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REFLECTIONS ON NORTH AMERICAN ENVIRONMENTAL COOPERATION

Steve Charnovitz[†]

INTRODUCTION

Our panel discussion is entitled “The Economics of Energy and Environment,” and because I am not an economist, I found this to be a difficult topic to think about, particularly at the culmination of this rich and extensive conference program. The organizers, however, assured me that I was not expected to draw any supply-and-demand curves and could instead speak about political economy and institutional economics.

Our session is taking place on a Sunday morning, a day that we typically devote time for reflection, for recuperation, and, all too often, for repentance. I will start with reflection. Have you ever wondered why God waited until the end of the sixth day to create man?¹ Why not on the first day? Had the timing been reversed, man and woman could have helped God create the light, partition the waters, design the seeds and stock the earth with animals. Apparently, though, God did not want man’s help in those creative tasks. Instead God wanted man’s first visualization to be nature in its most pristine form. God could then direct man to take care of the earth,² and man could understand that solemn duty. How should man carry out this divine injunction?

In the contemporary era, the solution has been two-fold. First, we need well-functioning institutions and markets. Yesterday, Tracy Dobson gave us a very interesting institutional history of the Great Lakes governance and how that developed.³ This morning, I will offer some reflections on what we have accomplished on the environment in North America and about the many challenges that lie ahead.

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¹ See generally *Genesis* 1-2.

² See *Genesis* 2:15 (New International Version) (“The LORD God took the man and put him in the Garden of Eden to work it and take care of it.”).

³ See generally Tracy Dobson, Henry A. Regier & William W. Taylor, *Governing Human Interactions with Migratory Animals, with a Focus on Humans Interacting with Fish in Lake Erie: Then, Now, and in the Future*, 28 CAN.-U.S. L.J. 393 (2002).

RECOGNIZING THE NORTH AMERICAN ENVIRONMENT

Recall, if you will, the first meeting of the North American ministers concerning the environment. It was the 1909 North American Conservation Conference held in Washington, D.C. Who attended? Representing the United States was Gifford Pinchot, the founder of the U.S. Forest Service, Secretary of State Robert Bacon, and Secretary of the Interior James R. Garfield. From Canada, there was Sidney Fisher, a long-time Minister of Agriculture; Sir Clifford Sifton, the Chairman of the Canadian Conservation Commission; and Senator Henri Béland, a physician.⁴ Also present were commissioners from Mexico,⁵ whom I know nothing about.

The Conference adopted a declaration of principles⁶ that set out a framework for thinking about environment and energy in North America. The ministers declared that the conservation of natural resources was indispensable for continued prosperity.⁷ They also agreed that no nation acting alone can do the job, and recommended the adoption of concurrent measures by their respective governments.⁸ The ministers stated that natural resources should be developed and used, but also conserved for the future; this was to be done in the interest of mankind.⁹

The Conference made a number of specific recommendations to the governments. The attendees called for preventative legislation to address pollution of lakes, rivers and streams;¹⁰ for the wise use and prompt renewal of forests;¹¹ for the regulation of lumbering operations to prevent improvident cutting;¹² and action by each government to reduce the enormous waste in the exploitation of mineral fuels and in the consumption of energy.¹³ Finally, they asked each country to establish a permanent bureau of conservation and to adopt a system of intercommunication among the three countries.¹⁴ For 1909, this was an impressive energy and environment charter.

⁴ CHARLES RICHARD VAN HISE, *THE CONSERVATION OF NATURAL RESOURCES IN THE UNITED STATES* 392 (1913).

⁵ The commissioners from Mexico were Rómulo Escobar, Miguel A. de Quevedo, and Carlos Sellerier. *Id.*

⁶ North American Conservation Conference Declaration of Principles, Feb. 23, 1909, *Can.-U.S.-Mex.*, reprinted in VAN HISE, *supra* note 4, at 385-393.

⁷ *Id.* at 385.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 388-89.

¹¹ *Id.* at 386-87.

¹² *Id.* at 387-88.

¹³ *Id.* at 390-91.

¹⁴ VAN HISE, *supra* note 4, at 391-92.

Unfortunately, the governments did not set up any institutions for implementing that declaration, and so it was lost. As far as I know, it was not until 1993 – about 84 years later, during the North American Free Trade Agreement (NAFTA) debate – that the three North American governments took the idea of a North American conservation policy any further than it had been taken during the discussions inaugurated back in 1909. In 1993, the government signed the North American Agreement on Environmental Cooperation¹⁵ and created the Commission that Janine Ferretti discussed.¹⁶ Janine has offered outstanding leadership at the Commission in the seven years she has been there. The Commission is on its way to becoming an important institution for environmental stewardship in North America, and it is not because of the commission's authority or teeth (because it has none). Rather, the contribution of the Commission is its ability to put a spotlight on issues and problems, to help improve dialogue between the governments and the public, and to help bring in some science to environmental policymaking.

