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What Lies Beneath: USMCA Chapter 24 and Sub-National Governance of Environmental Issues

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ARTICLE

**WHAT LIES BENEATH: USMCA CHAPTER 24 AND
SUB-NATIONAL GOVERNANCE OF ENVIRONMENTAL
ISSUES**

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INTRODUCTION

Treaty negotiation and law is, inherently, a national undertaking by members of the international community, and the United States (“US”)-Mexico-Canada Trade Agreement (“USMCA”) typifies this. Indeed, the public and often contentious negotiations of the USMCA – the successor entity to the often-maligned North American Free Trade Agreement (“NAFTA”) – exemplified the ways in which national political concerns intersect with international trade law. At the same time, national systems, particularly those in Canada, Mexico, and the US, are often quite dependent on sub-national governmental entities to address issues that arise in specific fields or that can be solved in unique ways based on expertise they possess. While these issues can be regarded as local in impact, the extension of laws addressing them to international actors and activities carries with it a much larger significance. Environmental issues and climate change issues offer key examples of these types of issues which are often addressed in a robust manner by sub-national entities. And yet, the USMCA’s terms are written to exclude all but national laws from its terms, including the terms of the environmental chapter.

This article examines the sub-national governance issues existing in the USMCA through the lens of environmental law and regulation in each of the three State Parties. It asserts that the governance gaps created by failing to include the terms of sub-national laws in the express parameters of the USMCA are significant and can pose a challenge to the successful implementation of the Agreement now and into the future. The decision to focus on the USMCA regime was made because of the recent timing of its negotiation, the many efforts made by all sides to incorporate critical non-trade issues into the main text of the Agreement, and the federal governance structures used in all three State Parties. In the USMCA context, environmental issues represent both an emerging area of law and policy, notably in the context of pollution and climate change responses, and one which was carried over from NAFTA.

In Section I, the article discusses the environmental issues raised in the USMCA and enshrined in Chapter 24, dedicated to environmental concerns and the systems of complaint resolution for related issues under the Agreement. Section II of this article

then discusses laws and rules from sub-national governmental entities in Canada, Mexico, and the US across key sectors of environmental law to provide insights into the ways in which these entities have adopted laws protecting environmental interests. Following this discussion, Section III of the article analyzes the potential for governance gaps emerging from the USMCA system and the ways in which sub-national governmental entities have stepped into the environmental law and regulatory spheres. Finally, the article concludes and emphasizes the importance of addressing the issues it raises in order to ensure the effectiveness of the USMCA.

I. Environmental Issues in the USMCA

From the outset, it is clear that environmental concerns and concomitant protections of natural resources play a significant policy role in the USMCA, and that these issues are also integral to national interests of the State Parties.¹ Indeed, a central element of the USMCA's preamble provides that one of the goals of the agreement is to "[promote] high levels of environmental protection, including through effective enforcement by each Party of its environmental laws, as well as through enhanced environmental cooperation, and further the aims of sustainable development, including through mutually supportive trade and environmental policies and practices."²

In the context of the USMCA, the text is quite clear defining environmental law as:

a statute or regulation of a Party, or provision thereof, including any that implements the Party's obligations under a multilateral environmental agreement, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through: (a) the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants; (b) the control of environmentally hazardous or toxic chemicals, substances, materials, or wastes, and the dissemination of information related thereto; or (c) the protection or

¹ United States-Mexico-Canada Agreement U.S.-Mex.-Can., pmbl., Nov. 30, 2018, Off. of U.S. Trade Representative [hereinafter USMCA].

² *Id.*

conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas, but does not include a statute or regulation, or provision thereof, directly related to worker safety or health, nor any statute or regulation, or provision thereof, the primary purpose of which is managing the subsistence or aboriginal harvesting of natural resources.³

Additionally, the terms “statute or regulation” are defined by the Agreement as:

(a) for Canada, an Act of the Parliament of Canada or regulation made under an Act of the Parliament of Canada that is enforceable by action of the central level of government; (b) for Mexico, an Act of Congress or regulation promulgated pursuant to an Act of Congress that is enforceable by action of the federal level of government; and (c) for the United States, an Act of Congress or regulation promulgated pursuant to an Act of Congress that is enforceable by action of the central level of government.⁴

As part of their undertakings in Chapter 24, the State Parties agree to promote trade laws and policies that also advance environmental law and policies and sustainable development principles.⁵ At the same time, however, Chapter 24 provides that “[t]he Parties further recognize that it is inappropriate to establish or use their environmental laws or other measures in a manner which would constitute a disguised restriction on trade or investment between the Parties.”⁶ While there are fairly comprehensive provisions regarding the need for enforcement of national environmental laws by each State Party, including public participation throughout the oversight and implementation process, and procedural thresholds for implementation, the USMCA is mute on the issues of sub-national environmental laws.⁷

Further, the USMCA binds State Parties to effectively implement national laws and requirements for environmental impact assessments⁸ and to ensure that their laws provide

³ *Id.* at ch. 24 art. 24.1 (footnotes omitted).

⁴ *Id.*

⁵ *Id.* at ch. 24, art. 24.2(2).

⁶ *Id.* at ch. 24, art. 24.2(5).

⁷ *See id.* at ch. 24, arts. 24.3–24.6.

⁸ *See id.* at ch. 24, art. 24.7.

protections against ozone depletion.⁹ Similar protection requirements exist for marine pollution, air quality standards, and biodiversity, particularly regarding fishing resources and forests.¹⁰ Beyond the binding law level, the USMCA contains a provision in which the State Parties voluntarily commit to promoting corporate social responsibility.¹¹

Following the precedent established in the NAFTA regime, the USMCA has adopted a specific system for complaints regarding the enforcement of environmental laws by a State Party under the auspices of the Secretariat of the Commission on Environmental Cooperation (“CEC Secretariat”).¹² As in the NAFTA system, the result of a complaint, if the complaint is advanced to the final stages of evaluation and review, is a finding of fact known as the factual record which, though not a legal judgment, carries a great deal of persuasive authority.¹³ However, there are limits to bringing claims before the CEC Secretariat, such as having proper legal jurisdiction, which is very much in doubt in the context of claims based on sub-national laws.¹⁴

In addition to the terms of Chapter 24, it should be noted that the USMCA creates a limited space for laws and rules relating to Indigenous communities under Chapter 32, which states

[p]rovided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, services, and investment, this Agreement does not preclude a Party from adopting or maintaining a measure it deems necessary to fulfill its legal obligations to indigenous peoples.¹⁵

Further, procurement plays a significant role in the terms of the USMCA and, while there are exceptions for procurement actions that relate to public health, safety, and morals, these are not specifically defined to include environmental or climate

⁹ *Id.* at ch. 24, art. 24.9.

¹⁰ *See id.* at ch. 24, arts. 24.10, 24.11, 24.15.

¹¹ *See id.* at ch. 24, art. 24.13.

¹² *See id.* at ch. 24, art. 24.27.

¹³ *See generally id.* at ch. 24, arts. 24.28.

