys co-ordinated by environmental organisations and state officials but performed on a voluntary basis by thousands of bird watchers across the continent. Over the years, the use of sophisticated statistical techniques and computer programming has also improved the abilities of wildlife agencies to manage populations. But despite these impressive efforts, knowledge of population status and trends remains incomplete and policy decisions are often contested by users as the accuracy of underlying estimates.

268 G. Thompson (1997) "Subsistence Hunting of the Arctic Anatidae in North America", unpublished paper. Mr. Thompson is senior policy analyst at Environment Canada and former director of Migratory Birds and Wildlife Conservation at the Canadian Wildlife Service. We should point out as well that these numbers suggest that Canadian Aboriginal communities are greater consumers of both ducks and geese (respectively 37 and 24 per hunter) than Alaskan Aboriginal communities (respectively 20 and 7 per hunter).

269 71% of this subsistence harvest is thought to occur in the northern part of the continent.

270 This estimation would correspond roughly to estimates done for Alaska alone, where about 56% of the waterfowl harvest is estimated to be taken during the spring. International Association of Fish and Wildlife Agencies (1994) Discussion paper of the IAFWA Migratory Birds Convention Ad Hoc Committee, Washington.

271 U.S. Fish and Wildlife Service (1994) Draft Environmental Assessment: Managing Migratory Birds Subsistence Hunting in Alaska, Washington, Department of the Interior, 30-32.

272 Canadian Wildlife Service (1994) Draft Environmental Assessment of Alternatives for the Protection and Harvest of Migratory Birds in Canada, Ottawa, Environment Canada, 44-45.

273 G. Thompson (1997) "Subsistence Hunting of the Arctic Anatidae in North America", unpublished paper, 15.

274 For example, see the Memorandum from Paul A. Lenzini, Legal Counsel for the International Association of Fish and Wildlife Associations, to the Officers of the International Association of Fish and Wildlife Associations, regarding the "Status of Protocol Amending the 1916 Convention for the Protection of Migratory Birds in the United States and Canada", dated 11 February 1985, 10-12.

275 In 1999, Canadian and American governments even allowed an unprecedented spring harvest to cull the Lesser Snow Goose population by up to 4.5 million specimen because it is considered overpopulated and thought to be destroying its own habitats.

276 H.P. Huntington (1992) Wildlife Management and Subsistence Hunting in Alaska, London, Belhaven Press, 121-124.

277 K. M. Dickson (1989) "Trends in sizes of breeding duck populations in western Canada, 1955-89", Progress Note, no.186, Canadian Wildlife Service, 2-3.

278 For a brief review of the developments leading to the Plan, see T. Conway (1992) "The Marginalization of the Department of the Environment: Environmental Policy, 1971-1988", Unpublished Ph.D. dissertation, Carleton University, chapter 8.

279 While the subsistence way-of-life is primarily associated with Aboriginal peoples, a small number of other northern residents and southern Aboriginal persons share this life-style, either out of necessity, personal choice or tradition. While the access rights of the northern non-Aboriginal hunters is a matter of some debate in both Alaska and northern Canada, my discussion in this chapter largely ignores them to focus on the main issue of Aboriginal subsistence rights. The faith of the subsistence rights of southern Aboriginal communities is a matter of even greater socio-political importance (as recent debates about the British Columbia salmon fisheries and the consequences of the Supreme Court's Marshall decision in the Atlantic provinces undoubtedly show). But, with regards to waterfowl and the Migratory Birds Convention, the central issue concerns subsistence needs, practices and rights of northern Aboriginal communities. For this reason, this chapter will concentrate on these users. The recognition of Aboriginal rights to a subsistence harvest of waterfowl for southern communities will be discussed in chapters 6 and 7 when we consider the consequences of the 1990 Sparrow decision on the Migratory Birds Convention amendment negotiations and the general opposition of the Department of Northern Development and Indian Affairs as well as Aboriginal organisations to a "northern" solution.

280 G. H. Finney (1990) "Indigenous Harvesting of Waterfowl in Canada", IWRB Special Publication, no.12, Slimbridge, U.K., 140-144.

281 For an example of this southern/northern distinction, see the following study on Manitoba: M. W. Wagner (1986) Domestic Hunting and Fishing by Manitoba Indians: Magnitude, Composition and Implications for Management, Winnipeg, Treaty and Aboriginal Rights Research Centre of Manitoba.

282 A. M. Ervin (1987) "Styles and Strategies of Leadership during the Alaska Indigenous Land Claims Movement, 1959-1971", Anthropologica, 29, 23-25.

283 In these three areas, Aboriginal people constitute 90% of the total population. On the concentration of subsistence hunting in these areas, see R. J. Wolfe, A. W. Paige and C. L. Scott (1990) The Subsistence Harvest of Migratory Birds in Alaska, Report prepared for the Alaska Department of Fish and Game, Anchorage.

284 R. J. Wolfe, A. W. Paige and C. L. Scott (1990) The Subsistence Harvest of Migratory Birds in Alaska, Report prepared for the Alaska Department of Fish and Game, Anchorage.

285 Peter Douglas Elias, "Report from the Roundtable Rapporteur", in Sharing the Harvest: The Road to Self-Reliance, Report of the National Round Table on Aboriginal

Economic Development and Resources, found in For Seven Generations - An Information Legacy of the Royal Commission on Aboriginal Peoples, record 20592.

286 Alexander M. Ervin (1987) "Styles and strategies of leadership during the Alaskan indigenous land claims movement: 1959-71", Anthropologica, 29, 24.

287 C. H. Scott (1987) "The socio-economic significance of waterfowl among Canada's Aboriginal Cree: Indigenous use and local management", ICBP Technical Publication, no. 6, 51.

288 R. G. Condon, P. Collings and G. Wenzel (1995) "The Best Part of Life: Subsistence hunting, ethnicity, and economic adaptation among young adult Inuit males", Arctic, 48:1, 43.

289 The land use and occupancy studies that have been done to inform comprehensive claims negotiations are an important source of documentary evidence on this topic.

290 S. Huntington (1992) Wildlife Management and Subsistence Hunting in Alaska, London, Belhaven Press.

291 Jim Rearden (1982) "Subsistence - Alaska's Agony", Alaska, October 1982, 60.

292 United States. Department of Interior, Fish and Wildlife Service, Draft Environmental Assessment - Subsistence Hunting of Migratory Birds in Alaska and Canada, Washington, 1980, i.

293 F. Berkes and C. Farkas (1978) "Eastern James Bay Cree Indians: Changing patterns of wild food use and nutrition", Ecology of Food and Nutrition, 7, 155-172; and C. H. Scott (1987) "The socio-economic significance of waterfowl among Canada's Aboriginal Cree: Indigenous use and local management", ICBP Technical Publication, no. 6, 53 and 60 (endnote no.3).

294 Quoted in Canadian Wildlife Service, Migratory Birds Convention Amendment Bulletin, Ottawa, Environment Canada, undated document, 2. The document should be available at http://www.ns.doe.ca/biodiversity/mbc/bulletin.html.

295 C. H. Scott (1987) "The socio-economic significance of waterfowl among Canada's Aboriginal Cree: Indigenous use and local management", ICBP Technical Publication, no. 6, 53.

296 C. H. Scott (1987) "The socio-economic significance of waterfowl among Canada's Aboriginal Cree: Indigenous use and local management", ICBP Technical Publication, no. 6, 57.

297 C. H. Scott (1987) "The socio-economic significance of waterfowl among Canada's Aboriginal Cree: Indigenous use and local management", ICBP Technical Publication, no. 6, 57; See also the comment made by Phillip Awashish, a Cree from northern Quebec, in Canadian Wildlife Service, Migratory Birds Convention Amendment Bulletin, Ottawa, Environment Canada, undated document, 2.

298 H.P. Huntington (1992) Wildlife Management and Subsistence Hunting in Alaska, London, Belhaven Press, 45.

299 A. Stairs and G. W. Wenzel (1992) "I am I and the environment: Inuit hunting, community and identity", Journal of Indigenous Studies, 3:1, 1-12. On the cultural significance of sharing, see also H. Loon (1989) "Sharing: You are never alone in a village", Alaska Fish and Game, 21:6, 34-36.

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300 See R. Schroeder and R. Nelson (1983) "Resource Use and in a Large, Non-Road Connected Community of Southeast Alaska", in R. A. Wolfe and L. J. Ellanna, eds., Resource Use and Socioeconomic Systems, Juneau, Alaska Department of Fish and Game, 235-238; and G. Thompson (1997) "Subsistence Hunting of the Arctic Anatidae in North America", unpublished paper, 8.

301 J. Kruse (1986) "Subsistence and the North Slope Inupiat", in S.J. Langdon, ed., Contemporary Alaska Indigenous Economies, Lantham, University Press of America, 121-152.

302 R. G. Condon, P. Collings and G. Wenzel (1995) "The Best Part of Life: Subsistence hunting, ethnicity, and economic adaptation among young adult Inuit males", Arctic, 48:1, 43.

303 R. G. Condon, P. Collings and G. Wenzel (1995) "The Best Part of Life: Subsistence hunting, ethnicity, and economic adaptation among young adult Inuit males", Arctic, 48:1, 43.

304 M. Nowak (1987) "Mobility and Subsistence Access", Inuit Studies, 11:1, 33-46.

305 Quoted in D. Hullen (1991) "Alaska's fight over subsistence hunting rights", Arctic Circle, May-June, 20.

306 See (National Archives of Canada, RG 109, vol. 735, Part 1.)

307 These events are recounted in H.P. Huntington (1992) Wildlife Management and Subsistence Hunting in Alaska, London, Belhaven Press, 28, 42-43, 121. See also the first-person account by Sadie Neakok, an Iñupiaq woman and magistrate, in M.B. Blackman (1989) Sadie Brower Neakok: an Iñupiaq woman, Seattle, University of Washington Press, 182-184.

308 There had been several attempts at organizing indigenous interests before the 1960s and provincial organisations were in existence before this period, although with less political impact. For a discussion of some of the difficulties in organizing, see H. Cardinal (1991) "Hat in hand: the long fight to organize", in J. R. Miller, ed., Sweet Promises: A Reader on Indian-White Relations in Canada, Toronto, University of Toronto Press, 393-405.