THE WORK OF THE NORTH AMERICAN COMMISSION

I commend to you the Commission's recent state of the environment report called *The North American Mosaic*.¹⁷ The Commission has understood the importance of markets in achieving sustainable development. Probably the biggest project undertaken by the Commission's secretariat was to do research on the environmental effects of free trade. A 460-page volume was published on this, showing the positive and negative effects of trade.¹⁸ The Commission has also focused on particular environmental threats, such as the use of chlordane and DDT, and it has proposed a North American policy for the control of these chemicals.¹⁹

No observer of the NAFTA debate would have been surprised to see the Commission publish a report on trade and environmental effects, but the Commission has also done some unexpected work. For example, the Commission charted an innovative project, discussed by Janine Ferretti, on

¹⁵ North American Agreement for Environmental Cooperation, Can.-U.S.-Mex., Sept. 14, 1993, 32 I.L.M. 1480 [hereinafter NAAEC].

¹⁶ Janine Ferretti, *NAFTA and the Environment: An Update*, 28 CAN.-U.S. L.J. 81 (2002).

¹⁷ COMMISSION FOR ENVIRONMENTAL COOPERATION, THE NORTH AMERICAN MOSAIC: A STATE OF THE ENVIRONMENT REPORT (2001), available at http://www.cec.org/files/PDF/PUBLICATIONS/soe_en.pdf.

¹⁸ COMMISSION FOR ENVIRONMENTAL COOPERATION, THE ENVIRONMENTAL EFFECTS OF FREE TRADE: PAPERS PRESENTED AT THE NORTH AMERICAN SYMPOSIUM ON ASSESSING THE LINKAGES BETWEEN TRADE AND ENVIRONMENT (2002), available at <http://www.cec.org/files/pdf/ECONOMY/symposium-e.pdf>.

¹⁹ See generally COMMISSION FOR ENVIRONMENTAL COOPERATION, NORTH AMERICAN AGENDA FOR ACTION 2002-2004 70-79 (2001) [hereinafter AGENDA], available at <http://www.cec.org/files/PDF/3YP02-04-e4r.pdf> (subch. 3.2.1 – Sound Management of Chemicals).

the integration of the North American electricity market and its environmental implications.²⁰ In this, we see an interesting example of an institution seeking to facilitate energy markets and, in particular, exploring the various tensions between environmental regulation and economic deregulation. We have had some excellent presentations in this conference on some of those issues. I particularly recall David Drinkwater's remark that deregulation is really *reregulation*.²¹

Now, the Commission itself has also undertaken several other initiatives to show a market-oriented focus. For example, the Commission has done work on "green" goods,²² sustainable tourism,²³ private-sector financing for environmental protection,²⁴ and pollution prevention.²⁵ Furthermore, the Commission has also been notable in the transparency of its operations. It was one of the first international organizations to post on its web site²⁶ draft reports for public comment.

The North American Council of Environment Ministers is aided by a joint public advisory committee consisting of five individuals from each of the three countries.²⁷ The idea of an advisory committee is hardly a revolutionary idea, but we do not see many of them in regional organizations. The three governments did not see fit to set up a joint public advisory committee for the Labor Commission, nor does the NAFTA Free Trade Commission have any joint public advisory committees. In my view, the next step in strengthening the commission will be to establish an inter-parliamentary forum on environment in North America.

Now, it may seem that I have dwelled too long on the Commission, but I do not think so. There is a great tendency to overlook the Commission because it is small, underfunded, and has no clout. Yet the Commission is truly a treasure. Our three different countries inaugurated a regional policy back in 1909, but it took eight decades to accomplish it. Indeed, that simple

²⁰ Ferretti, *supra* note 16, at 81.

²¹ David Drinkwater, *New Electricity: Generation, Pricing, Wheeling & Regulation*, 28 CAN.-U.S. L.J. 267, 268 (2002).