¹⁴ *See, e.g.,* The Saint-Adolphe-D’Howard Citizens Advisory Committee (Can.), SEM-18-005 (Comm’n Env’t Coop. 2018), http://www.cec.org/wp-content/uploads/wpallimport/files/18-5-sub_en.pdf [https://perma.cc/RVM9-MW4S].

¹⁵ USMCA, *supra* note 1, at ch. 32, art. 32.5.

change-related concerns.¹⁶ Under the USMCA, the articulated entities covered by procurement laws are primarily those operating at the federal level in each State Party,¹⁷ the fact of a possible discriminatory act in the context of environmentally-focused procurement at the sub-national level poses a potentially disruptive challenge to trade law at the same time that it could create a situation in which a national government is required to step into a state procurement issue.

II. Sub-National Environmental Governance in Three Federal Systems

There are many unique aspects to the USMCA and to the creation of a tripartite North American-based free trade agreement. The USMCA is the result of a refashioning of the NAFTA system and thus, a rare example of successful renegotiation of a trade relationship. From a legal perspective, perhaps one of the most notable elements of the USMCA is that the treaty regime brings together three ostensibly federal systems of government while leaving out references to the sub-national actors – States in the case of Mexico and the U.S. and Provinces and Territories of Canada – which are vital actors in any federal system. Since Canada, Mexico, and the U.S. vest sub-national entities with extensive powers in their constitutional right granting instruments, and which have established traditions of deference to these entities across several policy areas, including many environmental concerns, this is quite important. At the time, these sub-national entities and their actions in the environmental realm have become the site of contest with national policies when there is a perception that the national policies adopted do not reflect the will of their citizens.

This section highlights multiple laws adopted across critical environmental law sectors in the sub-national entities that are subject to the USMCA. The section provides background for the discussion of the ways in which governance and implementation

¹⁶ See *id.* at ch. 13, art. 13.3(1)–(2) (listing exceptions to procurement activities, all of which do not mention climate change).

¹⁷ See, e.g., *id.* at Annex 13-A (demonstrating the Schedule of Mexico's central government entities, rather than all of the schedules of the U.S., Mexico, and Canada.).

gaps could occur under the USMCA as a result of the failure to include references to sub-national actors in its text.

A. Canada

Comprised of ten provinces and three territories, Canada is at once a strong federal system that contains significantly different identities across these sub-national entities. Indeed, whether it be the dichotomy between Anglophone and Francophone populations and legal traditions, the role of Indigenous communities and Indigenous legal mechanisms, or the identity as being defined by geography and the need to create laws to protect natural resources, Canada offers a hybrid system of law. It is perhaps not surprising that this backdrop has resulted in significant environmental legal and regulatory systems at the sub-national levels.

i. Carbon and GHG emissions regulations

With a significant source of Canadian extractive sector activities and emissions, Alberta has enacted legislation providing for carbon capture and storage systems funding. With the goal of generating incentive systems that “encourage and expedite the design, construction and operation of carbon capture,”¹⁸ the Carbon Capture and Storage Funding Act creates a regulatory system and provides a budgeting function.¹⁹ At the same time, Alberta had adopted legal protections for coal extraction and related resources in the form of the Coal Conservation Act in 2000, which sought to survey provincial coal resources and ensure that these resources are conserved to avoid waste.²⁰

Several provinces and territories have established carbon taxation and trading systems. In this context, the British Columbia Carbon Tax Act and associated regulations contain extensive provisions to create a functioning carbon tax system across a spectrum of economic interests.²¹ This should be viewed in conjunction with the province’s Greenhouse Gas Reduction

¹⁸ Carbon Capture and Storage Funding Act, R.S.A., 2009, c C-2.5, (Can.).

¹⁹ *Id.* § 2.

²⁰ See Coal Conservation Act, R.S.A. 2000, c C-17, (Can.).

²¹ See *generally* Carbon Tax Regulation, B.C. Reg. 125/2008 (Can.).

Regulation from 2012, which are focused on clean energy and its use in the public utilities sector,²² and the Coal Act Regulation, which provide for specific regulations in the mining sector and an extensive oversight system for permitted coal extraction industries.²³ Additionally, the provincial government has adopted significant legal requirements for its own operations through the Carbon Neutral Government Regulation of 2008²⁴ and has created frameworks for climate accountability and efforts toward carbon neutrality through the Climate Change Accountability Act in 2007.²⁵

For example, New Brunswick's Climate Change Act requires the creation of greenhouse gas and carbon emissions thresholds, as well as emissions reporting requirements and a larger Climate Action Plan.²⁶ In Newfoundland and Labrador, the Greenhouse Gas from industrial facilities in the Province law establishes extensive reporting requirements for all sectors, as well as a system to create specific limitations on pollution rates.²⁷ Nova Scotia addresses hydrocarbon storage through a strict permitting system, outside of which there are significant prohibitions.²⁸ Further, Prince Edward Island has established a significant legal and regulatory system through the Climate Leadership Act.²⁹ This Act stresses the importance of climate and climate leadership to the province as a whole, including carbon pricing, emissions reductions, resilience, and greenhouse gas systems.³⁰

ii. Energy

Many provinces and territories have adopted laws which promote the importance of and need for various new forms of energy. For instance, Alberta's Energy Diversification Act stresses

²² See generally Greenhouse Gas Reduction (Clean Energy) Regulation, B.C. Reg. 102/2012 (Can.).

²³ See generally Coal Act Regulation, B.C. Reg. 251/2004 (Can.).

²⁴ See generally Carbon Neutral Government Regulation, B.C. Reg. 392/2008 (Can.).

²⁵ See generally Climate Change Accountability Act, S.B.C. 2007, c 42 (Can.).

²⁶ See Climate Change Act, S.N.B. 2018, c 11 (Can.).

²⁷ See Management of Greenhouse Gas Act, S.N.L. 2016, c M-1.001 (Can.).

²⁸ See generally Underground Hydrocarbons Storage Act, S.N.S. 2001, c 37 (Can.).

²⁹ See generally Climate Leadership Act, R.S.P.E.I. 1988, c C-9.1 (Can.).

³⁰ See *id.* pmbl., § 2(1).

the province's determination to create additional oil and gas-related streams of energy for current and future use.³¹ Similarly, the province has adopted the Oil Sands Conservation Act in an effort to efficiently generate exploration and exploitation of oil in the sector.³² In the context of hydroelectric energy, Alberta has enacted laws to regulate the production, promotion, and sale of hydroelectric energy.³³ Additionally, the province allows for the use of pipelines with the proviso that they are in compliance with the designated regulatory system.³⁴ At the same time, through the Renewable Electricity Act, Alberta enshrines the goals of using and generating renewable energy as a means of meeting reduction targets for greenhouse gas emissions and creates systems for licensing and oversight of renewables in the province.³⁵

In British Columbia, the Clean Energy Act sets out significant systems for promoting the generation and use of clean energy across multiple industries and incorporates sustainable energy as a principle of energy use in the province.³⁶ Accordingly, the 2015 Energy Efficiency Standards Regulation established labeling requirements, production requirements for certain industrial and household goods, and computers and electronic devices, which are applicable to all goods in the province, regardless of provenance.³⁷ In terms of energy sector activities, the Oil and Gas Act established significant licensing and oversight systems for the industry, which requires the general adoption of standards that generate more stringent environmental practices.³⁸ In terms of newer energy technologies, the laws of British Columbia provide licensing, oversight, and encouragement for geothermal energy.³⁹

Under Manitoba's Ozone Depleting Substances Act, the province has established restrictions on the sale of such harmful products as well as significant labeling and re-labeling rules that apply to products sold within the province regardless of the

³¹ Energy Diversification Act, S.A. 2018, c E-9.6, (Can.).