309 R. L. Nichols (1999) Indians in the United States and Canada: A Comparative History, Lincoln, University of Nebraska Press, 312.

310 F. Abele (1987) "Canadian Contradictions: Forty Years of Northern Political Development", Arctic, 40:4, 319.

311 F. Abele (1987) "Canadian Contradictions: Forty Years of Northern Political Development", Arctic, 40:4, 321.

312 Prior to the Alaska Federation of Natives, the Alaska Indigenous Brotherhood had represented the interests of the Haida and Tlingit communities of the panhandle region but it had been incapable of expanding to the rest of the state. For reasons of differences in organisational and community cultures, Aboriginal nations in other parts of the State had resisted their leadership. See A. M. Ervin (1987) "Styles and Strategies of Leadership during the Alaska Indigenous Land Claims Movement, 1959-1971", Anthropologica, 29, 25.

313 A. M. Ervin (1987) "Styles and Strategies of Leadership during the Alaska Indigenous Land Claims Movement, 1959-1971", Anthropologica, 29, 29.

314 A. M. Ervin (1987) "Styles and Strategies of Leadership during the Alaska Indigenous Land Claims Movement, 1959-1971", Anthropologica, 29, 33.

315 G. S. Harrison (1970) Electoral Behaviors of Alaska Indigenous Villages, College, University of Alaska Institute of Social, Economic and Government Research.

316 E. S. Burch, Jr. (1979) "Indigenous Claims in Alaska: An Overview", Inuit Studies, 3:1, 8.

317 E. S. Burch, Jr. (1979) "Indigenous Claims in Alaska: An Overview", Inuit Studies, 3:1, 21.

318 H. A. Feit (1979) "Political articulations of hunters to the state: Means of resisting threats to subsistence production in the James Bay and Northern Quebec Agreement", Inuit Studies, 3:2, 37-52.

319 S. McNabb (1992) "Indigenous claims in Alaska: A twenty-year review", Inuit Studies, 16:1-2, 85-95.

320 D. Hullen (1991) "Alaska's fight over subsistence hunting rights", Arctic Circle, May-June, 25.

321 A good expression of these values is found in discussions of the morality of hunting and the nature of hunting ethics (and aesthetics). See, for example, the discussion of what constitutes a valuable hunt or what hunters find valuable in hunting in C. J. List (1997) "Is Hunting a Right Thing?", Environmental Ethics, 18, 405-416; T. Vitali (1990) "Sport Hunting: Moral or Immoral?", Environmental Ethics, 12, 69-82; and A. S. Causey (1989) "On the Morality of Hunting", Environmental Ethics, 11, 327-343. It should also be acknowledged that there may be a paradox between the necessity of killing for validating an authentic hunting experience and the respect for wilderness that hunters' ethics seem to promote. In any case, even if much of the value derived by hunters from hunting can be attributed to its non-consumptive aspects, the entire experience nevertheless revolves around the ultimate consumptive objective of killing animals. For a discussion of the paradox, see B. Luke (1997) "A Critical Analysis of Hunters' Ethics", Environmental Ethics, 19, 25-44.

322 Commercial harvesters offer a more difficult case. Where economic alternatives and substitutes are rare, the harvesting of wildlife for commercial purposes could also be conceived as an essential enterprise for their users. Severe conflicts between commercial and indigenous fishers on the west and east coasts of Canada, often in areas where unemployment rates are high, illustrate that commercial fishers see commercial harvesting as a source of economic gains essential to their survival and well-being. Moreover, as many Aboriginal subsistence users readily point out, commercially trading the results of subsistence harvesting can be an essential part of assuring an adequate livelihood by acquiring a broader range of necessities through the cash economy. Nevertheless, generally speaking, commercial harvesters rely on wildlife resources for wealth creation that go beyond meeting basic needs and have better access to alternatives in the cash economy than subsistence harvesters. As a result, the essential nature of their consumptive use of wildlife resources seems more questionable than for most subsistence users.

323 For an early consideration of this issue, see J. Krutilla (1967) "Conservation Reconsidered", American Economic Review, 57:4, 777-786. For a broader discussion, see B. G. Norton (1986) The Preservation of Species: The value of biological diversity,

Princeton, Princeton University Press. Existence value should not be confused with the inherent and intrinsic value attributed to the natural world by some strands of the environmental movement (e.g. deep ecology). In contrast to the concept of intrinsic value (i.e. value that exists in the absence of a benefit or utility for an external agent), the concept of existence value used here remains anthropocentric and largely utilitarian.

324 For example, see the Mono Lake (California) case in J. B. Loomis (1991) "Conceptual and Empirical Classification of Wildlife Benefits and Beneficiaries", Policy Studies Journal, 19:3-4, 560-568.

325 See A. S. Causey (1989) "On the Morality of Hunting", Environmental Ethics, 11, 327-343. A prominent expression of this position will be found in animal rights activists and philosophers. See, for example, T. Regan (1983) The Case for Animal Rights, Berkeley, University of California Press, 353-359.

326 See T. Vitali (1990) "Sport Hunting: Moral or Immoral?", Environmental Ethics, 12, 79-81.

327 See also R. W. Loftin (1984) "The Morality of Hunting", Environmental Ethics, 6, 243-244 and 248-249; and R. W, Loftin (1988) "Plastic Hunting vs. Real Hunting", Behavioral and Political Animal Studies, 1, 18-19.

328 T. A. Lund (1980) American Wildlife Law, Berkeley, University of California Press.

329 This is also true of other sport hunting and fishing activities. Even for commercially harvested species (e.g. the BC salmon fishery), the economic value of sport fishing can exceed the economic benefits generated by the commercial harvest industry.

330 Canadian Wildlife Service (1993) The importance of wildlife to Canadians: Highlights of the 1991 survey, Ottawa, Minister of Supply and Services, 12 and U.S. Fish and Wildlife Service and U.S. Bureau of the Census (1997) 1996 National Survey of Hunting, Fishing and Wildlife-Related Recreation, Washington, Department of the Interior, 6.

331 Canadian Wildlife Service (1993) The importance of wildlife to Canadians: Highlights of the 1991 survey, Ottawa, Minister of Supply and Services, 16.

332 U.S. Fish and Wildlife Service and U.S. Bureau of the Census (1993) 1991 National Survey of Hunting, Fishing and Wildlife-Related Recreation, Washington, Department of the Interior, 35-37.

333 Canadian Wildlife Service (1994) The importance of wildlife to Canadians: The economic significance of wildlife-related recreational activities in 1991, Ottawa, Minister of Supply and Services.

334 U.S. Fish and Wildlife Service and U.S. Bureau of the Census (1993) 1991 National Survey of Hunting, Fishing and Wildlife-Related Recreation, Washington, Department of the Interior, 26. It is interesting to note that the 1996 national survey showed an important increase in expenditures, estimating them to be between US$21 billion and US$35 billion. The US$21 billion estimate is attributed directly to hunting by survey respondents. However, an additional US$14 billion was also attributed to hunting or fishing without further specification. See U.S. Fish and Wildlife Service and U.S. Bureau of the Census (1997) 1996 National Survey of Hunting, Fishing and Wildlife-Related Recreation, Washington, Department of the Interior.

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335 U.S. Fish and Wildlife Service and U.S. Bureau of the Census (1993) 1991 National Survey of Hunting, Fishing and Wildlife-Related Recreation, Washington, Department of the Interior, 26.

336 Membership and budget numbers were taken from the organisation's website at http://www.ofah.org.

337 Membership and financial data was taken from the organisation's website at http://www.ducks.ca.

338 J. Wilson (1992) "Green lobbies: Pressure groups and environmental policy", in R. Boardman, ed., Canadian Environmental Policy: Ecosystems, Politics, and Process, Toronto, Oxford University Press, 113.

339 Membership and budget numbers were taken from the organisation's website at http://www.ducks.org.

340 For an analysis of the North American waterfowl conservation regime, including the role of hunters, see J. H. Patterson and J. G. Thompson (1996) The Management and Sustainable Use of Ducks and Geese in North America, unpublished paper for the International Union for the Conservation of Nature - North American Sustainable Use Specialist Network.

341 See the organisation's website at http://www.ducks.org.

342 Newfoundland-Labrador Wildlife Federation (1992) Written Supplement to the Statement Made at the Goose Bay Workshop on the Amendment to the Migratory Birds Convention of 1916, 16-18 March 1992, mimeo.

343 The recurring survey on the importance of wildlife to Canadians also measures broader indicators of interest in wildlife, such as the number of people enjoying reading about wildlife or watching TV programs about it. Including all indicators of "indirect non-consumptive wildlife-related activities", the Canadian Wildlife Service found that 84.7% of the population participated in such activities. However, considering these as weak indicators of engagement toward wildlife protection, we exclude them from our analysis. See Canadian Wildlife Service (1993) The importance of wildlife to Canadians: Highlights of the 1991 survey, Ottawa, Minister of Supply and Services, 12. We should also point out that there is nothing preventing some hunters from also belonging to conservation groups.

344 Canadian Wildlife Service (1993) The importance of wildlife to Canadians: Highlights of the 1991 survey, Ottawa, Minister of Supply and Services, 13 and 52.

345 Canadian Wildlife Service (1993) The importance of wildlife to Canadians: Highlights of the 1991 survey, Ottawa, Minister of Supply and Services, 14.

346 U.S. Fish and Wildlife Service and U.S. Bureau of the Census (1993) 1991 National Survey of Hunting, Fishing and Wildlife-Related Recreation, Washington, Department of the Interior, 53.

347 Canadian Wildlife Service (1993) The importance of wildlife to Canadians: Highlights of the 1991 survey, Ottawa, Minister of Supply and Services, 14; and U.S. Fish and Wildlife Service and U.S. Bureau of the Census (1993) 1991 National Survey of Hunting, Fishing and Wildlife-Related Recreation, Washington, Department of the Interior, 58.

348 Canadian Wildlife Service (1993) The importance of wildlife to Canadians: Highlights of the 1991 survey, Ottawa, Minister of Supply and Services, 14-15.

349 U.S. Fish and Wildlife Service and U.S. Bureau of the Census (1993) 1991 National Survey of Hunting, Fishing and Wildlife-Related Recreation, Washington, Department of the Interior, 38 and 59.

