

More Than Friends?

U.S.-Canada Cooperative Frameworks on Agriculture and the Environment

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SYNOPSIS

Sharing a long and relatively peaceful border, Canada and the United States have built several cooperative frameworks to address issues of environmental protection and agricultural development. Some of these cooperative frameworks show the potential for the two countries to become “more than friends” in addressing these issues of common concern. Will that potential be realized? This article explores that question, focusing especially on (i) environmental and agricultural provisions in the U.S.-Mexico-Canada Agreement (“USMCA”) and (ii) cross-border environment-specific legal and institutional initiatives located outside the USMCA context . . . all with an eye to considering whether, and how, the two countries might build a deeper form of cooperation through novel forms of sovereign authority.

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OUTLINE

- I. INTRODUCTION: NATIONAL FRIENDS WITH NATIONAL SOVEREIGNTY
- II. ENVIRONMENTAL AND AGRICULTURAL COOPERATION IN THE USMCA
 - II.A. NAFTA, NAAEC, and CEC*
 - II.A.1. The framework in brief
 - II.A.2. An evaluation
 - II.B. The USMCA approach to environmental protection*
 - II.C. The USMCA approach to agriculture*
 - II.C.1. Agricultural biotechnology in the United States and Canada
 - II.C.2. The USMCA and biotechnology
- III. OTHER U.S.-CANADA ENTITIES AND INITIATIVES ON ENVIRONMENTAL PROTECTION
 - III.A. Waterton Glacier International Peace Park and the Crown Management Partnership*
 - III.B. Landscape Conservation Cooperatives*
 - III.C. Boundary Waters Treaty*
 - III.D. Great Lakes Water Quality Agreement*
 - III.E. U.S.-Canada Air Quality Agreement*
 - III.F. U.S.-Canada Pollution Contingency Plans*
 - III.F.1. Inland Pollution Contingency Plan
 - III.F.2. Marine Pollution Contingency Plan
 - III.G. North American Waterfowl Management Plan*
 - III.H. Other entities and initiatives*
 - III.H.1. Mohawk Nation at Akwesasne
 - III.H.2. The Dialogue on Climate Ambition
- IV. CONCLUDING OBSERVATIONS: MORE THAN FRIENDS WITH MORE THAN SOVEREIGNTY?
 - IV.A. Deep cooperation*
 - IV.B. Pluralistic sovereignty and a North American Prairies Agroecological Restoration Initiative*

I. INTRODUCTION: NATIONAL FRIENDS WITH NATIONAL SOVEREIGNTY

Three years ago, this journal published an article that one of us wrote on the international-law principle of state sovereignty.¹ Intended as a historical and theoretical critique of that principle, at least as it has evolved into “monolithic sovereignty,” that 2019 *Kansas Law Review* article concluded that a different formulation—“pluralistic sovereignty”—could better serve the interests of a global order facing unprecedented challenges.² What can that mean in a specific context? For instance, how might environmental protection (or, to take a more aggressive approach, environmental *restoration*) be assured for an ecosystem that happens to lie across the territories of two neighboring sovereign states?

These questions largely remained outside the scope of the 2019 *Kansas Law Review* article referred to above. Now we address those questions, or at least we make a more targeted attempt to do so. The editors of the *Kansas Law Review* have kindly agreed to publish this follow-on article, which we find especially appropriate because our homes here in the Great Plains lie within the North American Prairies that stretch from Texas far north into Canada’s so-called Prairie Provinces of Alberta, Saskatchewan, and Manitoba. This breadbasket region supplies vast stocks of grains that help feed the world, but it does so at a steep environmental cost.

That environmental cost has been explored elsewhere.³ What we wish to do in this article is to explore avenues by which the environmental problems of agriculture—especially in the regions of the United States and in Canada that were *formerly* prairies and grasslands—might be addressed through cooperative frameworks built by the two countries. Doing so in the context of the long and strong national friendship between the United States and Canada could set a pattern for building similar cooperative frameworks elsewhere in the world, where sovereign jealousies and frictions pose greater challenges.

Our approach in exploring these issues reflects the fact that the law is, in large part, precedent. Judges, attorneys, and scholars look for rules and patterns to guide their analysis of new and emerging legal issues.

1. John W. Head, *Addressing Global Challenges Through Pluralistic Sovereignty: A Critique of State Sovereignty as a Centerpiece of International Law*, 67 U. KAN. L. REV. 727 (2019).

2. *See id.* at 784–85 (explaining “pluralistic sovereignty” and its implications for addressing challenges with global dimensions).

3. *See, e.g.*, JOHN W. HEAD, INTERNATIONAL LAW AND AGROECOLOGICAL HUSBANDRY: BUILDING LEGAL FOUNDATIONS FOR A NEW AGRICULTURE 39–123 (2017). Chapters 2 and 3 explain the economic, environmental, and social unsustainability of modern extractive agriculture. *Id.*

Precedent reflects a society's principles and values; precedent is a living, amorphous history that shows the development of the law and shows where the law is going. With that in mind, this article provides an overview of the existing precedents for a North American Prairies Agroecological Restoration Initiative that would encompass the entirety of the North American prairies region that stretches across the United States and Canada.

We begin by surveying the special U.S.-Canada binational relations revolving around trade, most recently as manifest in selected provisions of the U.S.-Mexico-Canada Agreement ("USMCA"). Some of those provisions establish environmental protection rules and institutions aimed at facilitating cross-border cooperation. Other USMCA provisions deal with agriculture; in surveying those provisions, we highlight some differences and similarities between the two countries on agricultural issues, particularly agricultural biotechnology research and development. The article then moves beyond the USMCA context to discuss several cross-border environmental protection cooperative regimes, some of which include Native American tribal and First Nations involvement.

Taken as a whole, this survey shows that the two countries have made several real-life, serious-minded efforts to address environmental issues, and to a lesser degree agricultural issues, in a cross-border fashion that reflects the fact that the natural ecosystems at issue—river watersheds, mixed-grass prairies, bird migration patterns, and the like—pay no attention to human-drawn political boundaries. Those ecosystems are unconcerned with sovereignty, and the cooperative frameworks created thus far by the United States and Canada reflect a mature appreciation of this fact.

So what? Why do we identify and explain the record built by these two countries toward a "mature appreciation" of the artificiality of human-drawn borders? The final section of our article offers some observations about why the precedents we find in U.S.-Canada environmental and agricultural cooperation can serve as useful guides for building more robust frameworks. In that final section, we express both enthusiasm and despair—enthusiasm that these two countries have, through their friendship, built some cooperative momentum, but despair that the momentum is too shallow thus far to keep pace with the challenges they face. The USMCA, the Crown Management Partnership, the Boundary Waters Treaty, the Joint Pollution Contingency Plans . . . all of these show promise, but they all fall short. We suggest what a "deep cooperation" would look like in the U.S.-Canada context, and how it would involve a more appropriate, mature, and effective approach to sovereignty. As we

phrase it in the heading for our closing section, how can these two countries be “more than friends with more than sovereignty?”

II. ENVIRONMENTAL AND AGRICULTURAL COOPERATION IN THE USMCA

Examining the relationship between the United States and Canada must begin with the North American Free Trade Agreement (“NAFTA”) and its successor, the USMCA. The United States is the second largest trader of agricultural products in the world, second only to the European Union.⁴ NAFTA—an accord struck between the United States, Canada, and Mexico, implemented in 1994—played a large role in American near-hegemony by eliminating agricultural trade barriers.⁵ “Canada and Mexico are our first and second largest export markets for United States food and agricultural products, totaling more than \$39.7 billion food and agricultural exports in 2018.”⁶ Early in his tenure, President Donald Trump pushed for a renegotiation of NAFTA. A revised agreement, known as the USMCA, was signed on November 30, 2018.⁷

The USMCA, like NAFTA, is broad, covering everything from intellectual property rights to financial services to tariffs.⁸ This article focuses on the environmental and agricultural provisions in these agreements. Because the USMCA has been in place for only a short time, we give most attention to the NAFTA provisions. We then examine the ways in which the USMCA has brought innovations in environmental regulations and the many important USMCA provisions for Canadian and American agriculture, further connecting both countries’ markets and

4. *U.S. Agricultural Trade at a Glance*, ECON. RSCH. SERV. U.S. DEP’T AGRIC. (Dec. 7, 2020), <https://www.ers.usda.gov/topics/international-markets-us-trade/us-agricultural-trade/us-agricultural-trade-at-a-glance/> [https://perma.cc/FK67-NM26].

5. *See NAFTA Good for Farmers, Good for America*, OFF. U.S. TRADE REPRESENTATIVE (June 2001), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/archives/2001/june/nafta-good-farmers-good-america> [https://perma.cc/WS3M-MALG]. For a detailed description of the history of NAFTA and its effects, see generally M. ANGELES VILLARREAL & IAN F. FERGUSSON, CONG. RSCH. SERV., R42965, *THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)* (2017). NAFTA superseded the Free Trade Agreement between Canada and the United States signed in 1988.

6. *Secretary Perdue Statement on USMCA Signing*, U.S. DEP’T AGRIC. (Jan. 29, 2020) [hereinafter *Secretary Perdue Statement*], <https://www.usda.gov/media/press-releases/2020/01/29/secretary-perdue-statement-usmca-signing> [https://perma.cc/CH2F-CE5E].

7. M. ANGELES VILLARREAL, CONG. RSCH. SERV., IF10997, *U.S.-MEXICO-CANADA (USMCA) TRADE AGREEMENT* (2021).

8. For more consideration of the differences between NAFTA and USMCA, see *USMCA vs NAFTA*, INT’L TRADE ADMIN., <https://www.trade.gov/usmca-vsnafta> [https://perma.cc/6GSS-QAXK] (last visited Jan. 16, 2022).

regulatory schemes.⁹

II.A. NAFTA, NAAEC, and CEC

II.A.1. The framework in brief

Trade agreements and environmental issues have grown increasingly intertwined. NAFTA was the first agreement to explicitly include the environment.¹⁰ Environmental cooperation was a point of political emphasis. During the 1992 presidential campaigns, then-candidate Bill Clinton emphasized the importance of ensuring that the NAFTA—which had been negotiated under the George H. W. Bush administration and was soon to be considered by the U.S. Congress—would be accompanied by “side agreements” for both environmental matters and labor matters.¹¹ NAFTA and its environmental side treaty, the North American Agreement on Environmental Cooperation (“NAAEC”), represented a new era of trade agreements—its reach stretching beyond core trade issues, inextricably linking trade and the environment. The NAAEC’s lofty goals included:

[P]rotecting and improving the environment; promoting sustainable development; and increasing party cooperation for conserving, protecting, and enhancing the environment. Other objectives [were] supporting NAFTA’s environmental goals; avoiding trade distortions or new trade barriers; strengthening cooperation to develop and improve environmental rules and regulations; and enhancing compliance with environmental laws and regulations. Finally, the long list of aspirations [had] a major focus on promoting transparency and public participation in the development of environmental laws and regulations; promoting economically efficient environmental measures; and promoting pollution prevention policies and practices.¹²

9. See *Secretary Purdue Statement*, *supra* note 6.

10. Samuel L. Brown, *The USMCA, Trade, and the Environment*, HUNTON ANDREWS KURTH: NICKEL REP. (July 2, 2020), <https://www.huntonnickelreportblog.com/2020/07/the-usmca-trade-and-the-environment/> [https://perma.cc/6CN9-N43G].