³² *See generally* Oil Sands Conservation Act, Atla. Reg. 76/1988 (Can.).

³³ *See* Hydro and Electric Energy Act, Atla. R.S.A. 2000, c H-16, s 2 (Can.).

³⁴ *See* Pipeline Act, Atla. R.S.A. 2000, c P-15, s 6(1) (Can.).

³⁵ *See generally* Renewable Electricity Act, S.A. 2016, c R-16.5 (Can.).

³⁶ *See* Clean Energy Act, S.B.C. 2010, c 22 ¶ 5(Can.).

³⁷ *See generally* Energy Efficiency Standards Regulation, B.C. Reg. 14/2015 (Can.).

³⁸ *See generally* Oil and Gas Activities Act, S.B.C. 2008, c 36 (Can.).

³⁹ *See* Geothermal Resources Act, R.S.B.C. 1996, c 171 (Can.).

products origin.⁴⁰ Additionally, the province's Climate and Green Plan Act provides for the creation and implementation of a provincial climate and green plan that includes emissions reductions, greenhouse gas reductions, and the implementation of the Made-in-Manitoba Climate and Green Fund.⁴¹ To advance renewable energy, Manitoba has adopted several sector-specific laws. The Biofuels Act establishes licensing and funding systems for use and generation of biofuels, including ethanol and biodiesel,⁴² while the Manitoba Hydro Act establishes a dedicated hydroelectric corporation for the province, as well as a series of allowed activities and regulatory structures.⁴³ In terms of more traditional energy sources, the Manitoba Oil and Gas Act establishes governance and oversight mechanisms for extraction and use, as well as licensing requirements for exploration and exploitation.⁴⁴ Additionally, the Gas Pipelines Act establishes a regulatory system for pipelines and allowances for both activities related to pipelines and applicable environmental limitations.⁴⁵ Similar provisions regarding pipelines exist in New Brunswick,⁴⁶ Nova Scotia,⁴⁷ and the Northwest Territories.⁴⁸

The Nova Scotia Energy Resources Conservation Act was enacted to provide a regulatory structure to the energy sector, to reduce waste in the sector, and to promote energy exploration, exploitation, and efficiency.⁴⁹ The Prince Edward Island Renewable Energy Act provides extensive encouragements, regulatory, and oversight mechanisms for the renewables sector in the province.⁵⁰

In Quebec, the Hydro-Quebec Act serves as a model for establishing a system of governance, and pricing and oversight for

⁴⁰ The Ozone Depleting Substances Act, C.C.S.M. 2021, c O80, § 4(1), 7.1, 9(d) (Can.).

⁴¹ The Climate and Green Plan Act, C.C.S.M. 2021, c C134 (Can.).

⁴² The Biofuels Act, C.C.S.M. 2021, c B40 (Can.).

⁴³ *See generally* The Manitoba Hydro Act, C.C.S.M. 2021, c H190 (Can.) (This law is similar to the laws establishing a hydroelectric corporation in Newfoundland and Labrador and Ontario); *see also* The Churchill Falls (Labrador) Corporation Limited (Lease) Act, S.N.L. 1961, c 51 (Can.).

⁴⁴ The Oil and Gas Act, C.C.S.M. 2021, c O34 (Can.).

⁴⁵ *See generally* The Gas Pipelines Act, C.C.S.M. 2021, c G50 (Can.).

⁴⁶ Pipeline Act, S.N.B. 2005, c P-8.5 (Can.).

⁴⁷ Pipeline Act, R.S.N.S. 1989, c 345 (Can.).

⁴⁸ Oil and Gas Operations Act, R.S.N.W.T. 2014, c 14 (Can.).

⁴⁹ Energy Resources Conservation Act, R.S.N.S. 1989, c 147, § 3(a),(b), (d) (Can.).

⁵⁰ Renewable Energy Act, R.S.P.E.I. 1988, c R-12.1 (Can.).

hydroelectric power throughout the province.⁵¹ Additionally, the province has extensive legal and regulatory provisions regarding both electrical and hydrocarbon fueled appliances, including their production, sale, import, and use.⁵²

iii. Environmental protection and assessment

The majority of provincial and territorial laws contain provisions for the conduct of environmental assessments in the context of proposed developments and other potentially impactful activities.⁵³ In addition, in 2019, British Columbia adopted the Environmental Assessment Act – Reviewable Projects Regulation, which sets out the parameters for covered projects, including industrial projects, mining, energy, water management, waste disposal, transportation, and tourism.⁵⁴ Under Manitoba’s Environmental Act, an extensive regulatory and oversight system established the implementation of environmental impact assessments.⁵⁵

In Alberta, the Environmental Protection and Enhancement Act provides for the incorporation of conservation and sustainable development into the provincial legal system as well as administrative departments and their planning activities.⁵⁶ The British Columbia Environmental Management Act creates regulatory systems, remediation measures, clean air protections, greenhouse gas emissions reductions, waste management regulations, pollution control, abatement measures, and spills.⁵⁷

Under the New Brunswick Clean Environment Act, a regulatory system was created for all water resources in the province, especially clean water, as well as for the environment *per se*.⁵⁸ Additionally, the Clean Air Act sets out standards for

⁵¹ See Hydro-Québec Act, R.S.Q. 1964, c H-5 (Can.).

⁵² Act Respecting Energy Efficiency and Energy Conservation Standards for Certain Electrical or Hydrocarbon-Fuelled Appliances, R.S.Q. 2011, c N-1.01 (Can.).

⁵³ See, e.g., Environmental Protection and Enhancement Act, R.S.A 2000, c E-12 (Can.); Environmental Assessment Act, S.B.C. 2018, c 15 (Can.).

⁵⁴ Reviewable Projects Regulation, B.C. Reg. 243/2019 (Can.).

⁵⁵ The Environment Act, C.C.S.M. 1988, c E125, § 1(1)(b) (Can.).

⁵⁶ Environmental Protection and Enhancement Act, R.S.A. 2000, c E-12 (Can.).

⁵⁷ Environmental Management Act, S.B.C. 2003, c 53 (Can.).