²² COMMISSION FOR ENVIRONMENTAL COOPERATION, SUPPORTING GREEN MARKETS: ENVIRONMENTAL LABELING, CERTIFICATION AND PROCUREMENT SCHEMES IN CANADA, MEXICO AND THE UNITED STATES (1999), available at http://www.cec.org/files/pdf/ECONOMY/labels-e_EN.pdf; AGENDA, *supra* note 19, at 14-18 (subch. 1.2.1 – Supporting Environmental Protection and Conservation through Green Goods and Services).

²³ COMMISSION FOR ENVIRONMENTAL COOPERATION, CEC'S SUSTAINABLE TOURISM IN NATURAL AREAS PROJECT: 2000–2001: FINAL REPORT (2002), available at http://www.cec.org/files/PDF/ECONOMY/Final_rep-La%20Pazjan8e2.pdf.

²⁴ E.g., AGENDA, *supra* note 19, at 19-21 (subch. 1.2.2 – Financing in Support of Environmental Protection and Conservation).

²⁵ *Id.* at 87-92 (subch. 3.4.1 – Capacity Building for Pollution Prevention).

²⁶ *North American Commission for Environmental Cooperation*, at <http://www.cec.org>.

²⁷ See NAAEC art. 16, 32 I.L.M. at 1489.

step would not have happened without the stimulus from the politics of the NAFTA negotiation.

Looking around this room, I wonder whether there is more we can do to support the Commission. As lawyers, business executives, government officials, scientists and members of the press, we should become more familiar with the Commission's successes and try to participate in its efforts. In particular, I think the business community should step up its involvement in the Commission's activities.

NAFTA CHAPTER 11 AND THE ENVIRONMENT: A LESSON IN UNINTENDED CONSEQUENCES

Let me just switch from the Commission to the NAFTA and mention Chapter 11²⁸ briefly. Last week, in Washington D.C., there was a very good workshop on this organized by the International Institute for Sustainable Development and the Institute for International Economics, which are two of the leading institutes on environment and economics in North America, and in the world. At that workshop, there was quite a bit of discussion about the rules in Chapter 11 and whether or not Chapter 11 provisions are encroaching on legitimate environmental regulation.

Now, if one watched the documentary that Bill Moyers did about Chapter 11-B,²⁹ one might get the impression that environmental interests are being sacrificed on the altar of capital. Some commentators view Chapter 11 as a sort of a Manichean fight between private interests and public responsibilities.³⁰ In my view, much of the negative commentary on Chapter 11 misses the importance of the need to promote investment in poor countries, given that private capital flows to developing countries are from four to six times official flows,³¹ and to gain new infrastructure for investment. Obtaining new infrastructure for energy and environment depends on providing the right preconditions for investment. We heard David Manning discuss the regulatory risk in New York from unexpected government policies,³² so you can imagine how much worse it is in developing countries.

²⁸ North American Free Trade Agreement, Can.-U.S.-Mex., Dec. 17, 1992, Ch. 11, 32 I.L.M. 605, 639, available at 1992 WL 812394 [hereinafter Chapter 11].

²⁹ *Bill Moyers Reports: Trading Democracy* (PBS television broadcast, Feb. 5, 2002).

³⁰ See generally *id.* (transcript available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB65/transcript.html>).

³¹ See U.N. GAOR, Prep. Comm. for High-Level Int'l Intergovtl. Event on Fin. for Dev., 2d Sess. ¶ 96, U.N. Doc. A/AC.257/19 (2000), available at http://www.un.org/esa/ffd/aac257_19.pdf.

³² David Manning, *New Electricity: Generation, Pricing, Wheeling & Regulation*, 28 CAN.-U.S. L.J. 239, 243 (2002).

I mention Chapter 11-B because I think it provides such a good example of my overall thesis: that our success in promoting economic prosperity and environmental sustainability depends, in a general sense, on the way that society uses institutions and markets. Chapter 11 is an international institution to oversee national governments in the interest of making financial markets work better than they otherwise would. However, this oversight function engenders tensions when the rules of international law are applied on the biases of national governments or local juries. Chapter 11 creates a new legal market, wherein investors lodge novel and unexpected claims; to me, that is colleague friend, Sylvia Ostry, makes this point: "After twenty-five years in government," she says, "I learned a great deal but one lesson has proved most resilient – in all significant government policies the unintended consequences overwhelm the original policy objectives."³³

Last summer, the NAFTA commission issued official interpretations of some of the controversial Chapter 11 provisions as a response to some of the tribunals that had gone too far.³⁴ In my judgment, the final decisions in cases implicating Chapter 11 have been appropriate, even if all of the legal reasoning in these decisions may not have been sound. However, some of the cases that are underway would, if won by the investor, prove Sylvia's point: that the unintended results can swamp the original objectives.