350 Canadian Wildlife Service (1993) The importance of wildlife to Canadians: Highlights of the 1991 survey, Ottawa, Minister of Supply and Services, 24-43.

351 Canadian Wildlife Service (1994) The importance of wildlife to Canadians: The economic significance of wildlife-related recreational activities in 1991, Ottawa, Minister of Supply and Services, 8.

352 U.S. Fish and Wildlife Service and U.S. Bureau of the Census (1993) 1991 National Survey of Hunting, Fishing and Wildlife-Related Recreation, Washington, Department of the Interior, 43.

353 Canadian Wildlife Service (1993) The importance of wildlife to Canadians: Highlights of the 1991 survey, Ottawa, Minister of Supply and Services, 20.

354 Canadian Wildlife Service (1993) The importance of wildlife to Canadians: Highlights of the 1991 survey, Ottawa, Minister of Supply and Services, 24-43.

355 Canadian Wildlife Service (1993) The importance of wildlife to Canadians: Highlights of the 1991 survey, Ottawa, Minister of Supply and Services, 50-51.

356 While these figures might not indicate a level of resources of great significance compared to well-established industrial lobby groups, they nevertheless represent some of the most impressive resource bases among Canadian environmental community. In fact, with the further exception of a dozen pollution organisations, such as Greenpeace (about $7 million) and Pollution Probe (about $1.6 million), the 1 800 groups registered with the Canadian Environmental Network operate with less than $100 000 annually. See D. Macdonald (1991) The Politics of Pollution, Toronto, McClelland and Stewart, 42.

357 Membership information were drawn from the respective organisations' web pages in the fall of 1998.

358 J. Wilson (1992) "Green lobbies: Pressure groups and environmental policy", in R. Boardman, ed., Canadian Environmental Policy: Ecosystems, Politics, and Process, Toronto, Oxford University Press, 113.

359 D. Macdonald (1991) The Politics of Pollution, Toronto, McClelland and Stewart, 42.

360 Canadian Wildlife Service (1993) The importance of wildlife to Canadians: Highlights of the 1991 survey, Ottawa, Minister of Supply and Services, 21.

361 M. Dowie (1995) Losing Ground: American environmentalism at the close of the twentieth century, Cambridge, The MIT Press, 70-71.

362 M. Dowie (1995) Losing Ground: American environmentalism at the close of the twentieth century, Cambridge, The MIT Press, 175.

363 U.S. Fish and Wildlife Service and U.S. Bureau of the Census (1997) 1996 National Survey of Hunting, Fishing and Wildlife-Related Recreation, Washington, Department of the Interior, 91.

364 National Audubon Society (1999) Annual Report 1998, available at http://www.audubon.org.

365 For a persuasive account of how European states colonizing North America perceived Aboriginal peoples from a legal standpoint at the time, see M. Morin (1997) L'usurpation de la souveraineté autochtone, Montréal, Boréal. Much of the discussion in this sub-section is derived from this account. There is an extensive literature on these questions. While there are dissenting views, Morin generally argues within the scholarly consensus.

366 M. Morin (1997) L'usurpation de la souveraineté autochtone, Montréal, Boréal, 31-62.

367 W. Churchill (1998) "Tragédie et travestissement: La subversion de la souveraineté autochtone aux États-Unis", Recherches amérindiennes au Québec, 28:1, 9-12.

368 M. Morin (1997) L'usurpation de la souveraineté autochtone, Montréal, Boréal, 61.

369 W. Churchill (1998) "Tragédie et travestissement: La subversion de la souveraineté autochtone aux États-Unis", Recherches amérindiennes au Québec, 28:1, 12-13.

370 Jaenen rightfully points out that, in the 17th century, the meaning of sovereignty and nationhood were not necessarily seen as incompatible and that the French Crown could conceptually reconcile their claims of sovereignty (mainly understood as state control through coercion) over their North American territories with a clear understanding of indigenous nationhood (i.e. organized societies sufficiently autonomous to sign agreements, wage war and establish alliances) marked by independence and self-government in the part of their territories lying outside the St-Lawrence Valley. While colonial policy was still to assimilate Aboriginal peoples and convert them to Catholicism, both indigenous peoples and French authorities clearly considered them as self-governed, independent peoples who were allies and friends of the French Crown but not necessarily submitted to it. Indigenous peoples were not submitted to French laws and their laws and customs were not considered to have been abrogated by French rule. French authorities forbade settlers from clearly land above the Montreal Seigneuries and, at least by the mid-18th century, clear rules were in place about establishing relationships based on mutual consent. Versailles never denied indigenous rights to self-determination. C. J. Jaenen (1991) "French sovereignty and indigenous nationhood during the French Regime", in J. R. Miller, ed., Sweet Promises: A Reader on Indian-White Relations in Canada, Toronto, University of Toronto Press, 19-42.

371 M. Morin (1997) L'usurpation de la souveraineté autochtone, Montréal, Boréal, 133-161; B. Stonechild (1996) "Indian-White Relations in Canada, 1763 to the Present", in F. E. Hoxie, ed., Encyclopedia of North American Indians, Boston, Houghton Mifflin Company, 278.

372 C. J. Jaenen (1991) "French sovereignty and indigenous nationhood during the French Regime", in J. R. Miller, ed., Sweet Promises: A Reader on Indian-White Relations in Canada, Toronto, University of Toronto Press, 25-26; M. Morin (1997) L'usurpation de la souveraineté autochtone, Montréal, Boréal, 55-60. See also the discussion in J. Tully (1999) Une étrange multiplicité: Le constitutionnalisme à une époque de diversité, Sainte-Foy, Les Presses de l'Université Laval, especially 68-81.

373 M. Morin (1997) L'usurpation de la souveraineté autochtone, Montréal, Boréal, 172-178.

374 W. Churchill (1998) "Tragédie et travestissement: La subversion de la souveraineté autochtone aux États-Unis", Recherches amérindiennes au Québec, 28:1, 10.

375 M. Morin (1997) L'usurpation de la souveraineté autochtone, Montréal, Boréal, 148-151, 210-211.

376 A good review of this historical process and an interesting example of disagreement over the term of a treaty concerns Treaty 8. For a description and analysis, see R. T. Price and S. Smith (1993-94) "Treaty 8 and traditional livelihood: Historical and contemporary perspectives", Indigenous Studies Review, 9:1, 51-91.

377 R. F. Keith and J. McMullen (1992) Report on Workshops to Amend the Migratory Birds Convention of 1916, Ottawa, Canadian Arctic Resources Committee, 100.

378 See, for example, Inuit Circumpolar Conference, Statement on the Migratory Birds Convention, issued on 17 November 1990; and Inuit Tapirisat of Canada (1994) Inuit Position on Amendments to the Migratory Birds Convention, 21 January 1994.

379 For a review of these developments, see S. McNabb (1992) "Indigenous claims in Alaska: A twenty-year review", Inuit Studies, 16:1-2, 85-95; W. M. Bryner (1995) "Toward a Group Rights Theory for Remedying Harm to the Subsistence Culture of Alaska Indigenouss", Alaska Law Review, 12:2, 293-334; and R. Worl (1996) "Indian-White Relations in Alaska", in F. E. Hoxie, ed., Encyclopedia of North American Indians, Boston, Houghton Mifflin Company, 273-277.

380 See, for example, Innu Nation (1992) Amendments to the Migratory Birds Convention: The Innu Nation's Perspective, Brief submitted to the Consultation Workshop to Amend the Migratory Birds Convention of 1916, held in Goose Bay, Newfoundland, 16-18 March 1992.

381 R. F. Keith and J. McMullen (1992) Report on Workshops to Amend the Migratory Birds Convention of 1916, Ottawa, Canadian Arctic Resources Committee, 110.

382 Peter Douglas Elias, "Report from the Roundtable Rapporteur", in Sharing the Harvest: The Road to Self-Reliance, Report of the National Round Table on Aboriginal Economic Development and Resources, found in For Seven Generations - An Information Legacy of the Royal Commission on Aboriginal Peoples, record 20596.

383 Innu Nation (1992) Amendments to the Migratory Birds Convention: The Innu Nation's Perspective, Brief submitted to the Consultation Workshop to Amend the Migratory Birds Convention of 1916, held in Goose Bay, Newfoundland, 16-18 March 1992.

384 See R. F. Keith and J. McMullen (1992) Report on Workshops to Amend the Migratory Birds Convention of 1916, Ottawa, Canadian Arctic Resources Committee, 29. We should also note some divisions among Aboriginal organisations on the individuals who should qualify for subsistence rights under the amended convention. Indigenous organisations representing non-status Indians strongly argued for their recognition as beneficiaries under the terms of the amended agreement and domestic legislation. According to them, without such recognition, equality and justice would not be assured by the new waterfowl management regime. Many other organisations did not share this viewpoint and thought that the rights of non-status Indians should be settled in an other context. See Indigenous Council of Prince Edward Island (1992) Presentation to Canadian Arctic Resources Committee Regarding Amendments to the Migratory Bird Convention, Goose Bay, Labrador, 16 March 1992, 2-3.

385 See, for example, the letter from the Indigenous Council of Nova Scotia, the New Brunswick Aboriginal Peoples Council, the Federation of Newfoundland Indians, and the Indigenous Council of Prince Edward Island to Robbie Keith, director of the Migratory Birds Convention Consultation Project, dated 13 March 1992 and the written statement made by the Dene Nation representative at the consultation workshop held in Yellowknife on 22-24 April 1992. See also the positions taken by Aboriginal participants at the workshops held in Winnipeg, Goose Bay, Montreal, Ottawa, Whitehorse, Timmins, Edmonton, and Iqualiut, as summarised by R. Keith and J. McMullen in R. F. Keith and J. McMullen (1992) Report on Workshops to Amend the Migratory Birds Convention of 1916, Ottawa, Canadian Arctic Resources Committee.

386 See Memorandum regarding Inuit Position on Migratory Birds Convention Amendments - January 12-13, 1994 (Ottawa), from G. Thompson, Canadian Wildlife Service, to file, dated 24 January 1994; Memorandum regarding Nunavut Tunngavik Position on the Proposed Migratory Birds Convention Amendments, from Bruce Gillies, Nunavut Tunngavik Incorporated, to Jamie Keen, Inuit Tapirisat of Canada, dated 3 May 1994; and Inuit Circumpolar Conference, Statement on the Migratory Birds Convention, issued on 17 November 1990.