⁵⁸ See Clean Environment Act, R.S.N.B. 1973, c C-6 (Can.).

emissions and pollution control that are similar in many respects to the majority of provinces and territories.⁵⁹ The Nova Scotia Environment Act creates administrative apparatuses, environmental education support, licensing and permitting systems, oversight and reporting requirements, restrictions on dangerous goods, procedures for identifying and remediating contaminated sites, and water and air pollution restrictions.⁶⁰ Further, the Nova Scotia Environment Act implements greenhouse gas restrictions, provides for a cap and trade carbon system, and establishes the parameters of environmental impact assessment requirements.⁶¹

Significantly, under the Environmental Rights Act, Nunavut establishes the “right to a healthy environment and a right to protect the integrity, biological diversity and productivity of the ecosystems” within the territory,⁶² as an enforceable right under the terms of this Act.⁶³ The terms of the Act, and associated regulations, are further provided for in Nunavut’s Environmental Protection Act.⁶⁴ These environmental laws are essentially the mirror of those found in the Northwest Territories, which also includes a statement of environmental values as part of the Environmental Rights Act.⁶⁵

In Ontario, the Environmental Bill of Rights establishes individual and governmental rights, as well as obligations, regarding environmental conservation and protection.⁶⁶ This is reflected in the Environmental Protection Act, which provides for regulatory systems throughout the province.⁶⁷ Additionally, Ontario’s Environmental Assessment Act provides for the use of environmental assessments during the planning process.⁶⁸ This is in many ways similar to the Environmental Protection Act of Prince Edward Island, which establishes environmental impact assessment procedures as well as specific protections for waste

⁵⁹ See Clean Air Act, S.N.B. 1997, c C-5.2 (Can.).

⁶⁰ Environment Act, R.S.N.S. 1994-95, c 1 (Can.).

⁶¹ *Id.*

⁶² Environmental Rights Act, R.S.N.W.T. 1988, c 83, pmbl. (Can.).

⁶³ *Id.* § 6.

⁶⁴ See Environmental Protection Act, R.S.N.W.T. 1988, c E-7 (Can.).

⁶⁵ Environmental Rights Act, R.S.N.W.T. 1988, c 83, pmbl. (Can.).

⁶⁶ See Environmental Bill of Rights, 1993, R.S.O. 1993, c 28 (Can.).

⁶⁷ See *generally* Environmental Protection Act, R.S.O. 1990, c E.19 (Can.).

⁶⁸ See *generally* Environmental Assessment Act, R.S.O. 1990, c E.18 (Can.).

treatment and management, contaminated sites, and beach resources.⁶⁹

Further, Quebec has adopted the Environment Quality Act, which highlights greenhouse gas reductions, climate change and cross-cutting economic, social, and environmental issues as essential subjects for provincial control.⁷⁰ This includes the system for implementing environmental assessments within the province.⁷¹ Similar provisions regarding sustainability and environmental concerns are reflected in the Quebec Sustainable Development Act.⁷²

Under the Saskatchewan Environmental Management Act, the province has established a regulatory system, pollution prohibition, control requirements, water resource protections, waste management systems, air quality standards, and public information requirements for environmental matters.⁷³ This is accompanied by the extensive requirements set out in the Environmental Assessment Act.⁷⁴ Similarly, the Yukon Environment Act establishes environmental rights for its citizens and sets out regulatory regimes for enforcement of these rights, creates planning and assessment terms, and provides regulatory systems for waste management.⁷⁵

iv. Natural resources & species

Water is an essential natural resource and plays a significant part in the legal and regulatory systems of Canadian provinces and territories. Alberta's Water Act contains requirements for the conservation and protection of water resources, as well as their use for maximum economic benefits, recognizing that water is both a resource and a commodity.⁷⁶ New Brunswick's Aquaculture Act creates extensive licensing and permitting requirements as well as restrictions on the use of water and associated resources for

⁶⁹ See Environmental Protection Act, R.S.P.E.I. 1988, c E-9 (Can.).

⁷⁰ Environment Quality Act, R.S.Q. c Q-2, pmbl. (Can.).

⁷¹ See *id.*

⁷² See Sustainable Development Act, C.Q.L.R. c D-8.1.1 (Can.).

⁷³ See The Environmental Management and Protection Act, 2010, R.S.S. 2010, c E-10.22 (Can.).

⁷⁴ See The Environmental Assessment Act, R.S.S. 1980, c E-10.1 (Can.).

⁷⁵ See Environment Act, R.S.Y. 2002, c 76 (Can.).

⁷⁶ See Water Act, R.S.A. 2000, c W-3 (Can.).

commercial and individual purposes, or both.⁷⁷ This is similar to the provisions of Newfoundland and Labrador's Aquaculture Act; however, the latter also includes more extensive recognition and incorporation of Indigenous community interests in aquatic and biodiverse resources.⁷⁸

In Alberta, the preservation of marine biodiversity features prominently in the licensing and oversight systems for fisheries and fishing industries.⁷⁹ In conjunction with this, the province has adopted a critical role in marketing fish throughout provincial jurisdiction and beyond. Given the importance of fishing and fisheries, the laws of Newfoundland and Labrador contain significant protections and regulations of the fishing fleet and related resources.⁸⁰ Similar provisions exist in Nova Scotia, where the Fisheries and Coastal Resources Act provides for the oversight and support of aquaculture and fisheries, sea plant harvesting, and other forms of fishing.⁸¹ In Saskatchewan, the Fisheries Act includes provisions for the designation of aquatic species at risk.⁸²

In terms of mineral resources, Nova Scotia's law provides a regulatory system for its exploration and exploitation, including environmental protections and associated royalties.⁸³ Similar parameters, and the creation of a tax credit system for mineral resource exploration activities, can also be found in Saskatchewan's Mineral Resource Act.⁸⁴ While extractives are critical to Alberta's economy, forestry and timber are also essential, and are protected in the Forests Act.⁸⁵ Through this Act, the province emphasizes the importance of sustainable forestry, as well as the provincial role in creating laws and rules and the marketing of timber products. Similar considerations and legal systems exist in British Columbia.⁸⁶

Under the Land Stewardship Act, Alberta creates land protections that are balanced against landowners' rights to protect economic, environmental, and social interests, as well as

⁷⁷ See Aquaculture Act, S.N.B. 2019, c 40 (Can.).

⁷⁸ See Aquaculture Act, R.S.N.L. 1990, c A-13 (Can.).

⁷⁹ See *generally* Fisheries (Alberta) Act, R.S.A. 2000, c F-16 (Can.).

⁸⁰ See Fisheries Act, S.N.L. 1995, c F-12.1 (Can.).

⁸¹ See Fisheries and Coastal Resources Act, R.S.N.S. 1996, c 25 (Can.).

⁸² See *generally* Fisheries Act, R.S.S. 1978, c 23 (Can.).

⁸³ See Mineral Resources Act, R.S.N.S. 1990, c 18 (Can.).

⁸⁴ See The Mineral Resource Act, R.S.S. 1985, c M-16.1 (Can.).

⁸⁵ See Forests Act, R.S.A. 2000, c F-22 (Can.).