11. Olivia B. Waxman, *4 Things to Know About the History of NAFTA, as Trump Takes Another Step Toward Replacing It*, TIME (Nov. 30, 2018, 6:05 PM), <https://time.com/5468175/nafta-history/>; Wesley Smith, *Assessing the NAFTA Side Agreements*, HERITAGE FOUND. (Sept. 30, 1993), <https://www.heritage.org/trade/report/assessing-the-nafta-side-agreements> [https://perma.cc/VB49-XRJG].

12. David A. Gantz, *Arizona Legal Studies Discussion Paper No. 19-13: The United States-Mexico-Canada Agreement: Labor Rights and Environmental Protection*, RICE UNIV. BAKER INST. FOR PUB. POL’Y, June 13, 2019, at 5–6, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3404238.

In addition to these aspirations, the NAAEC recognized “the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities” but required that each country “ensure that its laws and regulations provide for high levels of environmental protection and . . . strive to continue to improve those laws and regulations.”¹³ However, this requirement was not enforceable; the NAAEC did not set any substantive environmental standards.¹⁴ “[N]othing prevent[ed] a party from weakening its environmental laws and then neglecting to strongly enforce them.”¹⁵ Disputes between the parties about environmental issues were to be resolved in arbitration.¹⁶

Environmentalists raised two major concerns about the environmental effects of North American trade liberalization: (1) that NAFTA would incentivize the relocation of polluting businesses to Mexico in response to Mexico’s weak environmental laws; (2) that NAFTA and trade liberalization would harm the environment throughout North America.¹⁷ To address these concerns, the NAAEC created the Commission for Environmental Cooperation (“CEC”) “not only to address trade-environment linkages but also to coordinate environmental policy

13. North American Agreement on Environmental Cooperation art. 3, Sept. 14, 1993, 32 I.L.M. 1480 [hereinafter NAAEC]; see also *EPA’s Role in the North American Commission for Environmental Cooperation (CEC)*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/international-cooperation/epas-role-north-american-commission-environmental-cooperation-cec> [<https://perma.cc/UC2N-LXHT>] (last visited Jan. 16, 2022) (describing the Commission for Environmental Cooperation, which was formed under the NAAEC to facilitate environmentally responsible practices).

14. Gantz, *supra* note 12, at 6. Interestingly, the enforcement procedures of the NAAEC differ from the enforcement procedures in NAFTA and the “only firm commitment” the signatories made was to promote adequate enforcement of domestic environmental standards. Isabel Studer, *The NAFTA Side Agreements: Toward a More Cooperative Approach?*, 45 WAKE FOREST L. REV. 469, 471 (2010).

15. Gantz, *supra* note 12, at 6. It could be argued that the weakening of domestic environmental laws would violate the broad commitments of the NAAEC. The NAAEC enforcement process initiates proceedings if there is a finding of “a persistent pattern of failure . . . to effectively enforce . . . environmental law.” NAAEC, *supra* note 13, at art. 22.1. However, the United States has never sued a trading partner for systemic environmental abuses. *Trump’s NAFTA 2.0: An Environmental Failure*, SIERRA CLUB (Dec. 10, 2019) [hereinafter *Environmental Failure*], <https://www.sierraclub.org/sites/www.sierraclub.org/files/Trump-NAFTA-Environment-Failure.pdf> [<https://perma.cc/9PE8-36NK>]; see also Studer, *supra* note 14, at 475 (“The dispute-resolution mechanisms were designed to fail and have in fact proven too cumbersome to implement.”).

16. NAAEC, *supra* note 13, at art. 24.1. An “arbitral panel” was never convened. Aaron Cosbey, *Weighing Up the Environmental Cooperation Agreement Under the Canada-United States-Mexico Agreement*, INT’L INST. SUSTAINABLE DEV. 2 (Feb. 2019), <https://www.iisd.org/system/files/publications/environmental-cooperation-agreement-policy-brief.pdf> [<https://perma.cc/VG2H-389N>].

17. Chris Wold, *Evaluating NAFTA and the Commission for Environmental Cooperation: Lessons for Integrating Trade and Environment in Free Trade Agreements*, 28 ST. LOUIS UNIV. PUB. L. REV. 201, 203 (2008).

throughout North America.”¹⁸

The CEC is composed of three bodies: the Council, Secretariat, and Joint Public Advisory Committee (“JPAC”).¹⁹ The Council comprises the highest-level environmental minister of each country: the Administrator of the Environmental Protection Agency from the United States, the Minister of Environment and Climate Change from Canada, and the Secretary of Environment and Natural Resources from Mexico.²⁰ The Secretariat, based in Montreal and headed by an Executive Director appointed by the Council, provides “technical, administrative and operational support to the Council.”²¹ Notably, the Secretariat is tasked with reviewing citizen suits.²² Lastly, there is the JPAC, composed of fifteen members; each of the three countries appoints five members.²³ JPAC convenes at least once a year and advises the Council on “any matter within the scope of [the NAAEC].”²⁴ “JPAC engages the public in open forums that bring together experts on North America’s most pressing environmental issues. JPAC subsequently submits its recommendations to Council in the form of an Advice.”²⁵

The NAAEC includes two enforcement mechanisms: (1) a dispute resolution mechanism—arbitration—by which a party can submit that another party is not properly enforcing its environmental law;²⁶ (2) a citizen petition process by which any resident of Canada, Mexico, or the United States could file a petition with the CEC Secretariat claiming that a country’s environmental laws were not being properly enforced.²⁷ With citizen engagement and increased transparency, negotiators hoped to increase enforcement of environmental laws, “a perceived Achilles heel for environmental regulation on the continent, particularly in Mexico.”²⁸

18. *Id.* at 203–04.

19. *About*, COMM’N ENV’T COOP., <http://www.cec.org/about/> [https://perma.cc/HAP5-FHNR] (last visited Jan. 16, 2022).

20. NAAEC, *supra* note 13, at art. 9; *CEC Council Sessions*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/international-cooperation/cec-council-sessions#2020> [https://perma.cc/5Y6L-GHSY] (last visited Jan. 16, 2022).

21. NAAEC, *supra* note 13, at art. 11.5.

22. *Id.* at art. 14.1.

23. *Id.* at art. 16.1.

24. *Id.* at art. 16.3, 16.4.

25. *Joint Public Advisory Committee*, COMM’N ENV’T COOP., <http://www.cec.org/about/joint-public-advisory-committee/> [https://perma.cc/YB8J-9T3Y] (last visited Jan. 17, 2022).

26. NAAEC, *supra* note 13, at arts. 22–24.

27. *Id.* at arts. 14–15. For a detailed description of the citizen petition procedures of NAAEC, see John H. Knox & David L. Markell, *Evaluating Citizen Petition Procedures: Lessons from an Analysis of the NAFTA Environmental Commission*, 47 TEX. INT’L L.J. 505, 510–12 (2012).

28. Knox & Markell, *supra* note 27, at 507.

However, this citizen petition process only creates a “factual record,” not a legally binding order.²⁹

II.A.2. An evaluation

It is worth examining the successes and failures of NAFTA, the NAAEC, and CEC to set the stage for assessing NAFTA’s record on the environment and the USMCA. A report issued in 2014 by the Sierra Club and other North American groups found “that NAFTA has reduced the ability of governments to respond to environmental issues while empowering multinational corporations to challenge environmental policies.”³⁰ In particular, the report found that NAFTA:

- Facilitated the expansion of large-scale, export-oriented farming that relies heavily on fossil fuels, pesticides, and genetically modified organisms;
- Encouraged a boom in environmentally destructive mining activities in Mexico;
- Undermined Canada’s ability to regulate its tar sands industry and locked the country into shipping large quantities of fossil fuels to the United States;
- Catalyzed economic growth in North American industries and manufacturing sectors while simultaneously failing to safeguard against the increase in air and water pollution associated with this growth; and
- Weakened domestic environmental safeguards by providing corporations with new legal avenues to challenge environmental policymaking.³¹

The report declared the above “the inevitable results of a model of trade that favors corporate profits over the interests of communities and the environment.”³² Ultimately, NAFTA’s environmental protection provisions, though innovative, were limited in scope; parties promised not to weaken environmental laws to encourage foreign investment but if a party did not meet its obligations, “the only redress was government-to-

29. *See id.* at 510.

30. Quentin Karpilow, Ilana Solomon, Alejandro Villamar Calderón, Manuel Pérez-Rocha & Stuart Trew, *NAFTA: 20 Years of Costs to Communities and the Environment*, SIERRA CLUB 1 (Mar. 2014), <https://big.assets.huffingtonpost.com/NAFTAReport.pdf> [<https://perma.cc/L7SL-J26A>].

31. *Id.* at 1.

32. *Id.*

government consultation.”³³

Despite the criticism leveled at it, NAFTA’s side treaty—the NAAEC—is considered “an innovative and groundbreaking agreement”³⁴ and its cooperative program has eliminated several dangerous pesticides and provided training to Mexican environmental officials.³⁵ As discussed above, the NAAEC created the intergovernmental organization to assist in the implementation of the NAAEC’s environmental goals—the CEC.

The CEC had its own set of problems. First, the CEC was “woefully underfunded.”³⁶ Second, because the CEC had a very narrow focus—trade-environment issues—it missed the larger environmental impacts of trade liberalization.³⁷ There were also problems with the citizen submission process, a key enforcement mechanism. The Secretariat of the CEC was charged with handling citizen submissions. Professor Chris Wold points out that the structure of the CEC caused the citizen submission process to be “extremely adversarial, with governments whittling away at the Secretariat’s discretion to make decisions concerning the scope and eligibility of submissions.”³⁸

Professor David L. Markell and Professor John H. Knox empirically analyzed the citizen suit provision in 2012, when the CEC re-examined the process. They found a myriad of issues, including “troubling signs” of declining interest in the procedure and a lengthy and unfair process.³⁹ Nonetheless, the evaluation found that, though the citizen suit resolution process is not legally binding, CEC factual records have forced governments to change their behavior because of the increased transparency and public attention garnered by the process.⁴⁰ Additionally, Professors Markell and Knox noted that:

[I]t seems likely that the procedure has contributed to greater public participation in international and domestic institutions in three ways. First, the procedure provides opportunities for environmental activists from different countries to work together. . . . Second, the submission

33. Anne-Catherine Boucher, *The USMCA Contains Enhanced Environmental Protection Provisions but Will They Lead to Substantive Environmental Protection Outcomes?*, AM. BAR ASS’N (Nov. 20, 2020), https://www.americanbar.org/groups/environment_energy_resources/publications/ierl/20201120-the-usmca-contains-enhanced-environmental-protection-provisions/.