387 Innu Nation (1992) Amendments to the Migratory Birds Convention: The Innu Nation's Perspective, Brief submitted to the Consultation Workshop to Amend the Migratory Birds Convention of 1916, held in Goose Bay, Newfoundland, 16-18 March 1992.

388 See, for example, Canadian Nature Federation and International Council for Bird Preservation (1991) Migratory Birds Convention Amendments, Ottawa, mimeo, 1.

389 Jim Rearden (1982) "Subsistence - Alaska's Agony", Alaska, October 1982.

390 Jim Rearden (1982) "Subsistence - Alaska's Agony", Alaska, October 1982, 9.

391 See, for example, Canadian Nature Federation and International Council for Bird Preservation (1991) Migratory Birds Convention Amendments, Ottawa, mimeo.

392 Canadian Wildlife Federation (1992) Recommendations of the Canadian Wildlife Federation to Environment Canada Regarding Spring Hunting Amendments to the Migratory Bird Convention, Ottawa, mimeo, 6.

393 See, for example, Canadian Nature Federation and International Council for Bird Preservation (1991) Migratory Birds Convention Amendments, Ottawa, mimeo, 8.

394 It should be noted that some Aboriginal persons who participated in the debate on amending the Migratory Birds Convention did acknowledge that traditional cultural norms are being violated by younger hunters who do not fully share in traditional Aboriginal culture. For example, one Aboriginal participant admitted that "there is abuse with the youth who do not know our customs". See R. F. Keith and J. McMullen (1992) Report on Workshops to Amend the Migratory Birds Convention of 1916, Ottawa, Canadian Arctic Resources Committee, 111.

395 See R. F. Keith and J. McMullen (1992) Report on Workshops to Amend the Migratory Birds Convention of 1916, Ottawa, Canadian Arctic Resources Committee, 15.

396 Canadian Wildlife Federation (1992) Recommendations of the Canadian Wildlife Federation to Environment Canada Regarding Spring Hunting Amendments to the Migratory Bird Convention, Ottawa, mimeo, 3-4.

397 Letter from Rick Bouzan, president of the Newfoundland-Labrador Wildlife Federation, to Greg Thompson, director of Migratory Birds and Wildlife Conservation, Canadian Wildlife Service, dated 26 March 1992, 2.

398 Northwest Territories Wildlife Federation (1992) Migratory Bird Convention Amendment - Position Paper, Yellowknife, mimeo.

399 For example, the Saskatchewan Natural History Society, a provincial conservation group, deplored that the proposed amendment "would set a dangerous precedent, discriminate against the vast majority of Canadians" and argued the Canadian government should not tamper with the Migratory Birds Convention "to attempt to get special status for a small segment of Canadians". Letter from L. L. Irvine, Corresponding Secretary of the Saskatchewan Natural History Society to the Department of Fisheries and Environment, dated November 18, 1982.

400 See, for example, Canadian Wildlife Federation (1992) Recommendations of the Canadian Wildlife Federation to Environment Canada Regarding Spring Hunting Amendments to the Migratory Bird Convention, Ottawa, mimeo, 6-7.

401 Ontario Federation of Anglers and Hunters (1992) Position Paper on Migratory Birds Convention Act Amendments, Timmins, mimeo.

402 G. Gallant (1993) "The Perspective of the Ontario Federation of Anglers and Hunters", Northern Perspectives, 21:2, 9.

403 G. Gallant (1993) "The Perspective of the Ontario Federation of Anglers and Hunters", Northern Perspectives, 21:2, 9. It should be noted here that the OFAH believes that many communities of the southern part of the territories have adequate access to waterfowl in the fall.

404 R. v. Sparrow, 1990, 1 SCR 1075.

405 Jim Rearden (1982) "Subsistence - Alaska's Agony", Alaska, October 1982, 7.

406 See R. Bateman (1997) "Comparative Thoughts on the Politics of Aboriginal Assimilation", BC Studies, 114, 59-83; and R. L. Nichols (1998) Indians in the United States and Canada: A Comparative History, Lincoln, University of Nebraska Press.

407 We should point out however that the idea of equal access as been an important dimension of American wildlife laws for a long time. See J. A. Tober (1981) Who Owns the Wildlife?, Westport, Greenwood.

408 V. Fisher (1975) Alaska's Constitutional Convention, Fairbanks, University of Alaska Press, 135.

409 The public opinion polls are referred to in D. Hulen (1991) "Alaska's fight over subsistence hunting rights", Arctic Circle, May-June issue, 19. For examples of vocal criticisms by citizens, see the comments reproduced in J. Rearden (1982) "Subsistence - Alaska's Agony", Alaska, October issue, 8.

410 See J. Rearden (1982) "Subsistence - Alaska's Agony", Alaska, October issue, 8.

411 Quoted in D. Hulen (1991) "Alaska's fight over subsistence hunting rights", Arctic Circle, May-June issue, 21-22.

412 Jim Rearden (1982) "Subsistence - Alaska's Agony", Alaska, October 1982, 9.

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413 G. Erasmus (1989) "A Indigenous Viewpoint", in M. Hummel, ed., Endangered Spaces: The Future of Canada's Wilderness, Toronto, Key Porter, 93.

414 Innu Nation (1992) Amendments to the Migratory Birds Convention: The Innu Nation's Perspective, Brief submitted to the Consultation Workshop to Amend the Migratory Birds Convention of 1916, held in Goose Bay, Newfoundland, 16-18 March 1992.

415 Letter from Danial Nanooch, a/chief of the Little Red River Cree Nation, to Robbie Keith, project director of the Canadian Arctic Resources Committee on Consultations on the Amendment of the Migratory Birds Convention, dated 15 April 1992, 1.

416 R. F. Keith and J. McMullen (1992) Report on Workshops to Amend the Migratory Birds Convention of 1916, Ottawa, Canadian Arctic Resources Committee, 15.

417 See their final comments to the Workshop on Amendments to the Migratory Birds Convention of 1916 held in Winnipeg 16-18 March 1992, in R. F. Keith and J. McMullen (1992) Report on Workshops to Amend the Migratory Birds Convention of 1916, Ottawa, Canadian Arctic Resources Committee, 13.

418 F. Berkes (1982) "Waterfowl management and northern indigenous peoples with reference to Cree hunters of James Bay", Musk-Ox, 30, 23-35.

419 In an illustrative manner, Vine Deloria, Jr., a prominent Aboriginal American writer on the subject, prefers to describe the indigenous American approach to land management by the term "spiritual management". V. Deloria, Jr. (1992) "Spiritual management: Prospects for restoration on tribal lands", Restoration and Management Notes, 10(1), 48-50.

420 A. L. Booth and H. M. Jacobs (1990) "Ties that Bind: Indigenous American Beliefs as a Foundation for Environmental Consciousness", Environmental Ethics, 12, 27-44. As most other writers, Booth and Jacobs do not suggest that Aboriginal peoples in North America form a monolithic group. But their great diversity does not prevent them from sharing some broad beliefs about the natural world. In this context, while being mindful of local differences, they are treated here as a single group. For other similar descriptions of the essence of indigenous environmental ethics, see J. B. Callicott (1983) "Traditional American Indian and Traditional Western Attitudes toward Nature: An Overview", in R. Elliot and A. Gare, eds., Environmental Philosophy: A Collection of Readings, University Park, Pennsylvania State University Press, 231-259; J. E. Brown (1985) The Spiritual Legacy of the American Indian, New York, Crossroad Publishing; and J. D. Hughes (1983) American Indian Ecology, El Paso, Texas University Press.

421 R. K. Nelson (1983) Make Prayers to the Raven, Chicago, University of Chicago Press, 240.

422 R. K. Nelson (1983) Make Prayers to the Raven, Chicago, University of Chicago Press; and R. K. Nelson (1982) "A Conservation Ethic and Environment: The Koyukon of Alaska", in N. M. Williams and E. S. Hunn, eds., Resource Managers: North American and Australian Hunter Gatherers, Boulder, Westview Press, 211-228.

423 See H. A. Feit (1971) "L'ethno-écologie des Cris Waswanipis, ou comment les chasseurs peuvent aménager leurs ressources", Recherches amérindiennes au Québec, 1:4-5; H. A. Feit (1986) Hunting and the Quest for Power: The James Bay Cree and Whitemen in the Twentieth Century", in R. B. Morrison and C. R. Wilson, eds., Indigenous Peoples: The Canadian Experience, second edition, Toronto, McClelland & Stewart, 181-224.

424 C. Martin (1980) "Subarctic Indians and Wildlife", in C. Vecsey and R. W. Venables, eds., American Indian Environments: Ecological Issues in Indigenous American History, Syracuse, Syracuse University Press, 38-45. See also his contentious C. Martin (1978) Keepers of the Game: Indian-Animals Relationships and the Fur Trade, Berkeley, University of California Press, especially chapter five.

425 J. D. Hughes (1983) American Indian Ecology, El Paso, Texas University Press, 25.

426 See J. D. Hughes (1983) American Indian Ecology, El Paso, Texas University Press, chapter 3.

427 For a discussion of the particular nature of such knowledge, see G. W. Wenzel (1999) "Traditional Ecological Knowledge and Inuit: Reflections on TEK Research and Ethics", Arctic, 52:2, 113-124.

428 P. M. Jostad, L. H. McAvoy and D. McDonald (1996) "Indigenous American Land Ethics: Implications for Natural Resource Management", Society and Natural Resources, 9, 565-581.

429 H. A. Feit (1973) "The ethno-ecology of the Waswanipi Cree", in B. Cox, ed., Cultural Ecology: Readings on the Canadian Indians and Eskimos, Toronto, McClelland and Stewart, 117-118.