⁸⁶ See Forest Act, R.S.B.C. 1996, c 157 (Can.).

sustainable development for future generations.⁸⁷ This includes the creation of conservation easements and concomitant regulatory and oversight systems. In British Columbia, the Agricultural Land Conservation Act establishes extensive oversight, licensing requirements, and conservation provisions for soil and land use activities.⁸⁸

In Manitoba, the Forest Act creates an administrative and regulatory system for forest protection, and forestry and timber production, including licensing.⁸⁹ In particular, the timber industry and cutting rights, as well as non-mixing of timber products, are the subject of extensive regulatory provisions.⁹⁰ Further, Manitoba has created a system for the designation and protection of ecological reserve areas in the province, as well as penalties for their damage and destruction through activities such as unapproved forestry, through the Ecological Reserves Act.⁹¹

Under the Quebec Sustainable Forest Development Act, there is an effort to protect forests and forest resources, as well as to promote sustainable development and forest management practices, and to provide for timber protections and licensing systems.⁹² The Saskatchewan Forest Resources Management Act designates forest resources within the province, creates a regulatory system with permits and licensing systems for forestry-related activities, and the handling and production of wood by-products.⁹³ General forest laws, typically timber regulations, can be found in Newfoundland and Labrador,⁹⁴ Nova Scotia,⁹⁵ the Northwest Territories,⁹⁶ and Prince Edward Island.⁹⁷

Wildlife features prominently throughout the legal systems established in Canadian provinces and territories. For example, Alberta's Wildlife Act contains licensing and use restrictions for all forms of wildlife in the province.⁹⁸ Similar provisions exist in

⁸⁷ See Alberta Land Stewardship Act, S.A. 2009, c A-26.8 (Can.).

⁸⁸ See Agricultural Land Commission Act, S.B.C. 2002, c 36 (Can.).

⁸⁹ See The Forest Act, C.C.S.M. c F150 (Can.).

⁹⁰ See *id.*

⁹¹ See The Ecological Reserves Act, C.C.S.M. c E5 (Can.).

⁹² Sustainable Forest Development Act, C.Q.L.R. c A-18.1 (Can.).

⁹³ See The Forest Resources Management Act, R.S.S. 1996, c F-19.1 (Can.).

⁹⁴ See *generally* Forestry Act, R.S.N.L. 1990, c F-23 (Can.).

⁹⁵ See *generally* Forests Act, R.S.N.S. 1989, c 179 (Can.).

⁹⁶ See *generally* Forest Management Act, R.S.N.W.T. 1988, c F-9 (Can.).

⁹⁷ See *generally* Forest Management Act, R.S.P.E.I. 1988, c F-14 (Can.).

⁹⁸ Wildlife Act, R.S.A. 2000, c W-10 (Can.).

Manitoba,⁹⁹ Newfoundland and Labrador,¹⁰⁰ Nova Scotia,¹⁰¹ Nunavut,¹⁰² the Northwest Territories,¹⁰³ Prince Edward Island,¹⁰⁴ Quebec,¹⁰⁵ and Saskatchewan.¹⁰⁶ In Yukon, the Wildlife Act is more nuanced in terms of hunting activities and authorizations, and this Wildlife Act recognizes and includes the rights of Indigenous communities under the terms of the Inuvialuit Final Agreement.¹⁰⁷ Specific laws regarding endangered species protections can be found in the laws of Newfoundland and Labrador,¹⁰⁸ Nova Scotia,¹⁰⁹ the Northwest Territories,¹¹⁰ and Ontario.¹¹¹

B. Mexico

Comprised of 32 states, Mexico has a robust federal constitutional system with powerful states that reflect the concerns and needs of their citizens, as well as geographies in their legal systems. While the legal relationships between the constitutional system and the Indigenous communities are not as developed as in the Canadian and US regimes, many states include specific concerns relating to Indigenous communities.

i. Energy and environmental protection

The Aguascalientes environmental protection law regulates preservation and restoration of the environment, including environmental sustainability.¹¹² This law includes public participation in relevant decision-making processes and contains a

⁹⁹ The Wildlife Act, R.S.M. 2021, c W130 (Can.).

¹⁰⁰ Wild Life Act, R.S.N.L. 1990, c W-8 (Can.).

¹⁰¹ Wildlife Act, R.S.N.S. 1989, c 504 (Can.).

¹⁰² Wildlife Act, S. Nu. 2003, c 26 (Can.).

¹⁰³ Wildlife Act, R.S.N.W.T. 2013, c 30 (Can.).

¹⁰⁴ Wildlife Conservation Act, R.S.P.E.I. 1988, c W-4.1 (Can.).

¹⁰⁵ Act Respecting the Conservation and Development of Wildlife, C.Q.L.R. 2021, c C-61.1 (Can.).

¹⁰⁶ The Wildlife Act, S.S. 1998, c W-13.12 (Can.).

¹⁰⁷ Wildlife Act, R.S.Y. 2002, c 229, pt. 13 (Can.).

¹⁰⁸ See Endangered Species Act, S.N.L. 2001, c E-10.1 (Can.).

¹⁰⁹ See Endangered Species Act, S.N.S. 1998, c 11 (Can.).

¹¹⁰ See Species at Risk (NWT) Act, R.S.N.W.T. 2009, c 16 (Can.).

¹¹¹ See Endangered Species Act, R.S.O. 2007, c 6 (Can.).

¹¹² Ley de Protección Ambiental para el Estado de Aguascalientes, Diario Oficial de la Federación [DOF] 4-02-2000, últimas reformas DOF 22-11-2021 (Mex.).

chapter dedicated to environmental impact evaluations.¹¹³ In Baja California, the environmental protection law regulates for “sustainable development, prevention and restoration of ecological balance, as well as protection of the territorial environment,” including specific protections of biodiversity, air, water and soil.¹¹⁴ This law seeks to bridge all layers of governance and also contains provisions relating to environmental impact evaluations.¹¹⁵

Baja California Sur’s Law of ecological balance and environmental protection establishes wide-ranging parameters of environmental protection, including those applicable to multiple levels of government.¹¹⁶ Additionally, the law provides for extensive public participation abilities and includes energy production and use within the State.¹¹⁷ Chihuahua has adopted the Law of ecological balance and environmental protection to stress the importance of protection and conservation throughout the State.¹¹⁸ This law highlights the need for interaction between different levels of government to achieve the goals of protection and conservation, establishes clean air, water and land requirements, creates rules for mineral extraction and establishes the system for designation of protected areas throughout the State.¹¹⁹

Ciudad de Mexico, as the federal district, can be considered largely metropolitan and yet it has enacted significant laws to preserve the ecological resources in the district and to counter environmental harms stemming from urban activities.¹²⁰ The law includes provisions on air, water, and land pollution, as well as environmental impact evaluation requirements and public participation in environmental and associated matters.¹²¹

¹¹³ *Id.*

¹¹⁴ Ley de Protección al Ambiente para el Estado de Baja California Diario Oficial de la Federación [DOF], 30-11-2001, últimas reformas DOF 12-2-21(Mex.).