34. Tracy Hester, *Still Standing: The New U.S.-Mexico-Canada Agreement and the Fate of the Commission for Environmental Cooperation*, 50 No. 5 ABA TRENDS 6, 6 (2019).

35. Wold, *supra* note 17, at 204.

36. *Id.*

37. *Id.* at 204–05.

38. *Id.* at 205.

39. Knox & Markell, *supra* note 27, at 520–27.

40. *Id.* at 527.

procedure may strengthen environmental activists' domestic networks. . . . Finally, and most generally, scholars have suggested that the procedure, together with other elements of the CEC, have raised the expectations of Mexican citizens as to the proper levels of transparency and public participation in public institutions.⁴¹

These observations suggest that citizen suit provisions can accomplish important goals but require significant rethinking.

II.B. The USMCA approach to environmental protection

The USMCA⁴² and its environmental side treaty, the Environmental Cooperation Agreement (“ECA”) update and replace both NAFTA and the NAAEC.⁴³ The USMCA builds on the environmental foundation laid by NAFTA, devoting an entire chapter—Chapter 24—to the environment,⁴⁴ and has been hailed as a major improvement on the NAAEC.⁴⁵ The USMCA includes many issue-specific provisions,

including new commitments relating to illegal wildlife trade, illegal fishing and depletion of fish stocks, species at risk, conservation of biological diversity, sustainable forest management, ozone depletion, marine litter (including plastic litter and microplastics), and environmental impact assessment with public participation for projects involving central government action likely to cause significant impacts and improved air quality.⁴⁶

The Commission for Environmental Cooperation (“CEC”), created by NAFTA, survived.⁴⁷ The CEC will have a large role to play in the

41. *Id.* at 528–29.

42. Canada refers to the agreement as the Canada-United States-Mexico Agreement, or CUSMA. *See, e.g., A New Canada-United States-Mexico Agreement*, GOV'T OF CAN., <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/index.aspx?lang=eng> [<https://perma.cc/XL9X-34KF>] (last visited Jan. 18, 2022). In its blog, written in English, Mexico appears to refer to the agreement as the USMCA. *See, e.g., Mexico, the United States and Canada Sign USMCA*, GOBIERNO DE MÉXICO (Nov. 30, 2018), <https://www.gob.mx/epn/en/articulos/mexico-the-united-states-and-canada-sign-usmca?idiom=en>.

43. *EPA's Role in the North American Commission for Environmental Cooperation (CEC)*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/international-cooperation/epas-role-north-american-commission-environmental-cooperation-cec> [<https://perma.cc/62KB-K2BP>] (last visited Jan. 18, 2022).

44. United States-Mexico-Canada Agreement ch. 24, Nov. 30, 2018 [hereinafter USMCA].

45. Gantz, *supra* note 12, at 5.

46. Boucher, *supra* note 33.

47. USMCA, *supra* note 44, at art. 24.25.; *United States-Mexico-Canada Agreement*, OFF. U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement> [<https://perma.cc/P82V-XGC6>] (last visited Jan. 18, 2022) [hereinafter USTR Report]; NAAEC, *supra* note 13, at art. 8.

implementation of USMCA Chapter 24. The USMCA created a new body dedicated to implementation—an Environment Committee.⁴⁸ The Environment Committee “is to oversee implementation of [Chapter 24]” and is tasked with providing “a forum to discuss and review the implementation of [Chapter 24],” periodically informing the Council of the CEC on implementation, and offering input on enforcement as needed.⁴⁹

The CEC has given a glimpse of its future in the CEC Strategic Plan 2021-2025, released in 2020.⁵⁰ The CEC’s Pillars for the future are:

1. Clean air, land, and water
2. Preventing and reducing pollution in the marine environment
3. Circular economy and sustainable materials management
4. Shared ecosystems and species
5. Resilient economies and communities
6. Effective enforcement of environmental laws.⁵¹

It is worth mentioning that the Strategic Plan does not include the term “climate change,” a reflection of the priorities of the USMCA and a legacy of the Trump administration that will last beyond Trump’s presidency.

The USMCA was innovative because it includes multilateral trade agreements. The USMCA includes the list of seven multilateral environmental agreements (“MEAs”) approved by the U.S. Congress, namely:

- The Convention on International Trade in Endangered Species of Wild Fauna and Flora
- The Montreal Protocol on Substances that Deplete the Ozone Layer
- The Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships
- The Convention on Wetlands of International Importance Especially as Waterfowl Habitat
- The Convention on the Conservation of Antarctic Marine

48. USMCA, *supra* note 44, at art. 24.26.2.

49. *Id.* at art. 24.26.3.

50. *Strategic Plan 2021-2025*, COMM’N ENV’T COOP. (2020), http://www.cec.org/files/documents/strategic_plans/cec-strategic-plan-2021-2025.pdf [<https://perma.cc/PD7A-MULQ>].

51. *Id.* at 10–11.

Living Resources

- The International Convention for the Regulation of Whaling
- The Convention for the Establishment of an Inter-American Tropical Tuna Commission.⁵²

The USMCA requires that each of the three signatories “adopt, maintain, and implement laws, regulations, and all other measures necessary to fulfill its respective obligations under the . . . [MEAs].”⁵³ Perhaps more notable than the MEAs included in the USMCA are the MEAs not included: the United Nations Framework Convention on Climate Change and the Paris Agreement. Given that the United States famously left the Paris Agreement under Donald Trump and his administration negotiated the USMCA, it is unsurprising but nonetheless disappointing that MEAs related to climate change are not part of the USMCA.

Another touted accomplishment of the USMCA was the “most comprehensive set of enforceable environmental obligations of any previous United States agreement.”⁵⁴ “The Environment chapter of the USMCA brings all environmental provisions into the core of the agreement and makes them enforceable.”⁵⁵ The USMCA contains similar language to the NAAEC: “No Party shall fail to effectively enforce its environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties.”⁵⁶ Additionally, the USMCA proves that “the Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protection afforded in their respective environmental laws.”⁵⁷ The USMCA says all the right things, but questions remain about enforcement.

52. USMCA, *supra* note 44, at art. 24.8.4. This is by no means the entire list of MEAs ratified by the U.S. Congress. See *Selected Multilateral Environmental Instruments in Force for the U.S.*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/international-cooperation/selected-multilateral-environmental-instruments-force-us> [https://perma.cc/SCP3-2RT6] (last visited Jan. 18, 2022).

53. USMCA, *supra* note 44, at art. 24.8.4.

54. *United States-Mexico-Canada Trade Fact Sheet Modernizing NAFTA into a 21st Century Trade Agreement*, OFF. U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/modernizing> [https://perma.cc/G696-T6PR] (last visited Jan. 18, 2022).

55. *Benefits for the Environment in the United States-Mexico-Canada Agreement*, OFF. U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/benefits-environment-united-states-mexico-canada-agreement> [https://perma.cc/EL8S-QBR6] (last visited Jan. 18, 2022).

56. USMCA, *supra* note 44, at art. 24.4.1 (internal footnotes omitted).

57. *Id.* at art. 24.4.3.

The USMCA updates the dispute resolution provisions, adopting a more modern practice. Called a modern “ladder” practice, “if consultations do not work, the next rung in the ladder is consideration by the CUSMA Environment Committee, followed by, if necessary, ministerial consultations, followed by the CUSMA’s general dispute settlement regime.”⁵⁸ In addition to this structural change, the USMCA includes an important update to dispute settlement: “[W]hile such disputes can be brought only if a country’s action or inaction creates a trade or investment advantage, environmental violations are presumed to affect trade and investment unless otherwise demonstrated.”⁵⁹

The USMCA largely replicates the enforcement provisions of the NAAEC; there is no independent, binding enforcement mechanism.⁶⁰ Despite its lofty language, there is real concern about the enforcement capabilities of the CEC under the USMCA. A notable example of this: “Only hours after the USMCA text was released, the U.S. Environmental Protection Agency announced their intent to significantly weaken mercury emissions applied to the U.S. coal sector.”⁶¹

The USMCA and its side agreement—the ECA—retain the citizen suit provisions, or Submissions on Enforcement Matters (“SEM”) of the NAAEC.⁶² In response to some of the criticisms laid out above, the USMCA provides shorter timelines for various stages of the SEM process; hopefully, this will speed up a notoriously slow process.⁶³

The most significant criticism of the USMCA’s environmental chapter is that it does not address—or even mention—climate change.⁶⁴ The only references to carbon emissions are a mention of carbon storage in the sustainable forest management and trade section⁶⁵ and a reference to clean

58. Cosbey, *supra* note 16, at 2.

59. Boucher, *supra* note 33.

60. *Environmental Failure*, *supra* note 15.

61. Scott Vaughan, *USMCA Versus NAFTA on the Environment*, INT’L INST. SUSTAINABLE DEV. (Oct. 3, 2018), <https://www.iisd.org/articles/usmca-nafta-environment?q=library/usmca-nafta-environment> [<https://perma.cc/2CR5-7FPV>].

62. USMCA, *supra* note 44, at art. 24.27.

63. *Id.* at arts. 24.27, 24.28.

64. See Bashar H. Malkawi & Shakeel Kazmi, *Dissecting and Unpacking the USMCA Environmental Provisions: Game-Changer for Green Governance?*, JURIST (June 5, 2020, 6:06 PM), <https://www.jurist.org/commentary/2020/06/malkawi-kazmi-usmca-environment/> [<https://perma.cc/WC97-QFC2>] (“Unfortunately, the USMCA fails to address climate change, the biggest challenge of our time.”); Amanda Maxwell & Dan West, *USMCA is a Huge Missed Opportunity to Act on Climate*, NAT. RES. DEF. COUNCIL (Dec. 19, 2019), <https://www.nrdc.org/experts/amanda-maxwell/usmca-huge-missed-opportunity-act-climate> [<https://perma.cc/P6JV-U442>].

65. USMCA, *supra* note 44, at art. 24.23.2(b).

technology in the environmental goods and services section.⁶⁶ Critically, as mentioned above, the USMCA does not include any climate treaties, such as the Paris Agreement. In addition to a lack of climate standards, environmental groups criticized the USMCA for a lack of binding standards and a failure to rein in corporate polluters.⁶⁷

II.C. The USMCA approach to agriculture

Thanks to decades of North American trade liberalization, Canadian and American agriculture enjoy a flourishing trade relationship.⁶⁸ Canada is the largest export market for agricultural products from the United States and the two countries “enjoy the largest agricultural bilateral trading relationship in the world, creating jobs and economic opportunities in both countries.”⁶⁹ The USMCA expands this relationship, further reducing trade barriers and intertwining the markets of Canada and the United States. First, “[a]ll food and agricultural products that have zero tariffs under . . . [NAFTA] will remain at zero tariffs.”⁷⁰ NAFTA did not eliminate all tariffs; though tariffs were phased out for most agricultural products, certain products were exempted from market liberalization.⁷¹ This left room for USMCA to create new market access opportunities. Specifically, USMCA increases market access for U.S. exports of dairy, poultry, and eggs and increases market access for Canadian exports of dairy, peanuts, processed peanut products, and some sugar products.⁷² In addition to increasing market access, USMCA changed Canadian regulations, eliminating grading systems that downgraded U.S. exports of

66. *Id.* at art. 24.24.1.