430 Calls for the recognition of the equal validity of Aboriginal traditional knowledge for the management of wildlife resources are now common in Aboriginal efforts to gain greater control over natural resources in North America. Aboriginal politicians and organisations defend the view that traditional knowledge - gained through hunters' observation-through-practice, tainted by cultural and spiritual beliefs, and transmitted orally from generation to generation - offers a foundation for resource management that is as sound as modern ecological and biological knowledge validated through Western scientific methods. In the view of Deloria, Aboriginal communities are "as systematic and philosophical as Western scientists in their efforts to understand the world around them. They simply use other kinds of data and have goals other than determining the mechanical functioning of things." Vine Deloria, Jr. (1995) Red Earth, White Lies: Indigenous Americans and the Myth of Scientific Fact, New York, Scribner, 67. For a more qualified and sophisticated treatment of the difficulties associated with the use of traditional environmental knowledge for modern resource management, see P. J. Usher (2000) "Traditional Ecological Knowledge in Environmental Assessment and Management", Arctic, 53:2, 183-193.

Its recognition by governments has come primarily in the context of co-management agreements negotiated in the context of land claims disputes. An exception is the government of the Northwest Territories which is attempting its incorporation into a broader set of policy and decision-making processes. See Government of the Northwest Territories (1993) Traditional Knowledge Policy, Yellowknife, Government of the Northwest Territories. For a broader call for such management systems in the provinces, see S. Berneshawi (1997) "Resource management and the Mi'kmaq nation", Canadian Journal of Indigenous Studies, 17:1, 115-148.

For an attempt to use Aboriginal perspectives on knowledge to rethink international environmental governance, see Franke Wilmer (1998) "Taking Indigenous Critiques Seriously: The Enemy 'R' Us", in K. T. Wilmer, ed., The Greening of Sovereignty in World Politics, Cambridge, MIT Press, 55-78.

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431 R. J. Preston, F. Berkes and P. J. George (1995) "Perspectives on Sustainable Development in the Moose River Basin", in D. H. Pentland, ed., Papers of the Twenty-Sixth Algonquian Conference, Winnipeg, University of Manitoba, 381.

432 The statement by the Indian Association of Alberta is reproduced at length in R. F. Keith and J. McMullen (1992) Report on Workshops to Amend the Migratory Birds Convention of 1916, Ottawa, Canadian Arctic Resources Committee, 74-76.

433 A. Fienup-Riordan (1999) "Yaqulget Qailun Pilartat (What the Birds Do): Yup'ik Eskimo Understanding of Geese and Those Who Study Them", Arctic, 52:1, 1-22.

434 A. Fienup-Riordan (1999) "Yaqulget Qailun Pilartat (What the Birds Do): Yup'ik Eskimo Understanding of Geese and Those Who Study Them", Arctic, 52:1, 7.

435 A. Fienup-Riordan (1999) "Yaqulget Qailun Pilartat (What the Birds Do): Yup'ik Eskimo Understanding of Geese and Those Who Study Them", Arctic, 52:1, 15.

436 A. Fienup-Riordan (1999) "Yaqulget Qailun Pilartat (What the Birds Do): Yup'ik Eskimo Understanding of Geese and Those Who Study Them", Arctic, 52:1, 15.

437 A. Fienup-Riordan (1999) "Yaqulget Qailun Pilartat (What the Birds Do): Yup'ik Eskimo Understanding of Geese and Those Who Study Them", Arctic, 52:1, 7.

438 See, in particular, the revealing comments made by Charles F. Hunt and Pascal Afcan in A. Fienup-Riordan (1999) "Yaqulget Qailun Pilartat (What the Birds Do): Yup'ik Eskimo Understanding of Geese and Those Who Study Them", Arctic, 52:1, 16-18.

439 R. F. Nash (1989) The Rights of Nature: A History of Environmental Ethics, Madison, Wisconsin University Press, 118.

440 See, for example, S. L. Udall (1964) The Quiet Crisis, New York and S. L. Udall (1973) "Indians: First Americans, First Ecologists", in Readings in American History - 73/74, Connecticut, Dushkin Publishing.

441 O. D. Schwartz (1987) "Indian Rights and Environmental Ethics: Changing Perspectives, and a Modest Proposal", Environmental Ethics, 9, 293.

442 R. White (1984) "Indigenous Americans and the Environment", in F. Jennings, ed., Scholars and the Indian Experience, Indiana University Press, 179-205.

443 For example, J. Kay (1979) "Wisconsin Indian Hunting Patterns, 1634-1836", Annals of the Association of American Geographers, 69, 402-418 and E. S. Rogers (1963) The Hunting Group - Hunting Territory Complex among the Mistassini Indians, National Museums of Canada Bulletin no.195 (Anthropological Series no.63), Ottawa, Department of Northern Affairs and National Resources found no evidence of Aboriginal conservation practices in the face of species decline. R. Knight (1968) Ecological Factors in Changing Economy and Social Organization among the Rupert House Cree, National Museums of Canada Anthropology Papers no.15, Ottawa, National Museums of Canada argued that conservation was the direct result of Hudson's Bay Company intervention.

444 R. White (1984) "Indigenous Americans and the Environment", in F. Jennings, ed., Scholars and the Indian Experience, Indiana University Press, 182.

445 The most contentious case here is probably Calvin Martin's argument that northeastern Algonquin hunters were prime agents of fur-bearer depletion because they considered themselves "at war" with the beavers (as non-human persons), blaming them for killing

indigenous peoples by voluntarily afflicting them with diseases. In their mind, epidemics were caused through supernatural powers by a community of animals who had broken faith with human beings. Martin's argument served to counter the prevailing view of the ecological damages of the fur trade as a result of pure economics; but it also serves to highlight the pitfalls of considering Aboriginal peoples as ecologists in the modern sense of the concept when their underlying motivations were of a different order. See the authors' prize-winning C. Martin (1978) Keepers of the Game: Indian-Animal Relations and the Fur Trade, Berkeley, University of California Press, and its damaging critiques in the collective volume S. Krech, ed. (1981) Indians, Animals and the Fur Trade: A Critique of Keepers of the Game, Athens, University of Georgia Press.

446 See the argument presented in C. Martin (1981) "The American Indian as Miscast Ecologist", The History Teacher, 14, 243-252.

447 O. D. Schwartz (1987) "Indian Rights and Environmental Ethics: Changing Perspectives, and a Modest Proposal", Environmental Ethics, 9, 295-296; R. M. M'Gonigle (1988) "Indigenous rights and environmental sustainability: Lessons from the British Columbia wilderness", Canadian Journal of Indigenous Studies, 8:1, 107-130; and R. W. Perrett (1998) "Indigenous Rights and Environmental Justice", Environmental Ethics, 20, 378-382.

448 For an interesting discussion of the seal controversy, see G. Wenzel (1991) Animal Rights, Human Rights: Ecology, Economy and Ideology in the Canadian Arctic, Toronto, University of Toronto Press.

449 A good example is the killing of an endangered Florida panther by a Seminole hunter in the early 1980s, which among other publicity led to a debate in the pages of the prominent magazine Science. A similar controversy erupted over the Aboriginal killing of bald eagles. See O. D. Schwartz (1987) "Indian Rights and Environmental Ethics: Changing Perspectives, and a Modest Proposal", Environmental Ethics, 9, 293, 297-298.

450 O. D. Schwartz (1987) "Indian Rights and Environmental Ethics: Changing Perspectives, and a Modest Proposal", Environmental Ethics, 9, 297.

451 For example, it was the case in northern Wisconsin when the curtailment of Ojibwa hunting was discussed in the late 1980s. When a Seminole hunter was accused of killing an endangered panther in the early 1980s in Florida, some environmentalists claimed that it could hardly be accepted as a legitimate expression of traditional religious practices since the animal was killed with a shotgun as opposed to a lance or a bow. O. D. Schwartz (1987) "Indian Rights and Environmental Ethics: Changing Perspectives, and a Modest Proposal", Environmental Ethics, 9, 297.

452 D. J. Buege (1996) "The Ecologically Noble Savage Revisited", Environmental Ethics, 18, 82-83.

453 P. George, F. Berkes and R. J. Preston (1995) "Aboriginal harvesting in the Moose River Basin: A historical and contemporary analysis", Canadian Review of Sociology and Anthropology, 32, 69-90.

454 See, for example, J. P. Prevett, H. G. Lumsden and F. C. Johnson (1983) "Waterfowl kill by Cree hunters of the Hudson Bay Lowland, Ontario", Arctic, 36, 185-192.

455 L.J.S. Tsuji and E. Nieboer (1999) "A question of sustainability in Cree harvesting practices: The seasons, technological and cultural changes in the western James Bay

region of Northern Ontario, Canada", Canadian Journal of Indigenous Studies, 19:1, 169-192.

456 See Ontario Federation of Anglers and Hunters (1992) Position Paper on Migratory Birds Convention Act Amendments, Timmins, mimeo.

457 Letter from the Mike Maier, executive vice-president of the Waterfowl Habitat Owners Alliance, to the Director General of the Canadian Wildlife Service, dated April 7, 1982.

458 For a discussion of these divergent conceptions in the Alaska debates, see J. D. Sacks (1995) "Culture, Cash or Calories: Interpreting Alaska Indigenous Subsistence Rights", Alaska Law Review, 12:2, 247-291.

459 The act itself clearly specifies that it is fulfilling the commitments made through ANCSA. Its Section 801 (4) states that: "The Congress finds and declares that in order to fulfill [sic] the policies and purposes of the Alaska Indigenous Claims Settlement Act and as matter of equity, it is necessary to invoke its constitutional authority [..] to protect and provide the opportunity for continued subsistence uses on the public lands by Indigenous and non-Indigenous rural residents;". See United States, Alaska National Interest Lands Conservation Act, Public Law 96 - 487 -DEC.2, 1980, Title VIII, Section 801(4).

460 Jim Rearden (1982) "Subsistence - Alaska's Agony", Alaska, October 1982, 7.

461 United States. Department of Interior, Fish and Wildlife Service, Draft Environmental Assessment - Subsistence Hunting of Migratory Birds in Alaska and Canada, Washington, 1980, 6.

462 United States. Department of Interior, Fish and Wildlife Service, Draft Environmental Assessment - Subsistence Hunting of Migratory Birds in Alaska and Canada, Washington, 1980, 2 and 22.

463 It should be noted that, in contrast to the Migratory Bird Treaty Act, the constitutionality of the ANILCA does not rest on international treaties provisions of the American constitution but on the federal government's responsibility towards Aboriginal peoples and the constitution's commerce and property clauses. These constitute less secure legal grounds for federal intervention.