¹¹⁵ *Id.*

¹¹⁶ Ley de Equilibrio Ecológico y Protección del Ambiente del Estado de Baja California Sur [LGEEPA], Diario Oficial de la Federación [DOF] 30-11-1991, últimas reformas DOF 12-12-2018 (Mex.).

¹¹⁷ *Id.*

¹¹⁸ Ley de Equilibrio Ecológico y Protección al Ambiente del Estado de Chihuahua [LGEEPA], Diario Oficial de la Federación [DOF] 12-05-2018 (Mex.).

¹¹⁹ *Id.*

¹²⁰ Ley Ambiental de Protección a la Tierra en el Distrito Federal Diario Oficial de la Federación [DOF] [LAPT] 13-01-2000, últimas reformas DOF 08-09-2017 (Mex.).

¹²¹ *Id.*

In Colima, the Environmental Law for Sustainable Development establishes the layers of government involved in administering its terms as well as their varied and respective powers.¹²² It provides for extensive protection and conservation of environmental resources, recognizes and protects individual rights to the environment as a matter of law, enshrines environmental impact evaluations as a standard requirement and prohibits air, water, and land pollution, including through the implementation of emissions caps.¹²³ Coahuila has adopted the Law that creates the attorney for protection of the environment, which establishes the jurisdiction system for environmental protection in the State, as well as creating significant oversight, investigation, and regulatory powers within State government apparatuses.¹²⁴ In Guanajuato, the Law for the protection and preservation of the environment enshrines protection and conservation of the State's environmental resources.¹²⁵ In Guerrero, several laws emphasize the importance of environmental impact evaluations as part of the overall protection process.¹²⁶ Hidalgo has enshrined verification of vehicular emissions standards and conformity as part of its Law for the protection of the environment.¹²⁷

Jalisco has adopted the State law of ecological balance and protection of the environment, which creates the goal of including all aspects of nature and society in the sustainability system.¹²⁸ Overall, similar laws have been adopted in Michoacan,¹²⁹

¹²² Ley Ambiental para el Desarrollo Sustentable del Estado de Colima Diario Oficial de la Federación [DOF] 15-06-2002, últimas reformas DOF 4-09-2021 (Mex.).

¹²³ *Id.*

¹²⁴ Ley que Crea la Procuraduría de Protección al Ambiente del Estado de Coahuila Diario Oficial de la Federación [DOF] 15-06-2002 (Mex.).

¹²⁵ Ley para la Protección y Preservación del Ambiente del Estado de Guanajuato Diario Oficial de la Federación [DOF] 08-02-2000, últimas reformas DOF 07-06-2013 (Mex.).

¹²⁶ Ley del Equilibrio Ecológico y la Protección al Ambiente del Estado de Guerrero [LGEEPA], Diario Oficial de la Federación [DOF] 03-03-2009 (Mex.).

¹²⁷ Ley para la Protección al Ambiente del Estado de Hidalgo Diario Oficial de la Federación [DOF] 31-12-2007, , últimas reformas DOF 13-09-2021 (Mex.).

¹²⁸ Ley General del Equilibrio Ecológico y la Protección al Ambiente [LGEEPA], Diario Oficial de la Federación [DOF] 28-01-1988, últimas reformas DOF 18-01-2021 (Mex.).

¹²⁹ Reglamento de la Ley Ambiental y de Protección del Patrimonio Natural del Estado de Michoacán de Ocampo Diario Oficial de la Federación [DOF] 12-8-2021 (Mex.).

Nayarit,¹³⁰ Puebla,¹³¹ San Luis Potosi,¹³² Sinaloa,¹³³ Tabasco,¹³⁴ Tamaulipas,¹³⁵ Tlaxcala,¹³⁶ Veracruz,¹³⁷ Yucatan,¹³⁸ and Zacatecas.¹³⁹

ii. Natural resources and species

The Baja California Sustainable Fishing and Aquaculture law bridges federal, state, and local interests in the agricultural and fishing sectors.¹⁴⁰ The law includes requirements to involve all aspects of actors in determining policies, especially fishers, farmers, and members of Indigenous communities.¹⁴¹ Campeche's Sustainable Fishing and Aquaculture law establishes environmental benefits for society as a key reason for creating a regulatory system in these fields, as well as the economic benefits

¹³⁰ Ley Estatal del Equilibrio Ecológico y Protección al Ambiente del Estado de Nayarit Diario Oficial de la Federación [DOF] 25-04-2001, últimas reformas DOF 04-07-2007 (Mex.).

¹³¹ Ley para la Protección del Ambiente Natural y el Desarrollo Sustentable del Estado de Puebla Diario Oficial de la Federación [DOF] 18-09-2002, últimas reformas DOF 29-08-2012 (Mex.).

¹³² Ley Ambiental del Estado de San Luis Potosi Diario Oficial de la Federación [DOF] 15-12-1999, últimas reformas DOF 06-03-2021 (Mex.).

¹³³ Ley Ambiental para el Desarrollo Sustentable del Estado de Sinaloa Diario Oficial de la Federación [DOF] 08-04-2013, últimas reformas DOF 14-08-2020 (Mex.).

¹³⁴ Ley de Protección Ambiental del Estado de Tabasco Diario Oficial de la Federación [DOF] 22-12-2012, últimas reformas DOF 11-12-2020 (Mex.).

¹³⁵ Ley de Protección Ambiental para el Desarrollo Sustentable del Estado de Tamaulipas Diario Oficial de la Federación [DOF] 19-10-2004, últimas reformas DOF 24-09-2006 (Mex.).

¹³⁶ Ley de Ecología y de Protección al Ambiente del Estado de Tlaxcala Diario Oficial de la Federación [DOF] 02-03-1994, últimas reformas DOF 30-12-2016 (Mex.).

¹³⁷ Ley de Desarrollo Forestal Sustentable para el Estado de Veracruz de Ignacio de la Llave Diario Oficial de la Federación [DOF] 14-07-2006, últimas reformas DOF 18-05-2012 (Mex.).

¹³⁸ Ley de Protección al Medio Ambiente del Estado de Yucatán Diario Oficial de la Federación [DOF] 08-09-2010, últimas reformas DOF 04-01-2021 (Mex.).

¹³⁹ Ley del Equilibrio Ecológico y la Protección al Ambiente del Estado de Zacatecas Diario Oficial de la Federación [DOF] 31-03-2007, últimas reformas DOF 9-01-2021 (Mex.).

¹⁴⁰ Ley de Pesca y Acuacultura Sustentables para el Estado de Baja California Diario Oficial de la Federación [DOF] 16-05-2008 últimas reformas DOF 31-10-2016 (Mex.).