67. *Environmental Failure*, *supra* note 15.

68. For a helpful timeline of the history of trade liberalization in agricultural products of North America, see ANITA REGMI, CONG. RSCH. SERV., R45661, AGRICULTURAL PROVISIONS OF THE U.S.-MEXICO-CANADA AGREEMENT 2 (2019) [hereinafter REGMI, AGRICULTURAL PROVISIONS 2019]. For an updated version of Regmi’s timeline, see ANITA REGMI, CONG. RSCH. SERV., R45661, AGRICULTURAL PROVISIONS OF THE U.S.-MEXICO-CANADA AGREEMENT 2 (2020) [hereinafter REGMI, AGRICULTURAL PROVISIONS 2020].

69. *Canada-United States Bilateral Trade*, GOV’T OF CAN. (Feb. 19, 2021), <https://agriculture.canada.ca/en/international-trade/market-intelligence/canada-united-states-bilateral-trade> [https://perma.cc/5AAE-UU7K].

70. *United States-Mexico-Canada Trade Fact Sheet Agriculture: Market Access and Dairy Outcomes of the USMC Agreement*, OFF. U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/market-access-and-dairy-outcomes> [https://perma.cc/Z3YH-GCXM] (last visited Jan. 18, 2022).

71. REGMI, AGRICULTURAL PROVISIONS 2020, *supra* note 68, at 1. In contrast, “[t]he United States and Mexico agreement under NAFTA did not exclude any agricultural products from trade liberalization.” *Id.*

72. *Id.* at 2. A helpful table—Canadian Market Access for U.S. Agricultural Products Under USMCA—provides a numerical summary of the provisions. *See id.* at 5.

wheat and milk; this change will enable U.S. exports to be more competitive in the Canadian market.⁷³

Increased market access requires additional provisions and regulations to facilitate the integration of different countries' markets. These additional provisions cover a wide range of topics. "For example, NAFTA included provisions for rules of origin, intellectual property rights, foreign investment, and dispute resolution. NAFTA's sanitary and phytosanitary (SPS) provisions made a significant contribution toward the expansion of agricultural trade by harmonizing regulations and facilitating trade."⁷⁴ The USMCA updates these provisions in a variety of ways, including significantly changing the rules of origin,⁷⁵ enhanced SPS provisions,⁷⁶ and a new dispute resolution mechanism that allows signatories to seek consultations to resolve issues before engaging in formal dispute resolution.⁷⁷

II.C.1. Agricultural biotechnology in the United States and Canada

The USMCA is the first U.S. trade agreement to address agricultural biotechnology. Since NAFTA was implemented in 1994, biotechnology⁷⁸ has come a long way and its effects on agriculture have been enormous.

73. *Id.* at 7, 9; *United States-Mexico-Canada Trade Fact Sheet Strengthening North American Trade in Agriculture*, OFF. OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/strengthening> [https://perma.cc/2863-Z4ZK] (last visited Jan. 18, 2022).

74. REGMI, AGRICULTURAL PROVISIONS 2019, *supra* note 68, at 3.

75. USMCA, *supra* note 44, at ch. 4; USTR Report, *supra* note 47; Gregory Spak, Francisco de Rosenzweig, Dean A. Barclay, Matt Solomon & Brian Picone, *Overview of Chapter 4 (Rules of Origin) of the US-Mexico-Canada Trade Agreement*, WHITE & CASE (Oct. 25, 2018), <https://www.whitecase.com/publications/alert/overview-chapter-4-rules-origin-us-mexico-canada-trade-agreement> [https://perma.cc/HJR8-R2FP].

76. USMCA, *supra* note 44, at ch. 9; USTR Report, *supra* note USTR Report.

77. Eric Rosenberg, Hans Stroo & Daria Mikaelchenko, *USMCA: Agricultural Trade Issues Remain Even with Passage*, BRYANT CHRISTIE INC. (2019), https://www.bryantchristie.com/Portals/0/BCI_USMCA_white_paper2.pdf [https://perma.cc/K3YH-8AHV].

78. Lamentably, terms like "biotechnology," "genetic engineering," and "genetic modification" have common but varied meanings and are likely to cause confusion. We appreciate the efforts of Dr. Alan McHughen to provide clear definitions of these terms and adopt the definitions laid out in Dr. McHughen's 2016 paper. Alan McHughen, *A Critical Assessment of Regulatory Triggers for Products of Biotechnology: Product vs. Process*, 7 GM CROPS & FOOD 125, 126-29 (2016). "Biotechnology" refers "to any application of biology to derive goods and services." *Id.* at 127. "Genetic engineering" refers to recombinant DNA (rDNA) technology. *Id.* at 129. The definition of "genetic modification" depends on the country: the EU has an official definition but the U.S. and Canada have no official definition. *Id.* at 127. "Popular usage of genetic modification, especially 'GMO' (genetically modified organism) can, depending on usage, limit the definition to rDNA or genetic engineering, or expanded more broadly to encompass things that fit no official definition, such as crops developed using non-traditional means of breeding (e.g., in vitro selection)." *Id.*

Advances in biotechnology, particularly genetic engineering, have produced crops with increased yields, better pest and disease resistance, and improved nutrient composition.⁷⁹ The biotechnology process itself matters; the United States, for example, does not regulate gene editing the same way it regulates genetically modified organisms.⁸⁰ Under the American approach, gene editing, which involves a modification to an organism's DNA, is distinct from a genetically modified organism, which involves introducing a new gene to one organism from another organism. The most recognizable gene editing method is Clustered Regularly Interspaced Short Palindromic Repeat, or CRISPR.⁸¹

Both the United States and Canada make significant contributions to the development of agricultural biotechnology. Canada spends more on agricultural research and development (as a percentage of the country's GDP) than the United States.⁸² Both countries are among the top ten countries in the scientific impact of their agricultural research.⁸³ A key difference is the scientific production of agricultural research: the United States produced 25% of the world's papers on veterinary medicine, agricultural science, food science, aquaculture, and renewable bioresources between 1997 and 2014 and Canada produced 4.7%.⁸⁴

The American and Canadian approaches to the regulation of biotechnology have important similarities and differences.⁸⁵ First, both countries regulate the product created by biotechnology, rather than the process of creating that product. Compared with the European Union, the American and Canadian biotechnology regulatory processes are generally viewed as more permissive, but the United States has an even more

79. Theresa Phillips, *Genetically Modified Organisms (GMOs): Transgenic Crops and Recombinant DNA Technology*, NATURE EDUC. (2008), <https://www.nature.com/scitable/topicpage/genetically-modified-organisms-gmos-transgenic-crops-and-732/> [<https://perma.cc/CS8S-DAET>].

80. *Secretary Perdue Issues USDA Statement on Plant Breeding Innovation*, U.S. DEP'T AGRIC. (Mar. 28, 2018), <https://www.usda.gov/media/press-releases/2018/03/28/secretary-perdue-issues-usda-statement-plant-breeding-innovation> [<https://perma.cc/6F2M-5RMM>].

81. Clara Rodríguez Fernández, *CRISPR-Cas9: The Gene Editing Tool Changing the World*, LABIOTECH (Mar. 11, 2021), <https://www.labiotech.eu/in-depth/crispr-cas9-review-gene-editing-tool/> [<https://perma.cc/G6MQ-T5TN>].

82. Canada's expenditures total 0.046% of its GDP and the United States' expenditures total 0.013% of its GDP. *An Overview of the Canadian Agricultural Innovation System*, AGRIC. INST. CAN. 16 (July 2017), <https://www.aic.ca/wp-content/uploads/2021/04/AIC-An-Overview-of-the-Canadian-Agricultural-Innovation-System-2017.pdf> [<https://perma.cc/EVA9-EKHF>].

83. The United States is ranked eighth and Canada is ranked ninth, based on the relative average citations and average of relative impact factors. *Id.* at 25–26.

84. *Id.* at 27.

85. For a comprehensive discussion of the agricultural biotechnology regulation, see generally *REGULATION OF AGRICULTURAL BIOTECHNOLOGY: THE UNITED STATES AND CANADA* (Chris A. Wozniak & Alan McHughen eds., 2012).

permissive biotechnology policy than Canada.⁸⁶

Canada and the United States have very different legislative approaches to biotechnology regulation. In the 1980s, Canada studied its biotechnology sector and regulatory structure and drafted new legislation to capture and regulate new biotechnologies, including Directive 94-08, the “first practical guideline to developers of genetically new plants.”⁸⁷ The United States, on the other hand, did not develop any new legislation for biotechnology and adapted existing statutes.⁸⁸ Instead, the Coordinated Framework for Regulation of Biotechnology divides the responsibility for biotechnology regulation between the U.S. Department of Agriculture, the U.S. Food and Drug Administration, and the U.S. Environmental Protection Agency.⁸⁹

II.C.2. The USMCA and biotechnology

The USMCA defines agricultural biotechnology as “technologies, including modern biotechnology, used for the deliberate manipulation of an organism to introduce, remove, or modify one or more heritable characteristics of a product for agriculture and aquaculture use and that are not technologies used in traditional breeding and selection.”⁹⁰ This definition covers “crops produced with all biotechnology methods, including recombinant DNA and gene editing.”⁹¹

The USMCA establishes “a Working Group for Cooperation on Agricultural Biotechnology . . . for information exchange and cooperation on policy and trade-related matters associated with products of agricultural biotechnology.”⁹² The Working Group, chaired by representatives from both countries, provides a forum for the exchange of information on issues, regulations, policies, and risk or safety assessments related to the trade of

86. Éric Montpetit, *A Policy Network Explanation of Biotechnology Policy Differences Between the United States and Canada*, 25 J. PUB. POL’Y 339, 340–46 (2005).

87. McHughen, *supra* note 78, at 140–43.

88. *Id.* at 138.

89. *Id.* at 138–40; *see also About the Coordinated Framework*, UNIFIED WEBSITE FOR BIOTECHNOLOGY REGUL., <https://usbiotechnologyregulation.mrp.usda.gov/biotechnologygov/about/about> [<https://perma.cc/H8W4-UGUR>] (last visited Jan. 18, 2022).

90. USMCA, *supra* note 44, at art. 3.12.

91. REGMI, AGRICULTURAL PROVISIONS 2020, *supra* note 68, at 10. By way of comparison, and to show how the USMCA has followed advances in biotechnology, “the Trans-Pacific Partnership covered only traditional rDNA technology.” AGRIC. POL’Y ADVISORY COMM., US-MEXICO TRADE AGREEMENT 3 (Sept. 27, 2018), [https://ustr.gov/sites/default/files/files/agreements/FTA/Advisory CommitteeReports/Agriculture%20Policy%20Advisory%20Committee.pdf](https://ustr.gov/sites/default/files/files/agreements/FTA/Advisory%20CommitteeReports/Agriculture%20Policy%20Advisory%20Committee.pdf) [<https://perma.cc/8X2H-SNCV>].