464 United States, Alaska National Interest Lands Conservation Act, Public Law 96 - 487 - DEC.2, 1980, Title VIII, Section 802(1) and (2). It is worth noting that the federal law differs from the 1978 State law in at least two respects: first, it targets specifically rural residents; and, secondly, it touches all renewable resources and not solely fish and wildlife. However, both laws stressed customs and traditions as the basis for creating a subsistence provision (as opposed to need).

465 Jim Rearden (1982) "Subsistence - Alaska's Agony", Alaska, October 1982, 65.

466 Jim Rearden (1982) "Subsistence - Alaska's Agony", Alaska, October 1982, 8.

467 It should be noted that a similar treaty concluded in 1972 with the Japanese government had already provided a first step in liberalising the provisions for subsistence hunting. The U.S.-Japan treaty had extended the subsistence exemption of the U.S.-Canada treaty to all species covered by the Migratory Birds Convention instead of the limited number of species specifically named in the U.S.-Canada treaty. However, the exemption was still tied to ethnic origin as it concerned only Alaskan "Eskimos, Indians and indigenous peoples of the Trust Territory of the Pacific Islands". The Soviet-U.S. treaty's wording,

"indigenous inhabitants of Alaska", was considered to extend this provisions to all rural inhabitants living a subsistence lifestyle and was consequently preferred by American authorities.

468 Migratory Birds Management Office, U.S. Department of the Interior, Issue Paper on The U.S./Canada Protocol on Subsistence Hunting of Migratory Birds, Washington, August 18, 1981, 2.

469 Canadian Wildlife Service, internal briefing note entitled "Protocol: Chronological Summary of Significant Developments", personal files of J. Anthony Keith, undated, 2.

470 Letter from Bob Herst, Assistant Secretary for Fish, Wildlife and Parks, Department of Interior, Washington, to Hon. Robert C. Brewster, Acting Assistant Secretary of State, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State, Washington, June 9th, 1978, U.S. FWS, Docket no. 0338A.

471 See article 24.14.2 of the James Bay and Northern Quebec Agreement.

472 J. P. Bruce, Assistant Deputy Minister, Environmental Management Services, Department of the Environment, to Deputy Minister, Department of the Environment, Memorandum entitled Indigenous Hunting and the Migratory Birds Convention, dated July 17, 1978.

473 Personal interview with J. Anthony Keith, former director of Migratory Birds, Canadian Wildlife Service.

474 Canada and United States, Protocol amending the Convention of August 16, 1916 for the Protection of Migratory Birds in Canada and the United States of America, 30 January 1979, article I. It should also be noted that the Protocol explicitly leaves untouched the already existing exceptions regarding the taking of scoters and other seabirds.

475 The intention of the government and wildlife management officials not to include Métis and non-status Indians at this point was clearly expressed and derived both from the desire to avoid opening up the harvest to too many hunters and the resolve to keep the Empire treaty status of the Migratory Birds Convention. According to Department of Justice legal opinions, since the original 1916 Convention already used the terms "Indians and Inuits of Canada" to allow the limited harvest of seabirds, the extension of subsistence benefits to these same groups appeared to be possible without unduly changing the Convention to the extent that it would effectively no longer be considered an Empire Treaty (and essentially considered to be a new convention). As such, the extension of subsistence benefits to Métis and non-status Indians as well as to non-Aboriginal hunters appeared at the time to be impossible without endangering the very foundation of federal jurisdiction over migratory birds.

476 Letter from Bob Herst, Assistant Secretary for Fish, Wildlife and Parks, Department of Interior, Washington, to Hon. Robert C. Brewster, Acting Assistant Secretary of State, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State, Washington, June 9th, 1978, U.S. FWS, Docket no. 0338A, 3. For another exposition of the American position, see also B. Tétreault, Director General, Canadian Wildlife Service, Memorandum entitled Proposals by U.S. Fish and Wildlife Service on Implementing the Protocol to the Migratory Birds Convention, addressed to M.A. Prahdu, Director of Legal Services, Department of the Environment, dated November 27, 1981. It should be noted that this position seems to reflect a traditional

misconception of Aboriginal claims, which are based on historical treaties and circumstances and not on ethnicity per se.

477 See, for example, letter from Mike Maier, executive vice-president of the Waterfowl Habitat Owners Alliance, to the Director General of the Canadian Wildlife Service, dated April 7, 1982, where Maier makes such a claim.

478 See A.G. Loughrey, Director General, Canadian Wildlife Service, Memorandum entitled Amendment of Migratory Birds Convention Act - revised report, dated 23 July 1979, 1.

479 Migratory Birds Management Office, U.S. Department of the Interior, Issue Paper on The U.S./Canada Protocol on Subsistence Hunting of Migratory Birds, Washington, August 18, 1981, 3.

480 See Letter from Jay Hair, Executive Vice-president, National Wildlife Federation, to Ray Arnett, Assistant Secretary for Fish, Wildlife and Parks, Department of the Interior, dated November 4, 1981, 1.

481 Since they were excluded from the scope of the amendment, the Métis and non-status Indians organisations protested against their exclusion from the Protocol's provisions.

482 See his telex to provinces and the press release announcing the signing of the 1979 Protocol.

483 Canadian Wildlife Service, internal briefing note entitled "Protocol: Chronological Summary of Significant Developments", personal files of J. Anthony Keith, undated, 3.

484 J. A. Keith, Canadian Wildlife Service, personal note entitled Briefing - Protocol, dated November 20, 1980, 1. The order-in-council authorized the Secretary of State "to take the action necessary to bring the Protocol into force for Canada". See Marie-Josée Nadeau, Legal Counsel, Department of the Environment, Memorandum to file entitled Migratory Birds Protocol - Binding Effect of a Negotiation Report, dated March 1, 1982.

485 A.G. Loughrey, Director General, Canadian Wildlife Service, Memorandum entitled Amendment of Migratory Birds Convention Act - revised report, dated 23 July 1979, 1.

486 Letter from Jack Epp, Minister of Indian and Northern Affairs, to John Fraser, Minister of the Environment, dated December 12, 1979, 1.

487 J. Anthony Keith, Acting Director of Migratory Birds Branch, Canadian Wildlife Service, to Dr. W.B. Mountain, Assistant Deputy Minister, Environmental Conservation, Department of the Environment, Memorandum entitled Discussion on the Protocol to Amend the Migratory birds Convention, Washington, 10 February 1982, dated February 10, 1982.

488 A.G. Loughrey, Director General, Canadian Wildlife Service, Memorandum entitled Amendment of Migratory Birds Convention Act - revised report, dated 23 July 1979, 3.

489 Canadian Wildlife Service, internal briefing note entitled "Protocol: Chronological Summary of Significant Developments", personal files of J. Anthony Keith, undated, 3.

490 Letter from John Fraser, Minister of the Environment, to Jack Epp, Minister of Indian and Northern Affairs, dated February 6, 1980; and Canadian Wildlife Service, internal briefing note entitled "Protocol: Chronological Summary of Significant Developments", personal files of J. Anthony Keith, undated, 3.

491 Canadian Wildlife Service, internal briefing note entitled "Protocol: Chronological Summary of Significant Developments", personal files of J. Anthony Keith, undated, 3. The Canadian Wildlife Service, and the Minister of the Environment, rejected this argument on the basis of a legal opinion from the Department of Justice, which it held since November 1978. See Letter from P.M. Ollivier, Associate Deputy Minister, Department of Justice, to J.P. Bruce, Assistant Deputy Minister, Department of the Environment, dated November 28, 1978.

492 John Roberts was appointed Minister of the Environment in March, 1980, when the Liberals replaced the Conservatives in power. G. Bruce Doern and Thomas Conway, The Greening of Canada, Toronto, University of Toronto Press, 39.

493 Canadian Wildlife Service, internal briefing note entitled "Protocol: Chronological Summary of Significant Developments", personal files of J. Anthony Keith, undated, 3.

494 Canadian Wildlife Service, internal briefing note entitled "Protocol: Chronological Summary of Significant Developments", personal files of J. Anthony Keith, undated, 3.

495 All the information in this paragraph is drawn from Canadian Wildlife Service, internal briefing note entitled "Protocol: Chronological Summary of Significant Developments", personal files of J. Anthony Keith, undated.

496 Personal interview with J. Anthony Keith, former director of Migratory Birds, Canadian Wildlife Service.

497 Canadian Wildlife Service, internal briefing note entitled "Protocol: Chronological Summary of Significant Developments", personal files of J. Anthony Keith, undated, 3.

498 Canadian Wildlife Service, internal briefing note entitled "Protocol: Chronological Summary of Significant Developments", personal files of J. Anthony Keith, undated, 4.

499 Migratory Birds Management Office, U.S. Department of the Interior, Issue Paper on The U.S./Canada Protocol on Subsistence Hunting of Migratory Birds, Washington, August 18, 1981, 1.

500 International Association of Fish and Wildlife Agencies, Resolution No. 17 - Protocol on Migratory Bird Treaty, Washington.

501 For example, in November 1981, the National Wildlife Federation wrote again to the Department of the Interior to reiterate its continued opposition to Senate approval. In its letter, the NWF complained to be frustrated by the refusal of the Department of Interior to come to grips with the fact that the real problem with the Protocol was that it endangered the conservation of waterfowl in Canada. Letter from Jay Hair, Executive Vice-president, National Wildlife Federation, to Ray Arnett, Assistant Secretary for Fish, Wildlife and Parks, Department of the Interior, dated November 4, 1981, 1.

502 Migratory Birds Management Office, U.S. Department of the Interior, Issue Paper on The U.S./Canada Protocol on Subsistence Hunting of Migratory Birds, Washington, August 18, 1981.

503 B. Tétreault, Director General, Canadian Wildlife Service, Memorandum entitled Proposals by U.S. Fish and Wildlife Service on Implementing the Protocol to the Migratory Birds Convention, addressed to M.A. Prahdu, Director of Legal Services, Department of the Environment, dated November 27, 1981.

504 The Wildlife Legislative Fund of America, Position statement of The Wildlife Legislative Fund of America concerning the proposed amendment of the Convention for the Protection of Migratory Birds between the United States and Canada, for presentation at a meeting in Washington, D.C., February 10, 1982. The statement is signed by James R. Hanson, General Counsel, The Wildlife Legislative Fund of America.