¹⁴¹ *Id.*

to farmers and fishers and to natural resource and biodiversity preservation.¹⁴² To accomplish these aims, the law creates and guides multiple governmental units tasked with oversight and establishes significant sanitary measures regarding fishing and farming is associated products.¹⁴³

In Aguascalientes, the Law to promote sustainable forestry development promotes conservation, preservation, protection, restoration, production, forest biodiversity, use, and sustainability of forests.¹⁴⁴ Many of the Mexican States feature similar forest development laws, which tend to serve as a way to set the parameters for interactions between various levels of government and regulatory authorities.¹⁴⁵ In Campeche, the Law on Tipac Populations and Water of Natural Beauty establishes basic rights for Indigenous and forest communities, including the creation of a designated committee as an oversight apparatus.¹⁴⁶ In the Sustainable Forest Development Law, Chiapas seeks to protect forest and timber resources while promoting sustainable use, including for ecotourism.¹⁴⁷ These purposes are advanced through the registration of forest resources and the authorization of significant administrative and regulatory systems that enshrine public participation.¹⁴⁸

Chihuahua has enacted a Law to promote sustainable forestry development to protect, preserve, and restore the State's forests and forest-based ecosystems, including the regulation of timber

¹⁴² Ley de Pesca y Acuacultura Sustentables del Estado de Campeche, Diario Oficial de la Federación [DOF] 05-12-2008, últimas reformas DOF 12-05-2015(Mex.).

¹⁴³ *Id.*

¹⁴⁴ Ley de Fomento para el Desarrollo Forestal Sustentable del Estado de Aguascalientes, Diario Oficial de la Federación [DOF] 11-09-2006, últimas reformas DOF 06-05-2019 (Mex.).

¹⁴⁵ See Ley de Desarrollo Forestal Sustentable para el Estado de Baja California Sur, Diario Oficial de la Federación [DOF] 13-12-2007, últimas reformas DOF 20-06-2019 (Mex.).

¹⁴⁶ Ley Sobre Poblaciones Típicas y Lugares de Belleza Natural del Estado de Campeche, Diario Oficial de la Federación [DOF] 27-09-1951, últimas reformas DOF 23-12-2002 (Mex.).

¹⁴⁷ Ley de Desarrollo Forestal Sustentable para el Estado de Chiapas, Diario Oficial de la Federación [DOF] 29-10-2008, últimas reformas DOF 01-07-2015 (Mex.).

¹⁴⁸ *Id.*

industries.¹⁴⁹ The law includes provisions for the recognition and inclusion of Indigenous communities in decision-making processes involving forest and natural resources.¹⁵⁰ In Colima, the Law for Sustainable Forest Development seeks to ensure appropriate State laws and administrative capacities for forest protection, including oversight of timber production, certification of forestry activities, and health and sanitary measures for forest activities and impacts.¹⁵¹ Similar provisions exist in Durango, where there are legal requirements for the involvement of all aspects of society in forest-related decision-making,¹⁵² and in Guanajuato, where the law also provides support for sustainable forestry initiatives.¹⁵³ Parallel regimes also exist in Guerrero,¹⁵⁴ Hidalgo,¹⁵⁵ Jalisco,¹⁵⁶

¹⁴⁹ Ley de Fomento para el Desarrollo Forestal Sustentable del Estado de Chihuahua, Diario Oficial de la Federación [DOF] 22-05-2004, últimas reformas DOF 22-10-2014 (Mex.).

¹⁵⁰ *Id.*

¹⁵¹ Ley para el Desarrollo Forestal Sustentable del Estado de Colima, Diario Oficial de la Federación [DOF] 02-09-06, últimas reformas DOF 07-07-2018 (Mex.).

¹⁵² Ley de Desarrollo Forestal Sustentable del Estado de Durango, Diario Oficial de la Federación [DOF] 13-06-2004, últimas reformas DOF 11-07-2019 (Mex.).

¹⁵³ Ley de Desarrollo Forestal Sustentable para el Estado y Los Municipios de Guanajuato, Diario Oficial de la Federación [DOF] 15-03-2005, últimas reformas DOF 25-11-2019 (Mex.).

¹⁵⁴ Ley de Desarrollo Forestal Sustentable del Estado de Guerrero, Diario Oficial de la Federación [DOF] 05-02-2008, (Mex.).

¹⁵⁵ Ley de Desarrollo Forestal Sustentable para el Estado de Hidalgo, Diario Oficial de la Federación [DOF] 07-08-2006, últimas reformas DOF 01-04-2019 (Mex.).

¹⁵⁶ Ley de Desarrollo Forestal Sustentable para el Estado de Jalisco, Diario Oficial de la Federación [DOF] 09-09-2004, últimas reformas DOF 22-02-2007 (Mex.).

Michoacan,¹⁵⁷ Nayarit,¹⁵⁸ Quintana Roo,¹⁵⁹ Sonora,¹⁶⁰ Tabasco,¹⁶¹ Tamaulipas,¹⁶² Tlaxcala,¹⁶³ and Zacatecas.¹⁶⁴

Under the Water Law in Aguascalientes, the State is vested with ownership of and control over rights to waters within its territorial jurisdiction, including oversight and administration of water as a resource.¹⁶⁵ This law emphasizes the role of the State as the coordinating entity between the national government, municipal governments, and other administrative actors.¹⁶⁶ Baja California Sur has adopted an extensive Water Law which covers all public and private aspects of the use and planning processes for water resources.¹⁶⁷ Additionally, and importantly, the law establishes water as a public good for public use throughout the State, subject to protections and oversight by a significant administrative system.¹⁶⁸

In the Chiapas Water Law, there is an explicit statement recognizing that there are designated federal laws governing certain waters but that others are designated as local and State

¹⁵⁷ Ley de Desarrollo Forestal Sustentable del Estado de Michoacán de Ocampo, Diario Oficial de la Federación [DOF] 22-11-2004, últimas reformas DOF 29-12-2016 (Mex.).

¹⁵⁸ Ley de Desarrollo Forestal Sustentable para el Estado de Nayarit, Diario Oficial de la Federación [DOF] 16-07-2005, últimas reformas DOF 17-12-2012 (Mex.).

¹⁵⁹ Ley Forestal del Estado de Quintana Roo, Diario Oficial de la Federación [DOF] 17-12-2007, últimas reformas DOF 19-08-2013 (Mex.).

¹⁶⁰ Ley de Fomento para el Desarrollo Forestal, Sustentable para el Estado de Sonora, Diario Oficial de la Federación [DOF] 15-12-2005, últimas reformas DOF 03-08-2017 (Mex.).

¹⁶¹ Ley Forestal de Estado de Tabasco, Diario Oficial de la Federación [DOF] 01-04-2006, últimas reformas DOF 05-07-2017 (Mex.).

¹⁶² Ley de Desarrollo Forestal Sustentable para el Estado de Tamaulipas, Diario Oficial de la Federación [DOF] 05-06-2007, últimas reformas DOF 05-06-2008 (Mex.); Ley Agrícola y Forestal para el Estado de Tamaulipas, Diario Oficial de la Federación [DOF] 18-01-1994, últimas reformas DOF 06-09-2006 (Mex.).

¹⁶³ Ley de Desarrollo Forestal Sustentable para el Estado de Tlaxcala, Diario Oficial de la Federación [DOF] 17-08-2004 (Mex.).