92. USMCA, *supra* note 44, at art. 3.16.

products of agricultural biotechnology.⁹³ Despite this enhanced information exchange, it remains the role of Congress “to establish a regulatory framework to govern trade in products created with agricultural biotechnology.”⁹⁴

III. OTHER U.S.-CANADA ENTITIES AND INITIATIVES ON ENVIRONMENTAL PROTECTION

Although the provisions noted above in the USMCA (and its predecessor NAFTA) constitute some of the more important legal and institutional cooperative arrangements between Canada and the United States on environmental and agricultural issues, the story has much more to it. Especially in terms of environmental management, the two countries have developed several quasi-independent entities and undertaken some cross-border initiatives that add to the precedents that we believe can prove useful in building more robust agricultural-reform and environmental-protection systems involving the two countries. We survey several of those entities and initiatives in the following paragraphs.

III.A. Waterton Glacier International Peace Park and the Crown Management Partnership

A UNESCO World Heritage site, Waterton Glacier International Peace Park lies on the border between the province of Alberta and the state of Montana.⁹⁵ The park was formed in 1932, combining Waterton Lakes National Park on the Canadian side with Glacier National Park on the American side, to form the world’s first International Peace Park.⁹⁶ Day-to-day management of the park is performed by the U.S. National Park Service on the American side and Parks Canada on the Canadian side.⁹⁷ In that respect, the Waterton Glacier management system resembles that of the Peace Arch at the border of Washington State and British Columbia.⁹⁸ Each side has its own management plan but there is strong

93. *Id.*

94. REGMI, AGRICULTURAL PROVISIONS 2020, *supra* note 68.

95. *Waterton Glacier International Peace Park*, UNESCO, <https://whc.unesco.org/en/list/354/> [<https://perma.cc/TZ7C-Z5CU>] (last visited Jan. 18, 2022).

96. *Id.*

97. *Id.*

98. Named Peace Arch Provincial Park in Canada and Peace Arch Historical State Park in the U.S., Peace Arch straddles the border. See *Peace Arch Provincial Park*, BC PARKS, https://bcparks.ca/explore/parkpgs/peace_arch/ [<https://perma.cc/96HS-59WM>] (last visited Jan. 18, 2022); *Peace Arch*

cooperation between the United States and Canada on a range of issues. In the case of the Waterton Glacier park, these issues include “natural and cultural resource management, visitor use and interpretation, science and research and relations with Aboriginal peoples.”⁹⁹

Waterton Glacier International Peace Park is part of a larger ecosystem known as the Crown of the Continent and, recently, a group formed to manage the large, pristine ecosystem straddling an international boundary. Started in 2001 and formalized in 2007,¹⁰⁰ the Crown Management Partnership (“CMP”) was formed as a multi-jurisdictional “partnership amongst federal, state, provincial, Tribal, and First Nation agency managers and universities in Montana, Alberta, and British Columbia.”¹⁰¹ The CMP works across the international border of the United States and Canada to support the management of the Crown of the Continent Ecosystem. Within the ecosystem, there are many different public and private landowners but no single agency carries responsibility for the nearly 18-million-acre ecosystem; the CMP strives to have everyone—managers, agencies, researchers, and communities—collaborate on environmental issues.¹⁰²

III.B. Landscape Conservation Cooperatives

In 2009, Landscape Conservation Cooperatives (“LCCs”) were formed by the U.S. Department of the Interior to address conservation

Historical State Park, WASH. STATE PARKS, <https://parks.state.wa.us/562/Peace-Arch> [<https://perma.cc/EVL5-8VPW>] (last visited Jan. 18, 2022). The park features a concrete arch that “was constructed to honor the centennial of the treaties resulting from the War of 1812. These agreements between the U.S. and Britain established a peaceful, undefended border between the U.S. and Canada.” *Id.* The northern half of the park is managed by British Columbia Parks and the southern half of the park is managed by Washington State Parks. During the COVID-19 pandemic, the Canadian side of the park was closed, but the Washington side remained open, creating an “unwritten loophole” that allowed Canadians to visit American friends and family located across the border. Ben Miljure, *People Still Taking Advantage of Cross-Border B.C. Park to Skip Quarantine*, CTVNEWS (Nov. 12, 2020, 7:19 PM), <https://bc.ctvnews.ca/people-still-taking-advantage-of-cross-border-b-c-park-to-skip-quarantine-1.5187127> [<https://perma.cc/R3YM-QN6Z>].

99. *Waterton Glacier International Peace Park*, *supra* note 95.

100. *Our Origin Story*, CMP, <https://www.crownmanagers.org/history> [<https://perma.cc/53A9-J3Y8>] (last visited Jan. 18, 2022).

101. *We Manage Lands Together*, CMP, <https://www.crownmanagers.org/> [<https://perma.cc/WN94-P7JK>] (last visited Jan. 18, 2022).

102. *Who We Are: Where We Work*, CMP, <https://www.crownmanagers.org/about-the-crown> [<https://perma.cc/UA6D-LVCX>] (last visited Jan. 18, 2022); *see also Memorandum of Understanding and Cooperation Between the Government of the State of Montana, United States and the Government of the Province of Alberta, Canada, Respecting the Crown Managers’ Partnership*, CMP (Oct. 29, 2007), https://static1.squarespace.com/static/5b0ed84b9f8770e4668d521e/t/5f987bde45584410048ba3fd/1603828703601/Final+CMP+MoU_AB-MT.pdf [<https://perma.cc/4GMJ-RL9E>] (discussing the specific, high-level goals of the CMP).

issues at the eco-system level.¹⁰³ The Department of the Interior saw fit to operate at the landscape-level “[g]iven the broad impacts of climate change.”¹⁰⁴ This landscape-level approach is ideally suited for conservation “where multiple jurisdictions are involved; where the threats to species, ecosystems, and cultural resources occur at large regional scales; and where biological and geomorphic processes span across ecosystems.”¹⁰⁵ There is a serious need for this broad form of conservation; conservation in the United States is often gradual because conservation policies in the United States are “a complex tapestry of environmental and conservation policies.”¹⁰⁶ Of the twenty-two LCCs, eight span the borders of the United States and Canada:

- Great Northern
- North Atlantic
- North Pacific
- Plains & Prairie Potholes
- Upper Midwest & Great Lakes
- Aleutian & Bering Sea Islands
- Arctic
- Northwest Interior Front¹⁰⁷

“Each LCC has its own governance structure, coordinators, and steering committee, which develop strategic conservation priorities for the region.”¹⁰⁸ Despite their autonomy, the LCCs are coordinated by the “U.S. Fish and Wildlife Service . . . with input from the LCC Council, an advisory group that helps shape the LCC Network’s overall strategic vision and goals.”¹⁰⁹ Unfortunately, the Trump administration, through former Secretary of the Interior Ryan Zinke, “attempted to defund or

103. Ken Salazar, *Order No. 3289: Addressing the Impacts of Climate Change on America’s Water, Land, and Other Natural and Cultural Resources*, U.S. DEP’T INTERIOR (Sept. 14, 2009), <https://www.fws.gov/home/climatechange/pdf/SecOrder3289.pdf> [<https://perma.cc/D4TD-V5NZ>]; NAT’L ACADS. SCIS., ENG’G & MED., *A REVIEW OF THE LANDSCAPE CONSERVATION COOPERATIVES 1* (2016) [hereinafter *REVIEW OF THE LANDSCAPE*].

104. Salazar, *supra* note 103, at 3.

105. *REVIEW OF THE LANDSCAPE*, *supra* note 103, at 1.

106. *Id.* at 3.

107. *Landscape Conservation Cooperatives: Frequently Asked Questions*, U.S. FISH & WILDLIFE SERV. 4 (Feb. 2012), https://www.fws.gov/landscape-conservation/pdf/LCC_FAQs_2012.pdf [<https://perma.cc/7QXT-Y6K6>].

108. *REVIEW OF THE LANDSCAPE*, *supra* note 103, at 1.

109. *Id.*

eliminate the Landscape Conservation Cooperative (LCC) Network.”¹¹⁰ The LCC initiative is now cancelled and, despite the Biden administration’s commitment to conservation, “there is no national network that can collaboratively and holistically advance the Biden administration’s goals to address urgent challenges related to biodiversity (30 x 30 initiative), equity, and climate change.”¹¹¹

III.C. *Boundary Waters Treaty*

The United States and Canada have cooperatively managed the water resources along their borders since the Boundary Waters Treaty of 1909.¹¹² The Boundary Waters Treaty imposes “fairly strenuous restrictions” on the United States and Canada:¹¹³ the treaty prevents either country from constructing or maintaining any dam or obstruction in the boundary waters that would “raise the natural level of waters on the other side of the boundary unless the construction or maintenance thereof is approved by the . . . International Joint Commission.”¹¹⁴

The Boundary Waters Treaty established the International Joint Commission (“IJC”), an international organization tasked with implementing the Boundary Waters Treaty. The primary responsibilities of the IJC are “approving projects that affect water levels and flows across the boundary and investigating transboundary issues and recommending solutions.”¹¹⁵ The IJC can also serve as a dispute resolution mechanism; as former Commissioner Allen Olson described, “[w]e serve as the independent—presumably objective—institutional mechanism to which the governments can turn for help in preventing or resolving disputes. Think of the IJC as a sort of diplomatic ‘safety net’ that might not be

110. Laura Bloomer, Peter Daniels, Eric Wriston & Joseph Goffman, *Managing Public Lands Under the Trump Administration and Beyond*, HARV. L. SCH. ENV’T & ENERGY L. PROGRAM 25 (Oct. 2020), <http://eelp.law.harvard.edu/wp-content/uploads/Managing-Public-Lands-Under-the-Trump-Administration-and-Beyond.pdf> [https://perma.cc/VM96-ND6W].

111. *Build Back a Better National Landscape Conservation Framework*, CTR. LARGE LANDSCAPE CONSERVATION 2 (2021), <https://largelandscapes.org/wp-content/uploads/2021/04/Landscape-Conservation-Framework.pdf> [https://perma.cc/WHM3-NK4H].

112. Treaty Between the United States and Great Britain Relating to Boundary Waters and Questions Arising Between the United States and Canada, U.K.-U.S., Jan. 11, 1909, 36 Stat. 2448 [hereinafter *Boundary Waters Treaty*].

113. JOHN W. HEAD, A GLOBAL CORPORATE TRUST FOR AGROECOLOGICAL INTEGRITY: NEW AGRICULTURE IN A WORLD OF LEGITIMATE ECO-STATES 170 (2019).

114. *Boundary Waters Treaty*, *supra* note 112, at art. IV.