Prognosticating Scholars Missed It, Too

In the early and mid-1990s, many analysts studied the environmental implications of NAFTA and wrote comprehensive articles and books about it. What did they say about the impact of Chapter 11B on the environment? Not very much. I went back and looked at some of these in preparation for this talk. An excellent book by two Canadians, Pierre Marc Johnson and Andre Beaulieu, *The Environment and NAFTA*,³⁵ does not contain a word about Chapter 11 and its implications for the environment. Another book, *NAFTA and the Environment*, edited by Seymour Rubin and Dean Alexander,³⁶ had eighteen different essays on the topic of NAFTA and the environment, but not a word about how Chapter 11 could possibly be related (I note that Seymour Rubin is one of the leading American law experts on

³³ Sylvia Ostry, External Transparency: The Policy Process at the National Level of the Two-Level Game 3 (WTO Advisory Group, 2002) (unpublished paper, on file with the author and available at http://www.utoronto.ca/cis/WTO_Transparency.doc).

³⁴ NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, July 31, 2001, available at <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpre.asp>

³⁵ PIERRE MARC JOHNSON & ANDRE BEAULIEU, *THE ENVIRONMENT AND NAFTA: UNDERSTANDING AND IMPLEMENTING THE NEW CONTINENTAL LAW* (1996).

³⁶ *NAFTA AND THE ENVIRONMENT* (Seymour Rubin & Dean Alexander eds., 1996).

international investment issues). Another article, this one by Steve Charnovitz, called “The North American Free Trade Agreement: Green Law or Green Spin?”³⁷ Yet like the others, this author was totally clueless about what would happen on Chapter 11.

Perhaps the governments themselves, since they negotiated NAFTA, did a better job. But they did not. In the U.S. Trade Representative’s report, *The NAFTA: Report on Environmental Issues*,³⁸ there was hardly a word about Chapter 11.³⁹ The Canadian government environmental review⁴⁰ does at least mention Chapter 11, but its drafters, too, had no foresight as to what might happen with environmental regulations.⁴¹ So I think that is a pretty sorry record of prognostication.

Among environmentalists today, Chapter 11 is perceived as the biggest threat in NAFTA to the environment. Those of us who wrote about NAFTA in the early 1990s simply did not make that connection. Instead, we were focusing in on Chapters 7 and 9 and Article 104, which are provisions that have no relevance or resonance today. To my knowledge, *no* analyst in the early 1990s saw what seems so obvious now in retrospect: that a new investor-state provision between two industrial countries would lead to mischief, and particularly so as a matter of a political economy, when Canada and the United States already have so many ongoing disputes and sore points.

OTHER KEY ISSUES OF THE CONFERENCE

Allow me to just briefly talk about a few other issues.

The Johannesburg Summit

At this point, the Johannesburg World Summit for Sustainable Development conference is only four months away, and very little has been accomplished yet in the preparatory work. The big issue is: are we going to take a step forward to fulfill the Rio mandate of helping developing countries improve their environmental policy?⁴² The northern countries promised

³⁷ Steve Charnovitz, *The North American Free Trade Agreement: Green Law or Green Spin?*, 26 LAW & POL’Y INT’L BUS. 1 (1994).

³⁸ OFFICE OF THE U.S. TRADE REPRESENTATIVE, *THE NAFTA: REPORT ON ENVIRONMENTAL ISSUES* (1993), available at <http://www.ustr.gov/environment/nafta93report.pdf>.

³⁹ What the report did say about Chapter 11 is to give merely a (small) factual presentation of what it was *designed* to accomplish. *Id.* at 10.

⁴⁰ NAFTA ENVIRONMENTAL REVIEW COMMITTEE, *NORTH AMERICAN FREE TRADE AGREEMENT: CANADIAN ENVIRONMENTAL REVIEW* (1992).

⁴¹ *Id.* at 28-29.

⁴² See, e.g., *Report of the United Nations Conference on Environment and Development*, Annex I, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26

more market access, aid, capacity building, and technology transfer, yet little of that has been forthcoming.

One interesting focus in the discussions for Johannesburg has been a commitment for improving national environmental governance. Some interesting ideas are being discussed about what governments need to do to attract investment – provide for the rule of law, among other things. It would be useful to put that in the declaration. Attention needs to continue on integrating economic and environmental policy, something that all countries, including the United States, do very poorly.

The Århus Convention⁴³ is a UN treaty on environmental information and access to justice that came into force within the past year. The principles in that convention would be very important for us to try to universalize. That is because information is empowering.