505 J. Anthony Keith, Acting Director of Migratory Birds Branch, Canadian Wildlife Service, to Dr. W.B. Mountain, Assistant Deputy Minister, Environmental Conservation, Department of the Environment, Memorandum entitled Discussion on the Protocol to Amend the Migratory birds Convention, Washington, 10 February 1982, dated February 10, 1982, 1.

506 J. Anthony Keith, Acting Director of Migratory Birds Branch, Canadian Wildlife Service, to Dr. W.B. Mountain, Assistant Deputy Minister, Environmental Conservation, Department of the Environment, Memorandum entitled Discussion on the Protocol to Amend the Migratory birds Convention, Washington, 10 February 1982, dated February 10, 1982, 2.

507 See the letter from K.A. Brynaert, executive vice-president of the Canadian Wildlife Federation, to the Director, U.S. Fish and Wildlife Service, Department of the Interior, dated April 15, 1982; and letter from J. Hanson, The Wildlife Legislative Fund of America, to T. Clark, Chairman of the Migratory Wildlife Committee of the IAFWA, dated March 17, 1982.

508 Letter from B. Seaborn, deputy minister, Department of the Environment to R. Arnett, assistant secretary for Fish, Wildlife and Parks, U.S. Department of the Interior, dated January 8, 1982.

509 Canadian Wildlife Service, internal briefing note entitled "Protocol: Chronological Summary of Significant Developments", personal files of J. Anthony Keith, undated, 4.

510 Section 37 of The Constitution Act, 1982, set out some guidelines for these conferences.

511 Canadian Wildlife Service, internal briefing note entitled "Protocol: Chronological Summary of Significant Developments", personal files of J. Anthony Keith, undated, 4.

512 Department of Indian and Northern Affairs, Discussion Paper on the Protocol to Amend the Migratory Birds Convention of 1916 Between the United States and Canada, dated June 2nd, 1983, unpublished.

513 For example, in the late 1970s, Hugh Faulkner, minister of Indian and Northern Affairs, wrote to all Inuit and Status Indian associations in Canada in order to communicate his desire to see them participate in the development of regulations and amendments to the Migratory Birds Convention Act. Other ministers also made public statements to that effect. See Department of Indian and Northern Affairs, Discussion Paper on the Protocol to Amend the Migratory Birds Convention of 1916 Between the United States and Canada, dated June 2nd, 1983, unpublished, 12.

514 Department of Indian and Northern Affairs, Discussion Paper on the Protocol to Amend the Migratory Birds Convention of 1916 Between the United States and Canada, dated June 2nd, 1983, unpublished, 16.

515 Canadian Wildlife Service, internal briefing note entitled "Protocol: Chronological Summary of Significant Developments", personal files of J. Anthony Keith, undated, 4.

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516 Canadian Wildlife Service, internal briefing note entitled "Briefing Note: Protocol to Amend the Migratory Birds Convention", personal files of J. Anthony Keith, undated, 1.

517 Canadian Wildlife Service, internal briefing note entitled "Briefing Note: Protocol to Amend the Migratory Birds Convention", personal files of J. Anthony Keith, undated, 2.

518 Canadian Wildlife Service, internal briefing note entitled "Briefing Note: Protocol to Amend the Migratory Birds Convention", personal files of J. Anthony Keith, undated, 2.

519 The Alaska Indigenous Claims Settlement Act of 1971 did not explicitly entrench a indigenous subsistence right. However, in adopting the legislation, the congressional conference committee clearly affirmed that such protection of the subsistence lifestyle was seen by Congress as a significant part of the agreement. In its report, the committee stated the following: "The conference committee, after careful consideration, believes that all Indigenous interests in subsistence resource lands can and will be protected by the Secretary [of the Interior] through the exercise of his existing withdrawal authority [..] The conference committee expects both the Secretary and the State to take any action necessary to protect the subsistence needs of the Natives." See S. Rep., no.581, 92nd Cong., 1st Sess., 1971, 37.

520 See the Title VIII of the Alaska National Interest Lands Conservation Act, 1980.

521 J. D. Sacks (1995) "Culture, Cash or Calories: Interpreting Alaska Indigenous Subsistence Rights", Alaska Law Review, 12:2, 267.

522 The State law created a Subsistence Division within the Alaska Department of Fish and Game, mandated local boards of game to devise regulations permitting subsistence harvesting, and gave priority to subsistence hunting and fishing in the advent of a restriction on harvesting for conservation purposes. See K. J. Atkinson (1987) "The Alaska National Interest Lands Conservation Act: Striking the balance in favour of 'customary and traditional' subsistence uses by Alaska Natives", Natural Resources Journal, 27, 431-433.

523 The State's approach to indigenous subsistence needs was not framed as an acknowledgement of indigenous rights. Instead, a number of criteria were used to attribute subsistence licences, including "customary and direct dependence" and area of residency. While the selection criteria aimed to cover primarily indigenous residents, the terms of the act made it possible to cast the net wider. In 1986, after the intentions of the legislature were raised in the context of a court challenge, the State passed an amendment to its subsistence law, basing it solely and explicitly on a rural residency criterion, without regards to ethnicity. See J. D. Sacks (1995) "Culture, Cash or Calories: Interpreting Alaska Indigenous Subsistence Rights", Alaska Law Review, 12:2, 269.

524 Sport hunters were also naturally concerned with the potential decline of their annual quotas if environmental conditions forced the State to restrict harvesting. Moreover, such a situation seemed all the more likely given that spring harvesting would add to the pressures placed on waterfowl populations. However, as we have seen in chapter five, sport hunters' opposition to subsistence harvesting was mostly tied to the defence of a liberal conception of individual equality. The rural subsistence preferential access policy - as a principle and because it disproportionately benefited Aboriginal hunters in its application - was strongly criticized for being unjust toward non-Aboriginal urban citizens.

525 During a consultation process in 1979, 29 of the 36 local wildlife advisory committees commenting on the issue were already opposed to the introduction of subsistence priority regulations in their areas. However, notwithstanding this significant level of opposition, the new rural subsistence priority provisions had been adopted by the Alaskan legislature. After three years of public debate on the issue, more than two-thirds of the 50 or so wildlife advisory committees were still opposed to the introduction of subsistence priority regulations in 1982. In many cases, resulting inequity between rural (and predominantly Aboriginal) and urban (and predominantly non-Aboriginal) residents was clearly identified as the basis of opposition. See Jim Rearden (1982) "Subsistence - Alaska's Agony", Alaska, October 1982, 62.

526 The organization's members were mostly urban non-Aboriginal citizens from Fairbanks and Anchorage.

527 Jim Rearden (1982) "Subsistence - Alaska's Agony", Alaska, October 1982, 9.

528 Alaska Fish and Wildlife v. Dunkle, 829 F.2d 933 (9th Circuit), 1987.

529 While a new co-management agreement was later successfully negotiated without the subsistence provisions, it became increasingly clear that the Migratory Birds Convention would continue to be a thorn in the side of effective management of wildlife in the State, particularly in relation to indigenous peoples.

530 For an illustration of the U.S. Fish and Wildlife Service's sense of urgency in finding a resolution of the issue, see U.S. Fish and Wildlife Service, Briefing statement entitled Migratory Bird Subsistence Hunting, prepared for the Director, 22 May 1991.

531 *R. v. Sikyea*, 6 C.N.L.R. 597, 1964 (S.C.C.).

532 *R. v. George*, S.C.R. 267, 1966; and *Daniels v. White*, S.C.R. 517, 1968.

533 *R. v. Flett*, 4 C.N.L.R. 128, 1989 (Manitoba Q.B.) and *R. v. Arcand*, 2 C.N.L.R. 110, 1989 (Alberta Q.B.).

534 *R. v. Sparrow*, 3 C.N.L.R. 160, 1990 (S.C.C.).

535 Cree Regional Authority (1991) Statement of the Cree Regional Authority on the Consultation Process Respecting Amendments to the Migratory Birds Convention, Submitted to the Hunting, Fishing and Trapping Coordinating Committee, Grand Conseil des Cris (du Québec), 11.

536 An example is the letter from Matthew Coon Come, Grand Chief, Grand Council of the Crees (of Québec) to David Brackett, Director General, Canadian Wildlife Service, dated 18 November 1993, 4. Personal file of author.

537 M.W. Wagner and J.G. Thompson (1993) "The Migratory Birds Convention: Its History and the Need for an Amendment", Northern Perspectives, 21:2, 4.

538 Letter from Gregory Thompson, Director of Migratory Birds and Wildlife Conservation, Canadian Wildlife Service, to Ian Juniper, Secretary of the Hunting, Fishing and Trapping Coordinating Committee, dated 9 April 1992, Ottawa, 2.

539 See, for example, Cree Regional Authority (1991) Statement of the Cree Regional Authority on the Consultation Process Respecting Amendments to the Migratory Birds Convention, Submitted to the Hunting, Fishing and Trapping Coordinating Committee, Grand Conseil des Cris (du Québec), 7.

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540 Assembly of First Nations (1990) Press Release entitled Rejection of Canadian Wildlife Service Consultation Process, dated 11 December 1990.

541 See, for example, letter from Matthew Coon Come, Grand Chief, Grand Council of the Crees (of Québec) to David Brackett, Director General, Canadian Wildlife Service, dated 18 November 1993.

542 See, for example, the description of a meeting held with the Cree representatives in Memorandum entitled February 6, 1991 Meeting with Bay Hunting, Fishing and Trapping Coordinating Committee Montreal, from Trevor Swerdfager, Project Manager for Migratory Birds Convention Amendments to Director, Migratory Birds Conservation, Canadian Wildlife Service, to Director, Migratory Birds and Wildlife Conservation, Canadian Wildlife Service, dated 21 February 1991.

543 See Memorandum entitled Meetings with Government of Ontario officials, from Trevor Swerdfager, Project Manager for Migratory Birds Convention Amendments to Director, Migratory Birds Conservation, Canadian Wildlife Service, to Director, Migratory Birds and Wildlife Conservation, Canadian Wildlife Service, dated 7 December 1990, 4.