115. *Role of the IJC*, INT’L JOINT COMM’N, <https://ijc.org/en/who/role> [https://perma.cc/3BK2-U9Z7] (last visited Jan. 18, 2022).

needed but is available if necessary.”¹¹⁶ Former Commissioner Olson provided several examples of IJC dispute resolution, including issues with the rising Devils Lake and the apportionment of the St. Mary and Milk rivers, to demonstrate that the IJC is “an independent bi-national agency with a long record of success.”¹¹⁷

III.D. Great Lakes Water Quality Agreement

The Great Lakes Water Quality Agreement (“GLWQA”) between the United States and Canada serves “to restore and maintain the chemical, physical, and biological integrity of the Waters of the Great Lakes.”¹¹⁸ The GLWQA was first signed in 1972 and last updated in 2012.¹¹⁹ To preserve the world’s largest freshwater ecosystem, the GLWQA “provides a framework for identifying binational priorities and implementing actions that improve water quality.”¹²⁰ The GLWQA lays out general and specific objectives that account for the wide variety of issues facing the Great Lakes.¹²¹

According to the parties’ collaborative website, “[t]he Great Lakes Water Quality Agreement promotes advancement in areas of concern, lakewide management, and science; as well as targeted commitments to address legacy and emerging issues such as aquatic invasive species, climate change impacts, nutrients, chemicals and other environmental concerns related to Great Lakes water quality.”¹²² Additionally, the GLWQA provides guidelines for implementation, requiring cooperation from “State and Provincial Governments, Tribal Governments, First Nations, Métis, Municipal Governments, watershed management agencies, other local public agencies, and the Public.”¹²³ The latest agreement, signed in 2012, contains new provisions that “address aquatic invasive species, habitat degradation and the effects of climate change, and

116. Allen I. Olson, *Panel I—The Boundary Waters Treaty and Canada-U.S. Relations*, 54 WAYNE L. REV. 1461, 1464 (2008).

117. *Id.* at 1463–64.

118. Great Lakes Water Quality Agreement, Can.-U.S., art. 2, Apr. 15, 1972, 23 U.S.T. 301; *U.S.-Canada Air Quality Agreement*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/airmarkets/us-canada-air-quality-agreement> [<https://perma.cc/G2ZS-3F3T>] (last visited Jan. 18, 2022).

119. *Id.*; *The IJC and the Great Lakes Water Quality Agreement*, INT’L JOINT COMM’N, <https://www.ijc.org/en/what/glwqa-ijc> [<https://perma.cc/DQ2Z-LVL9>] (last visited Jan. 18, 2022).

120. *What is GLWQA?*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/glwqa/what-glwqa> [<https://perma.cc/TL8B-LCKZ>] (last visited Jan. 18, 2022).

121. Great Lakes Water Quality Agreement, *supra* note 118, at art. 3.

122. *Welcome to Binational.net*, BIONATIONAL.NET, <https://binational.net> [<https://perma.cc/95LA-TQMJ>] (last visited Jan. 18, 2022).

123. Great Lakes Water Quality Agreement, *supra* note 118, at art. 4.

support continued work on existing threats to people's health and the environment in the Great Lakes Basin such as harmful algae, toxic chemicals, and discharges from vessels."¹²⁴

The United States' obligations under the GLWQA are managed by its Environmental Protection Agency and its Great Lakes National Program Office.¹²⁵ Canada's obligations are managed by Environment and Climate Change Canada.¹²⁶ The two agencies co-chair the Great Lakes Executive Committee, a committee that exists "to help coordinate, implement, review and report on programs, practices and measures undertaken to achieve the purpose of [the GLWCA]."¹²⁷ The rest of the Great Lakes Executive Committee members are representatives from a variety of national, tribal, and local governments.¹²⁸ In its last progress report, the Commission reported a variety of achievements, including restoration of water quality and elimination of impairments to beneficial use of the Great Lakes.¹²⁹ It is worth noting that the GLWCA invokes the IJC of the Boundary Waters Treaty to play a key role.¹³⁰

III.E. U.S.-Canada Air Quality Agreement

In response to the problem of transboundary pollution—particularly acid rain and smog—the United States and Canada signed the United States-Canada Air Quality Agreement in 1991. To control transboundary air pollution, the U.S.-Canada Air Quality Agreement requires that the countries: (1) "establish specific objectives for emissions limitations or reductions of air pollutants and adopt the necessary programs and other measures to implement such specific objectives;"¹³¹ (2) "undertake

124. Julia P. Valentine, *United States and Canada Sign Amended Great Lakes Water Quality Agreement/Agreement Will Protect the Health of the Largest Freshwater System in the World*, U.S. ENV'T PROT. AGENCY (Sept. 7, 2012), https://archive.epa.gov/epapages/newsroom_archive/news_releases/9e6415ec5260e5c885257a7200669766.html [https://perma.cc/56NF-MJ84].

125. Chris Korleski, *About the Great Lakes National Program Office (GLNPO)*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/aboutepa/about-great-lakes-national-program-office-glnpo> [https://perma.cc/Z642-JWXQ] (last visited Feb. 10, 2022).

126. *Great Lakes Water Quality Agreement*, GOV'T OF CAN. (Apr. 27, 2020), <https://www.canada.ca/en/environment-climate-change/corporate/international-affairs/partnerships-countries-regions/north-america/great-lakes-water-quality-agreement.html> [https://perma.cc/2QHD-BSKQ].

127. Great Lakes Water Quality Agreement, *supra* note 118, at art. 5.

128. *Id.*

129. *2019 Progress Report of the Parties*, BINATIONAL.NET (2019), https://binational.net/wp-content/uploads/2020/01/2019-ProgressReport_EN.pdf [https://perma.cc/CK4C-AS7R].

130. The IJC and the Great Lakes Water Quality Agreement, *supra* note 119.

131. Agreement Between the Government of Canada and the Government of the United States

environmental impact assessment, prior notification, and, as appropriate, mitigation measures;”¹³² (3) “carry out coordinated or cooperative scientific and technical activities, and economic research . . . and exchange information[;]”¹³³ and (4) “review and assess progress, consult, address issues of concern, and settle disputes.”¹³⁴

The U.S.-Canada Air Quality Agreement establishes an Air Quality Committee, composed of equal members from each country, to review implementation progress.¹³⁵ The Committee releases a biennial report. As with the GLWQA, the IJC is given a variety of responsibilities “for the sole purpose of assisting the Parties in the implementation of [the Agreement].”¹³⁶ The Agreement “led to reductions in acid rain in the 1990s, and was expanded in 2000 to reduce transboundary smog emissions under the Ozone Annex.”¹³⁷

III.F. U.S.-Canada Pollution Contingency Plans

Since the 1990s, the United States and Canada have had in place a pair of contingency-plan systems for handling cross-border pollution. One focuses on “inland” pollution, the other on marine pollution. They are intended to complement each other and intended to be consistent with the Boundary Waters Treaty, the Great Lakes Water Quality Agreement, and the Air Quality Agreement.¹³⁸

of America on Air Quality, Can.-U.S., art. III.2(a), Mar. 13, 1991, 30 I.L.M. 676 [hereinafter Air Quality Agreement]; *U.S.-Canada Air Quality Agreement*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/airmarkets/us-canada-air-quality-agreement> [<https://perma.cc/9EQD-D224>] (last visited Feb. 10, 2022). Specific Air Quality Objectives are covered in Article IV.

132. Air Quality Agreement, *supra* note 131, at art. III.2(b). Assessment, Notification, and Mitigation is covered in Article V.

133. *Id.* at art. III.2(c). Scientific and Technical Activities and Economic Research are covered in Article VI. Exchange of Information is covered in Article VII.

134. *Id.* at art. III.2(e). Review and Assessment is covered in Article X. Consultations are covered in Article XI. Referrals are covered in Article XII. Settlement of Disputes is covered in Article XIII.

135. *Id.* at art. VIII.

136. *Id.* at art. IX.

137. *U.S.-Canada Air Quality Agreement*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/airmarkets/us-canada-air-quality-agreement> [<https://perma.cc/9EQD-D224>] (last visited Feb. 10, 2022). For a useful summary of the reduction in pollutants described in the 2018 Progress Report, see *Canada-United States Air Quality Agreement: Overview*, GOV’T OF CAN., <https://www.canada.ca/en/environment-climate-change/services/air-pollution/issues/transboundary/canada-united-states-air-quality-agreement-overview.html> [<https://perma.cc/7U9X-HFDU>] (last visited Feb. 10, 2022).

138. *Canada-United States Joint Inland Pollution Contingency Plan*, U.S. ENV’T PROT. AGENCY 1 (2009), https://www.epa.gov/sites/default/files/2014-08/documents/us_can_jcp_eng.pdf [<https://perma.cc/EF24-9BBU>].

III.F.1. Inland Pollution Contingency Plan

The United States-Canada Joint Inland Pollution Contingency Plan “sets forth cooperative measures for dealing with a release of a pollutant along the inland boundary of a magnitude that causes, or may cause, damage to the environment or constitutes a threat to public safety, security, health, welfare, or property.”¹³⁹ The first version was signed in 1994.¹⁴⁰ The Inland Contingency Plan:

- [E]nsures appropriate cooperative preparedness, notification, and response measures between Canada and the United States;
- [C]oordinates the federal response to a significant polluting incident; and
- [P]rovides a mechanism for cooperative responses among all levels of government.¹⁴¹

The governments involved include recognized First Nations in Canada and Tribal Nations in the United States.¹⁴² The Inland Contingency Plan requires collaboration because it acknowledges that the release of a pollutant along the boundary could affect both countries. But, interestingly, it also requires collaboration when the pollutant affects only one country, if the polluting incident is large.¹⁴³ As one aspect of this cooperative-response mechanism, the updated version of the Inland Contingency Plan established a regional joint response team composed of representatives from both countries. For the United States, implementation of the Inland Contingency Plan is the responsibility of the EPA; for Canada, implementation of the Inland Contingency Plan is the responsibility of Environment and Climate Change Canada.¹⁴⁴

139. *Id.* at iii.

140. *Id.* at 1.

141. *U.S.-Canada Joint Inland Pollution Contingency Plan*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/emergency-response/us-canada-joint-inland-pollution-contingency-plan> [<https://perma.cc/T2T6-WPZE>] (last visited Feb. 10, 2022).

142. *Canada-United States Inland Pollution Contingency Plan*, GOV'T OF CAN., <https://www.canada.ca/en/environment-climate-change/corporate/international-affairs/partnerships-countries-regions/north-america/canada-united-states-inland-pollution-contingency.html> [<https://perma.cc/9H3D-FEWL>] (last visited Feb. 10, 2022).

143. *U.S.-Canada Joint Inland Pollution Contingency Plan*, *supra* note 141.

144. *Canada-United States Inland Pollution Contingency Plan*, *supra* note 142.