More needs to be done on international environmental governance issues at Johannesburg, but I am pessimistic that we are going anything out of that Conference.⁴⁴ A key problem is the lack of U.S. leadership.

The Kyoto Protocol

We have had some very good presentations on the Kyoto Protocol at this conference. I will just note a couple of things. One, that the Protocol and what governments and businesses are doing to prepare for its potential ratification is a good example of the interplay between institutions and markets. We now have a treaty that develops certain institutions, but the centerpiece of how that treaty is to be implemented are market mechanisms. We learned from Bob Page⁴⁵ about the various institutions – for example, the emissions trading association – that have been set up to make those market mechanisms work well.

One problem I see in the U.S. policy on Kyoto is how unfortunate it was for President Bush to link U.S. action to economic growth. You recall that President Bush said that the United States should reduce greenhouse gas intensity by 18 percent in relation to GDP.⁴⁶ What that means is that we will

(Vol. 1), at Principle 11, 31 I.L.M. 874, 878 (1992), available at <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> (last visited May 18, 2002).

⁴³ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, ECE/CEP/43, 38 I.L.M. 517 (1999), available at <http://www.unece.org/env/pp/documents/cep43e.pdf>. The Århus (or Aarhus) Convention was entered into force on Oct. 30, 2001.

⁴⁴ See generally Steve Charnovitz, *A World Environment Organization*, 27 COLUM. J. ENVTL. L. 323 (2002).

⁴⁵ Robert Page, *Kyoto and Emissions Trading: Challenges for the NAFTA Family*, 28 CAN.-U.S. L.J. 55 (2002).

⁴⁶ See *President Bush Announces Clear Skies & Global Climate Change Initiatives*, at

do well on U.S. greenhouse goals if we have no economic growth. Yet the United States ought to be able to have economic growth and a responsible climate change policy. By linking the two, President Bush gives credence to fears that there is a direct trade-off between good environmental policy and economic growth.⁴⁷ I do not believe that is the case. Strong economic growth and good environmental policy are mutually complementary and synergistic in many ways.

The WTO and Environmental Concerns

Panel Chair David Runnals asked me to say a word about the World Trade Organization (WTO). In the time that I have left, let me just note that environment is now on the agenda for the newest round of negotiations.⁴⁸ Many people are talking about “win-win” ideas, whereby we take action to remove environmental distortions and, at the same time, we take action to improve economic growth and mutually beneficial trade.

The issues on the agenda for the next round of negotiations include reducing trade barriers to environmental goods and services, and the lowering of agricultural subsidies, trade restrictions and fishery subsidies. The latter issue is one in which many NGOs pushed for years to get on the WTO agenda. It was thought that government fishery subsidies were doing very bad things because they lead to overfishing, and the environmental NGOs believed that this issue was something the WTO could address because the WTO does have some competence for subsidies.⁴⁹ I would like to see Canada and the United States working together to develop a constructive approach to these issues in the negotiations.

CONCLUDING REMARKS

Let me conclude where I began on this Sunday morning at the end of an intellectually full and fast-paced conference. God may take a day of rest, but not Professor Henry King.

<http://www.whitehouse.gov/infocus/environment/> (last visited Aug. 1, 2002).

⁴⁷ See Letter from President George W. Bush to Senators Charles Hagel, Jesse Helms, Larry Craig and Pat Roberts (Mar. 13, 2001), available at <http://www.whitehouse.gov/news/releases/2001/03/20010314.html>.

⁴⁸ See *Ministerial Declaration*, WTO Ministerial Conference, 4th Sess., Doc. WT/MIN(01)/DEC/1, at ¶ 31 (Nov. 14, 2001).

⁴⁹ See, e.g., Office of the U.S. Trade Representative, Trade Policy Staff Committee, Public Comments Regarding the Doha Multilateral Trade Negotiations and Agenda in the World Trade Organization, 67 Fed. Reg. 12,637 (2002); WTO, FISHERIES SUBSIDIES, at http://trade-info.cec.eu.int/civil_soc/documents/meeting/me-50-23.5%20fishsub3.doc (last visited Aug. 9, 2002).

The economics of energy and environment are inseparable from the institutions that we need to facilitate transactions, address externalities, and provide equity in our countries. This Conference has succeeded in helping us understand the interplay between law and markets in a Canada-U.S. context. In that regard, I want to close by commending the Canada-U.S. Law Institute for its valuable contributions to the debate over the last sixteen years with these important conferences. Thank you.