544 See Memorandum entitled Meeting with Manitoba Department of Natural Resources, from Trevor Swerdfager, Project Manager, Migratory Birds Convention Amendment, Canadian Wildlife Service, to Director of Migratory Birds and Wildlife Conservation, Canadian Wildlife Service Project Manager, dated 28 February 1991.

545 See Memorandum entitled Meeting with Manitoba Department of Natural Resources, from Trevor Swerdfager, Project Manager, Migratory Birds Convention Amendment, Canadian Wildlife Service, to Director of Migratory Birds and Wildlife Conservation, Canadian Wildlife Service Project Manager, dated 28 February 1991.

546 See Memorandum entitled Telecon - B. McIvor, M. Gillespie and B. Carmichael Jan. 11/94 Re. Migratory Birds Convention Amendments - Extended Seasons in Manitoba, from Gregory Thompson, Special Advisor on Migratory Birds Convention Amendments, Canadian Wildlife Service to file, dated January 12, 1994.

547 Letter from Gregory Thompson, Director of Migratory Birds and Wildlife Conservation, Canadian Wildlife Service, to Ian Juniper, Secretary of the Hunting, Fishing and Trapping Coordinating Committee, dated 9 April 1992, Ottawa, 1.

548 Direction générale de la ressource faunique, Ministère du Loisir, de la Chasse et de la Pêche du Québec (1992) Commentaires sur la 4e ébauche de modifications à la convention concernant les oiseaux migrateurs, unpublished document, 1-2.

549 See Memorandum entitled Kuujuak Meeting with Makivik and Kativik, from Trevor Swerdfager, Project Manager for Migratory Birds Convention Amendments to Director, Migratory Birds Conservation, Canadian Wildlife Service, dated 30 January 1991.

550 See, for example, the Naskapi position reported in Memorandum entitled February 6, 1991 Meeting with Bay Hunting, Fishing and Trapping Coordinating Committee Montreal, from Trevor Swerdfager, Project Manager for Migratory Birds Convention Amendments to Director, Migratory Birds Conservation, Canadian Wildlife Service, to Director, Migratory Birds and Wildlife Conservation, Canadian Wildlife Service, dated 21 February 1991; the Memorandum entitled Kuujuak Meeting with Makivik and Kativik, from Trevor Swerdfager, Project Manager for Migratory Birds Convention Amendments to Director, Migratory Birds Conservation, Canadian Wildlife Service, dated 30 January 1991; the Letter from Chief George Shecanapish, Naskapi Band of

Québec, to Sheila Copps, Minister of the Environment, dated 22 November 1993; and, for a clear Aboriginal statement stressing exclusivity, see Resolution no.1991-M of the Makivik Annual General Meeting held in Kuujjuarapik (Québec) on 18-22 March 1991.

As a federal official pointed out at the time, this position on exclusivity seemed not only to exceed previous positions taken by many of the same communities but it also appeared to be incompatible with many on-going practices, which allowed non-beneficiaries to hunt on these territories. See the Letter from Gregory Thompson, Director of Migratory Birds and Wildlife Conservation, Canadian Wildlife Service, to Ian Juniper, Secretary of the Hunting, Fishing and Trapping Coordinating Committee, dated 9 April 1992, Ottawa, 5. For a clear Aboriginal statement stressing such exclusivity, see Resolution no.1991-M of the Makivik Annual General Meeting held in Kuujjuarapik (Québec) on 18-22 March 1991.

551 See letter from Richard Chatelain, Directeur de la gestion des espèces et des habitats, Ministère du Loisir, de la Chasse et de la Pêche du Québec, to David Brackett, Director General, Canadian Wildlife Service, dated 1 December 1992.

552 Letter from Gregory Thompson, Director of Migratory Birds and Wildlife Conservation, Canadian Wildlife Service, to Ian Juniper, Secretary of the Hunting, Fishing and Trapping Coordinating Committee, dated 9 April 1992, Ottawa, 5.

553 Letter from Sheila Copps, Minister of the Environment, to Chief George Schecanapish, Naskapi Band of Québec, undated, 1.

554 See, for example, Canadian Nature Federation and International Council for Bird Preservation (1991) Migratory Birds Amendments, Ottawa, unpublished document.

555 None of the provinces and territories consulted by the Canadian Wildlife Service supported the use of restrictions on residency. Gregory Thompson (1994) Environmental Assessment of Alternatives for the Protection and Harvest of Migratory Birds in Canada, Ottawa, unpublished, 46.

556 See Gregory Thompson (1994) Environmental Assessment of Alternatives for the Protection and Harvest of Migratory Birds in Canada, Ottawa, unpublished, 45-46.

557 See Gregory Thompson (1994) Environmental Assessment of Alternatives for the Protection and Harvest of Migratory Birds in Canada, Ottawa, unpublished, 45-46.

558 While the consultation contract was put up for bids and the Canadian Wildlife Service received a number of them by different organizations, the Canadian Arctic Resources Committee was approached directly because of its track-record on northern issue and its reputation for independence in relation to government policy.

559 The remaining participants were composed of 8 provincial wildlife officials, 21 federal wildlife officials, and 29 individuals did not list an affiliation.

560 In fact, there is a second notable difference. The CARC report proposed that co-management bodies include representatives of all stakeholders. While this practice would be consistent with some of the American experiences, it would entail a different approach than the one used typically in Canada. Co-management institutions being traditionally negotiated under Aboriginal land-claims agreements, they include only Aboriginal representatives and government officials.

561 The list of members, advisors and observers is annexed to International Association of Fish and Wildlife Agencies, Discussion Paper of the IAFWA Migratory Birds

Convention Ad Hoc Committee, Washington, unpublished paper, April 1994, appendix 2.

562 The paper is J. G. Thompson (1991) "Current Perspectives on the Management of Migratory Birds in Northern Canada and Newfoundland", Transactions of the 56th North American Wildlife and Naturals Resources Conference, 350-357.

563 Letter from John F. Turner, Director of the U.S. Fish and Wildlife Service, to David Brackett, Director General of the Canadian Wildlife Service, dated 11 June 1991.

564 A Notice of Public Involvement was published in the 9 January 1992 issue and a Notice of Public Meetings was published in the 9 March 1992 issue of the Federal Register.

565 U.S. Fish and Wildlife Service (1994) Draft Environmental Assessment - Managing Migratory Bird Subsistence Hunting in Alaska, Washington, Department of Interior.

566 See IAFWA Migratory Birds Convention Ad Hoc Committee, Summary Report and Recommendations, Washington, unpublished paper, April 1994.

567 See telex entitled Migratory Birds Convention: Strategy, from Sheila Tooze, an official at the Canadian Embassy in Washington to the Canadian Wildlife Service staff in Ottawa, dated 9 June 1992, which is discussing the Canadian strategy for defending the amendments in the U.S.

568 See, for example, the argumentation presented in its final report: IAFWA Migratory Birds Convention Ad Hoc Committee, Summary Report and Recommendations, Washington, unpublished paper, April 1994, 3.

569 In Canada, the failure to adopt adequate domestic implementation legislation for meeting international legal commitments does not appear to result in the abrogation of these international commitments. The historical experience in cases where these national international commitments fall under the constitutional jurisdiction of reluctant provincial legislatures that fail to adopt proper implementation legislation seems indicative of this reality. In the case of the Migratory Birds Convention, the inability to enforce the terms of the Convention on indigenous subsistence hunters (when conservation objectives are not at stake) would not seem to have forced the Convention's abrogation or its loss of effectiveness in regulating harvesting by other hunters throughout the year.

570 U.S. Fish and Wildlife Service, "President Clinton Formally Submits Migratory Bird Treaty Amendments to Senate For Ratification", Press Release, dated 20 August 1996.

571 A good example of this position and discourse can be found in the Draft Environmental Assessment (the official document outlining policy options and serving as the basis for decision-making in the U.S. policy process), in particular in Annex A containing the Department of Interior's response to representations made by non-state actors. U.S. Fish and Wildlife Service (1994) Draft Environmental Assessment - Managing Migratory Bird Subsistence Hunting in Alaska, Washington, Department of Interior.

572 We should nevertheless note that the emphasis on using need as a fundamental criterion will likely lead them to exclude the panhandle region of Alaska from the spring harvest. Given that the north and north-west areas are predominantly populated by Aboriginal inhabitants, Inuit and First Nations peoples will likely benefit disproportionately from the new measure. Notwithstanding this caveat, the Canadian and American approaches still differ fundamentally.

573 Letter from John F. Turner, Director of the U.S. Fish and Wildlife Service, to David Brackett, Director General of the Canadian Wildlife Service, dated 11 June 1991, 2.

574 International Association of Fish and Wildlife Agencies, Discussion Paper of the IAFWA Migratory Birds Convention Ad Hoc Committee, Washington, unpublished paper, April 1994, 30-33.

575 Canada and United States, Protocol between the Government of Canada and the Government of the United States of America Amending the 1916 Convention between the United Kingdom and the United States of America for the Protection of Migratory Birds in Canada and the United States, 14 December 1995, article II, subsection 4(a)(ii).

576 See Removal of Injunction of Secrecy - Treaty Document No. 104-28 and Treaty Document No. 104-29, Congressional Record, Senate - August 02, 1996, S9661.

577 U.S. Fish and Wildlife Service, "U.S. Senate Ratifies Migratory Birds Treaties with Canada and Mexico", Press Release, 20 November 1997.

578 Changes in constitutional rights can have an important impact on the discourse and strategies of social movements providing that these changes are perceived as legitimate by the actors themselves. Miriam Smith has recently documented this process in studies of the gay and lesbian movements in Canada. See Miriam Smith (1998) «Nationalisme et politique de mouvements sociaux : les droits des gais et lesbiennes et l'incidence de la Charte canadienne au Québec", Politique et Sociétés, 17:3, 113-142; and Miriam Smith (1999) Lesbian and gay rights in Canada : Social Movements and Equality-Seeking, 1971-1995, Toronto, University of Toronto Press.

In our case, *Sparrow* and *Flett* clearly validated traditional arguments of Aboriginal groups and they were quickly placed at the center of the discourse of Aboriginal representatives claiming the recognition of their subsistence rights and the modification of the Migratory Birds Convention.

579 Personal interview with Hugh Boyd, former director of migratory birds, Canadian Wildlife Service.