III.F.2. Marine Pollution Contingency Plan

As with the Inland Contingency Plan, the Joint Marine Pollution Contingency Plan seeks “to provide a coordinated system for planning, preparedness and response” to release of a pollutant; in this case, “spills . . . occurring in the coastal waters and great lakes regions between the two countries.”¹⁴⁵ The agreement is between the Canadian Coast Guard and the United States Coast Guard and, importantly, grew out of the GLWQA.¹⁴⁶ Oil spills are, of course, the main concern.¹⁴⁷ The response team itself, a team with members from both countries, is called the Joint Environmental Emergency Response Team.¹⁴⁸

III.G. North American Waterfowl Management Plan

In response to declining waterfowl populations in North America, the United States and Canada signed the North American Waterfowl Management Plan in 1986, with Mexico signing in 1994.¹⁴⁹ Hailed as a paradigm for bird conservation partnerships, “[t]he plan is innovative because its scope is international, but its implementation occurs at the regional level. Its success depends on regional partnerships called migratory bird joint ventures, comprising federal, state, provincial, tribal, and local governments; businesses; conservation organizations; and individuals.”¹⁵⁰ The joint ventures bring together this variety of groups and together they develop and implement a conservation plan.¹⁵¹ The North American Waterfowl Management Plan is led by the North American Waterfowl Management Plan Committee, which “provides a forum for discussion of major, long-term international waterfowl issues

145. *Canada-United States Marine Pollution Contingency Plan*, GOV'T OF CAN. (Apr. 27, 2020), <https://www.canada.ca/en/environment-climate-change/corporate/international-affairs/partnerships-countries-regions/north-america/canada-united-states-marine-pollution-contingency.html> [https://perma.cc/DK6E-3D2E].

146. *Id.*

147. *See OR&R Participates in Canada-United States Joint Marine Pollution Contingency Plan, Pacific Annex*, OFF. RESPONSE & RESTORATION: NOAA (May 28, 2019), <https://response.restoration.noaa.gov/orr-participates-canada-united-states-joint-marine-pollution-contingency-plan-pacific-annex> [https://perma.cc/9DNA-MY22].

148. *Canada-United States Marine Pollution Contingency Plan*, *supra* note 145.

149. *North American Waterfowl Management Plan*, U.S. FISH & WILDLIFE SERV. (Oct. 4, 2016), <https://www.fws.gov/birds/management/bird-management-plans/north-american-waterfowl-management-plan.php> [https://perma.cc/84FY-TZTF].

150. *Id.*

151. *Migratory Bird Joint Ventures*, U.S. FISH & WILDLIFE SERV. (Feb. 7, 2018), <https://www.fws.gov/birds/management/bird-conservation-partnership-and-initiatives/migratory-bird-joint-ventures.php> [https://perma.cc/3JB8-E8XK].

and makes recommendations to directors of the three countries' national conservation agencies."¹⁵²

III.H. Other entities and initiatives

In offering the above survey of U.S.-Canada cooperative arrangements that might serve as useful precedents for a more robust system of agricultural and environmental cooperation between the two countries, we have been illustrative, not exhaustive. That is, the above list is surely incomplete. We conclude it with two other illustrations that warrant attention.

III.H.1. Mohawk Nation at Akwesasne

The Mohawk Nation of indigenous Americans is one of the six nations of the Haudenosaunee Confederacy, also known as the Iroquois.¹⁵³ "Original Mohawk homelands stretched from the northeastern region of what is now New York State into parts of what are now Vermont and Canada."¹⁵⁴ After the War of 1812, Mohawk land along the St. Lawrence River was divided in two to create the border between the United States and Canada.¹⁵⁵

Today, half of the Akwesasne Mohawk reservation is located in Quebec and Ontario, Canada and the other half is located in New York, United States.¹⁵⁶ Its legal status is fuzzy; Akwesasne is "not quite a part of either country, but not quite independent either."¹⁵⁷ "All told, including the United States, Canada, the state of New York and the provinces of Quebec and Ontario, there are eight governments with some level of jurisdiction over a territory with an area of less than 40 square miles."¹⁵⁸ Akwesasne itself has three governments: a Canadian government, a United

152. *North American Waterfowl Management Plan*, *supra* note 149.

153. *Background Information on the Akwesasne Mohawk*, NAT'L MUSEUM OF THE AM. INDIAN, https://americanindian.si.edu/environment/pdf/07_01_Teacher_Background_Akwesasne.pdf [<https://perma.cc/95YY-5DEQ>] (last visited Jan. 19, 2022).

154. *Id.*

155. David Sommerstein, *At U.S.-Canada Border Reservation, Mohawks Say They Face Discrimination*, NPR (Oct. 28, 2017, 7:54 AM), <https://www.npr.org/2017/10/28/560436303/at-u-s-canada-border-reservation-mohawks-say-they-face-discrimination> [<https://perma.cc/4FDS-Z5NN>].

156. *Akwesasne History*, MOHAWK COUNCIL OF AKWESASNE, <http://www.akwesasne.ca/history-resources/akwesasne-history/> [<https://perma.cc/4G3H-EFXR>] (last visited Jan. 19, 2022).

157. Joshua Keating, *The Nation That Sits Astride the U.S.-Canada Border*, POLITICO MAG. (July 1, 2018), <https://www.politico.com/magazine/story/2018/07/01/akwesasne-american-indian-community-218936> [<https://perma.cc/F59E-REGK>].

158. *Id.*

States government, and a tribal government.¹⁵⁹ The United States recognizes the elected Saint Regis Mohawk Tribal Council and Canada recognizes the elected Mohawk Council of Akwesasne.¹⁶⁰

III.H.2. The Dialogue on Climate Ambition

In early 2021, U.S. President Joe Biden and Canadian Prime Minister Justin Trudeau launched the U.S.-Canada High-Level Ministerial Dialogue on Climate Ambition. The dialogue “will be led on the United States side by Special Presidential Envoy John Kerry and on the Canadian side by Minister of Environment and Climate Change Jonathan Wilkinson.”¹⁶¹ And, importantly, the talks will “accelerat[e] climate efforts at all levels,” by engaging parties outside of the federal government, including “U.S. and Canadian subnational and non-state actors.”¹⁶² This vision of working “at all levels” matches our own.¹⁶³

The first goal of the dialogue is to increase “shared ambition,” or develop specific strategies to meet the Paris Agreement goals.¹⁶⁴ The second goal seeks “policy and regulatory alignment.”¹⁶⁵ In setting this goal, the United States and Canada acknowledge the reality that we have spent many pages showing: that “the policies and regulations of the United States and Canada are inextricably linked” because “of shared markets, overlapping supply chains, and neighboring terrestrial and marine territories.”¹⁶⁶ Last, the dialogue will focus on “climate adaptation,

159. *Id.*

160. Molly Gibbs & Rebecca Lan, *Unwelcome at Home: Borders Challenge Haudenosaunee Identity, Sovereignty*, NEWSHOUSE (May 20, 2020, 6:04 PM), <https://www.thenewshouse.com/borderlines/international-borders-challenge-haudenosaunee-identity-sovereignty-akwesasne-mohawk-reservation/> [<https://perma.cc/7RR8-CNU7>].

161. *U.S.-Canada High-Level Ministerial Dialogue on Climate Ambition*, U.S. DEP’T OF STATE (Feb. 24, 2021), <https://www.state.gov/u-s-canada-high-level-ministerial-dialogue-on-climate-ambition/> [<https://perma.cc/JSW6-ZYNL>].

162. *Id.*

163. *See infra*, Section IV.B. To provide a preview: our own North American Prairies Agroecological Restoration Initiative envisions participation from representatives of the U.S. and Canadian federal governments; representatives of provincial and state governments with territories lying within the North American prairies region; farmers and ranchers in those territories; environmental and agricultural experts from universities, from non-government advocacy groups of the sort listed on the website of the Global Restoration Project that the two of us have helped form recently, and from “think tanks” focusing their attention on agricultural policy and environmental protection; business leaders with corporate operations in the region; and others within civil society eager to serve the region’s long-term interspecies integrity. *Id.*

164. *U.S.-Canada High-Level Ministerial Dialogue on Climate Ambition*, *supra* note 161 (alterations omitted).

165. *Id.* (alterations omitted).

166. *Id.*

resilience and security,” seeking “to build resilience to climate impacts at a national level and a local level, prioritizing the needs of those that are most vulnerable to climate change.”¹⁶⁷ This goal acknowledges that climate change, like so many challenges we face, does not acknowledge borders, and overcoming such a challenge requires deep cooperation.

Though only a dialogue, this is a welcome development from Trump-era climate policy (or lack thereof). And the goals of the dialogue acknowledge the realities of the relationship between the United States and Canada and the challenges we face.

IV. CONCLUDING OBSERVATIONS: MORE THAN FRIENDS WITH MORE THAN SOVEREIGNTY?

What value do we see in these precedents? That is, in what ways might the variety of cooperative provisions, entities, and arrangements that we have surveyed above provide guidance or inspiration in designing more robust systems of cooperation in the areas of agriculture and environmental protection?

In this closing section, we offer two types of answers. We first explore what “deep cooperation” might look like, drawing from several specific elements of the cooperative approaches surveyed above. Then we explain how this “deep cooperation” could have an important *legal* element: U.S.-Canada agricultural and environmental cooperation might be dramatically improved by creating a form of “pluralistic sovereignty.”

IV.A. Deep cooperation

In explaining why we regard most forms of U.S.-Canada cooperation as relatively shallow in their impact, we start with the Waterton Glacier International Peace Park. It bears noticing that the Waterton Glacier park is a UNESCO World Heritage site, and this means that there is an international organization involved in its creation and in funding its maintenance. Moreover, likely thanks in part to this UNESCO involvement, the United States and Canada do collaborate on “natural and cultural resource management, visitor use and interpretation, science and research and relations with Aboriginal peoples.”¹⁶⁸ Still, the fact remains that the portion of the park located in Canadian territory is managed by Canada’s park service and the portion of the park located in U.S. territory

167. *Id.* (alterations omitted).

168. *Waterton Glacier International Peace Park*, *supra* note 95.

is managed by U.S. park authorities. Each side has its own management plan, in accordance with the formal agreement between the two countries.¹⁶⁹

The pollution agreements between the United States and Canada—that is, the United States-Canada Joint Inland Pollution Contingency Plan and the Joint Marine Pollution Contingency Plan discussed above—show more “depth” of cooperation because the response team that each of them establishes is itself staffed with members from both countries (rather than each country maintaining its own separate response team).¹⁷⁰ Still, the agreements do not give authority to a separate entity, apart from the two countries themselves, to trigger action by a response team.

Let us bear down more emphatically on that last point: for a U.S.-Canada arrangement to create “deep cooperation” of the sort we urge, it would (in the terms we used above) need to “give authority to a separate entity, apart from the two countries themselves.” The 2019 *Kansas Law Review* article on state sovereignty referred to above¹⁷¹ explored briefly just what kind of *authority* and what kind of *entity* would be required under a notion of “pluralistic sovereignty,” which that article defined in this way:

Instead of a concept of sovereignty based on an assumption of autonomous territorial isolation and on the pretension of a singular nationality, a new and more realistic version of sovereignty for today’s world would be *pluralistic* in its outlook—both (i) in the expectation that authority over specific territories of the Earth’s surface would be shared and blended (as is already true in important respects and becoming increasingly so for good reason) and (ii) in the realization that multiple types of authorities (not just so-called “nation-states” of the sort emerging from European circumstances of several centuries ago) can naturally and legitimately exercise sovereignty. Such a “pluralistic sovereignty” would rest on the two pillars of *innovation* and *negotiation*, in the sense that it would both (i) aggressively seek new solutions, including technological solutions, to governance issues in an increasingly complex and integrated world and (ii) result from participation by an unprecedented breadth of persons and entities whose interests are to be taken into account in addressing such governance issues. Ultimately, the “pluralistic sovereignty” that would emerge from such negotiated innovation has as its aim to create and reflect a governance structure that would have a set of entities, loyalties, authorities, and responsibilities suitable for the modern age—with

169. See *supra* note 97 and accompanying text. The same applies to the Peace Arch Provincial Park, which is managed by British Columbia Parks on the north side of its territory and by the Washington State Parks authorities on the south side of its territory. See *supra* notes 97–98 and accompanying text.

170. See *supra* notes 141, 148 and accompanying text.

171. Head, *supra* note 1.

special attention to the existential ecological crises that this modern age presents.¹⁷²

Applying these comments in the U.S.-Canada context, we might imagine a different set of arrangements for the Waterton Glacier International Peace Park, one in which authority over the parks' territory would be shared by means of an independent entity—not controlled wholly or predominantly by either of the two countries—that would be responsible for the natural and cultural integrity of the park.

This is also true for the pollution agreements discussed above. A form of “deep cooperation” in that context might involve placing responsibility (and corresponding legal authority) in a separate entity—not beholden to the two countries—with the aim of responding promptly and aggressively to inland or marine pollution occurring within the regions encompassed within the two Contingency Plans.

Consider now the NAFTA/USMCA arrangements discussed above. Their environmental and agricultural provisions might be regarded as showing somewhat more “depth” of cooperation in the detailed objectives, guidelines, and committees they create, such as the Commission for Environmental Cooperation (“CEC”) and the Working Group for Cooperation on Agricultural Biotechnology. As explained above, the United States and Canada have different national policies on environmental protection and agricultural biotechnology but, by broadly cooperating in the USMCA, they do set some clear objectives.

On the other hand, the USMCA lacks an independent, binding enforcement mechanism on environmental issues.¹⁷³ Moreover, funding is always an issue. For example, the CEC has historically been seriously underfunded and, although the USMCA is in its early stages, it is likely that the CEC will have a lower budget under the USMCA than it did under NAFTA.¹⁷⁴

Among the various U.S.-Canada cooperative arrangements surveyed

172. *Id.* at 784–85. In the paragraphs just following the one quoted above, the article explained that as a historical matter, “a system of ‘pluralistic sovereignty’ would resemble the political and social landscape found in Europe before the rise of the nation-state, when people found themselves answering to numerous cross-cutting loyalties.” *Id.* at 785.

173. *Environmental Failure*, *supra* note 15. This is common, of course, in environmental and other types of rules at the international level. As one observer has explained, even the United Nations, though it imposes obligations on all United Nations members, depends upon individual countries to enforce its resolutions; the United Nations lacks its own enforcement ability, to its detriment. Scott Barrett, *Coordination vs. Voluntarism and Enforcement in Sustaining International Environmental Cooperation*, 113 PROC. NAT'L ACAD. SCIS. 14515, 14517 (2016), <https://www.pnas.org/content/113/51/14515.short> [<https://perma.cc/A895-WTAW>].

174. Cosbey, *supra* note 16, at 2.

earlier in this article, the International Joint Commission succeeded in developing the greatest “depth” of cooperation. The IJC, the independent binational organization created by the Boundary Waters Treaty, appears very efficient: most IJC recommendations are accepted and acted on by the United States and Canada.¹⁷⁵ The IJC is also an excellent example of scientific and technical cooperation. As one assessment of the IJC has explained, “the IJC’s ability to create, gather, synthesize, harmonize, mobilize, and share environmental and scientific information has only increased since the 1980s, and its reports, findings, and recommendations carry weight precisely because the IJC is widely perceived as objective, impartial, and expert.”¹⁷⁶ The same assessment continues:

[T]he IJC has evolved from a body that almost always used to call on government bureaucrats to help with references and applications into one that now seconds experts from various jurisdictions outside government such as universities, the private sector, First Nations and Tribes, non-government organizations, and civil society. And these various disciplines as well as their local knowledge have created a tremendous pool of talent from which commissioners can draw when looking for suitable candidates for IJC boards, tasks forces, initiatives, etc. Moreover, these members, some of whom serve for many years consecutively, form bonds with their counterparts in other jurisdictions and these spill over into areas far beyond the work of the IJC.¹⁷⁷

The IJC’s usefulness as a legal mechanism is also evident in the U.S.-Canada Air Quality Agreement and the Great Lakes Water Quality Agreement. Both are separate from the Boundary Waters Treaty that created the IJC, but the agreements assign the IJC a variety of responsibilities for implementing the agreements—a credit to the expertise and efficiency of the IJC.

Despite these positive attributes, the IJC does have serious limitations. The IJC cannot, by its *own* initiative, get involved in matters of importance; as a result, the United States and Canada can, if they wish, avoid utilizing the IJC.¹⁷⁸

175. THE FIRST CENTURY OF THE INTERNATIONAL JOINT COMMISSION 351 (Daniel Macfarlane & Murray Clamen eds., 2020).

176. *Id.* at 533.

177. *Id.* at 531–32.

178. *Id.* at 545. These same observers have also noted, however, that “the inability to initiate applications and references has given the commission a reputation for objectivity and neutrality.” *Id.*

*IV.B. Pluralistic sovereignty and a North American Prairies
Agroecological Restoration Initiative*

In addition to several characteristics of “deep cooperation” that we have discussed immediately above, we see another attribute as being central to the creation of an effective North American framework for agricultural reform and ecological integrity: a vigorous diversity of *participation* in creating and operating such a framework. In the passage we quoted above from the 2019 *Kansas Law Review* article on sovereignty, the relevant phrase was “participation by an unprecedented breadth of persons and entities whose interests are to be taken into account in addressing such governance issues.”¹⁷⁹

Expressed more simply: *it's not just states*, as represented by United States or Canadian government officials, that should have a voice and a vote in agroecological policy and restoration in ecosystems that cross the political boundaries of our two countries. We can, by way of illustration, consider three other cooperative arrangements surveyed earlier in this article: the Crown Management Partnership, the Landscape Conservation Cooperatives program, and the North American Waterfowl Management Plan. All of these, as explained above, count on input and expertise from a variety of entities—governments at several levels, non-government advocacy organizations, business associations, communities, and individuals.¹⁸⁰

If, then, we were to strive for “deep cooperation” between the United States and Canada—if the two countries were to be “more than friends”—in order to address agricultural and ecological issues that know no political borders on the continent we share, the various conditions and characteristics we have enumerated above would be necessary. Authority should be placed with entities having legal personalities of their own, not dependent on the governments of the two states. Those entities would need to have powers to take regulatory measures to protect the long-term agroecological integrity of the landscapes under their jurisdiction. They would not have *exclusive* jurisdiction, of course, because the scope of their authority would be limited to agricultural and environmental matters—in simplistic terms, to human relations with the natural world as opposed to purely or predominantly “intra-species” (human-to-human) relations.

179. See *supra* note 172 and accompanying text (quoting Head, *supra* note 1, at 785).

180. For the diversity of input involved in the operations of the Crown Management Partnership, see *supra* notes 101–102. For the diversity of input involved in the operations of the LCC program, see *supra* notes 108–109. For the diversity of input involved in the Waterfowl Management Plan, see *supra* notes 150–152.

In all their operations, these entities themselves would need to be pluralistic in their own governance, reflecting the interests and input of a wide range of stakeholders and specialists . . . all of them ultimately intent on serving the interests of the ecosystems in question.

This brings us to the North American Prairies Agroecological Restoration Initiative. Without trying to envision the details of such an initiative, we can sketch the outlines and contours of a project aimed at effective restoration and management of the vast grassland ecosystems that once stretched from northern Texas and Oklahoma to the Prairie Provinces of Alberta, Saskatchewan, and Manitoba.

Such a prairies initiative would, in keeping with the points we have emphasized above for “deep cooperation” and “pluralistic sovereignty,” involve these elements:

- A clear, formal, and robust commitment by the two countries to place ecological integrity at the very highest degree of priority at federal, state, and local levels, and an acknowledgement that this involves a substantial financial commitment as well, to begin and sustain a transformative process.
- Corresponding “buy-in” by (Canadian) provincial and (U.S.) state authorities, announcing those same priorities and undertaking funding commitments of their own to reflect those priorities.
- The creation of a legally independent entity possessing international legal personality, thus giving it autonomous regulatory authority over agricultural and environmental policy, with express *powers* to implement such policy without consent of either U.S. or Canadian government officials . . . and with corresponding *responsibility* to take a science-based approach in protecting and restoring the ecological integrity of the North American Prairie ecosystems.
- Establishment of a broadly pluralistic and participatory system of governance for the prairies initiative, so that both “voice and vote” would be allocated fairly among various relevant stakeholders. This would include a wide array: representatives of the U.S. and Canadian federal governments; representatives of provincial and state governments with territories lying within the North

American prairies region; farmers and ranchers in those territories; environmental and agricultural experts from universities, from non-government advocacy groups of the sort listed on the website of the Global Restoration Project that the two of us have helped form recently,¹⁸¹ and from “think tanks” focusing their attention on agricultural policy and environmental protection; business leaders with corporate operations in the region; and others within civil society eager to serve the region’s long-term interspecies integrity.

What we have tried to do in this article is to explain that none of these elements to a new prairies initiative for the United States and Canada is unprecedented. Instead, the two countries, with a centuries-old friendship, have already taken beginning steps toward the type of “deep cooperation” we are urging here. By building energetically on these beginning steps, and by injecting the legal notion of “pluralistic sovereignty” explained above, our two countries can become “more than friends”—and an excellent way to start can involve the creation of a North American Prairies Agroecological Restoration Initiative. We hasten to acknowledge the fact that countless details would need to be worked out and that political realities of our current day present many obstacles. On the other hand, the environmental crises we face require ambitious plans. This is the one we offer.

181. See *Organization Database*, GLOB. RESTORATION PROJECT, <https://globalrestorationproject.org/orgdatabase/> [<https://perma.cc/3Q4D-VMJB>] (last visited Jan. 19, 2022). This is the “Org Database” page of the website of the Global Restoration Project. *Id.* Several of the organizations listed there have specific North American focus; these include, for instance, the Agricultural Watershed Institute, the Canadian Environmental Law Association, Conservation International, Ecoagriculture Partners, and many more.