¹⁶⁴ Ley del Desarrollo Forestal Sustentable del Estado de Zacatecas, Diario Oficial de la Federación [DOF] 28-10-2006, últimas reformas DOF 10-01-2018 (Mex.).

¹⁶⁵ Ley de Agua para el Estado de Aguascalientes, Diario Oficial de la Federación [DOF] 24-07-2000, últimas reformas DOF 11-11-2019 (Mex.).

¹⁶⁶ *Id.*

¹⁶⁷ Ley de Aguas del Estado de Baja California Sur, Diario Oficial de la Federación [DOF] 31-07-2001, últimas reformas DOF 20-12-2019 (Mex.).

¹⁶⁸ *Id.*

interests.¹⁶⁹ Similar laws exist in Ciudad de Mexico,¹⁷⁰ Colima,¹⁷¹ Estado de Mexico,¹⁷² Guerrero,¹⁷³ Hidalgo,¹⁷⁴ Jalisco,¹⁷⁵ San Luis Potosi,¹⁷⁶ and Tamaulipas.¹⁷⁷ Additionally, the Tamaulipas law provides for a specific tariff system that is to be assessed for water resource uses.¹⁷⁸

C. United States

As is perhaps axiomatic, the U.S. is a federal system comprised of 50 states. Under the terms of the U.S. Constitution, legislative power is divided between the articulated powers granted to the U.S. Congress and those which are not articulated, which then fall to the individual states.¹⁷⁹ The U.S. Congress may delegate powers to the states; however, all legislative actions are subject to the terms of the U.S. Constitution regardless of the body exercising the law.¹⁸⁰ Additionally, each US state has a separate constitution which may supplement the rights and obligations of

¹⁶⁹ Ley de Aguas para el Estado de Chiapas, Diario Oficial de la Federación [DOF] 08-12-2000, últimas reformas DOF 11-12-2013 (Mex.).

¹⁷⁰ Ley de Aguas del Distrito Federal, Diario Oficial de la Federación [DOF] 27-05-2003, últimas reformas DOF 23-03-2015 (Mex.).

¹⁷¹ Ley para Regular la Prestación del Servicio Público Agua Potable, Alcantarillado y Saneamiento para el Estado de Colima, Diario Oficial de la Federación [DOF] 22-07-1995, últimas reformas DOF 29-09-2018 (Mex.).

¹⁷² Ley del Agua del Estado de Mexico y Municipios, Diario Oficial de la Federación [DOF] 22-02-2013, últimas reformas DOF 07-10-2021 (Mex.).

¹⁷³ Ley de Aguas para el Estado Libre y Soberano de Guerrero, Diario Oficial de la Federación [DOF] 03-01-2003, últimas reformas DOF 12-08-2016 (Mex.).

¹⁷⁴ Ley Estatal de Agua y Alcantarillado para el Estado de Hidalgo, Diario Oficial de la Federación [DOF] 30-12-1999, últimas reformas DOF 31-12-2013, (Mex.).

¹⁷⁵ La Ley del Agua para el Estado de Jalisco y Sus Municipios, Diario Oficial de la Federación [DOF] 24-02-2007, últimas reformas DOF 27-04-2019 (Mex.).

¹⁷⁶ Ley de Aguas para el Estado de San Luis Potosi, Diario Oficial de la Federación [DOF] 12-01-2006, últimas reformas DOF 21-11-2020 (Mex.).

¹⁷⁷ Ley de Aguas del Estado de Tamaulipas, Diario Oficial de la Federación [DOF] 15-02-2006, últimas reformas DOF 20-03-2018 (Mex.).

¹⁷⁸ *Id.*

¹⁷⁹ U.S. CONST. amend. X.

¹⁸⁰ See U.S. CONST. art. VI, cl. 2 (The Supremacy Clause: “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

its citizens provided they are not in conflict with the U.S. Constitution.¹⁸¹

The accepted view of the balance between state and federal functions in the U.S. was perhaps best articulated by Supreme Court Justice Louis Brandeis in *New State Ice Co. v. Liebmann*, in which he explained that “a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”¹⁸² Though nearly 100 years old, this articulation of the power of states remains equally vital to the way in which states function today and also, validates the leeway the states have.

i. Carbon and GHG emissions regulations

In Alabama, the state environmental law balances the current function of the coal industry with the realization that there will be changes in the future.¹⁸³ Indeed, the coal industry is at once highlighted as being vital to state policy – which itself could constitute the basis for tensions with national and international laws – and subject to established significant regulatory prohibitions and damages stemming from unauthorized coal removals from state territory.¹⁸⁴

Under California law, guidelines have been established for mitigation of greenhouse gases, accompanied by requirements for periodic review and updating of statewide greenhouse gas emissions targets.¹⁸⁵ These function with the established “greenhouse gas emissions limits and emissions reduction measures” that are provided for as a matter of state law.¹⁸⁶ In terms of state agency decision-making and climate issues, there is a California law requiring that the state vehicle fleet becomes carbon neutral.¹⁸⁷ Further, California has adopted the Climate Change Assessment as a required state activity, with mandatory

¹⁸¹ *See id.*

¹⁸² 285 U.S. 262, 311 (1932).

¹⁸³ *See* ALA. CODE § 9-5-3 (2021).

¹⁸⁴ *See id.* § 9-16-87(a), (d).

¹⁸⁵ *See* CAL. PUB. RES. CODE § 21083.05 (West 2021).

¹⁸⁶ CAL. HEALTH & SAFETY CODE §38562(a) (West 2021).

¹⁸⁷ *Zero-Emission Vehicle Fleet*, CAL. AIR RES. BD., <https://ww2.arb.ca.gov/our-work/programs/zero-emission-vehicle-fleet/about> [https://perma.cc/6KCW-HG5R] (last visited Feb. 27, 2022); *See id.* §43018.8(b).

areas and products that must be considered, to be repeated every five years.¹⁸⁸

Recognizing the financial impacts of climate change, and the need costs of transitioning to new technologies as a result, Colorado has established the Colorado Climate Change Markets Act to assist businesses in staying ahead of climate change related technologies.¹⁸⁹ Connecticut has operationalized the Subcommittee of Governor's Steering Committee on Climate Change, which works to advance the state's overall policy of reducing greenhouse gases, including the use of target-setting.¹⁹⁰

Additionally, Hawaii has taken extensive actions to address climate change and associated greenhouse gas emissions reduction efforts, through the creation of state goals for state planning that include current and future generations,¹⁹¹ the establishment of significant climate change adaptation priority guidelines,¹⁹² the creation of the Hawaii Climate Change Mitigation and Adaptation Commission,¹⁹³ the establishment of specific greenhouse gas emissions limits,¹⁹⁴ and, the Hawaii 2050 Sustainability Plan.¹⁹⁵ In this context, the State has also adopted specific prohibitions on coal power purchases that require the approval of the public utility authorities.¹⁹⁶

Illinois has adopted legislation that provides for the phasing out of fossil fuel-filled electricity generating plants as part of its efforts to address climate change and greenhouse gas emissions.¹⁹⁷ Relatedly, the state requires public actors to include sustainable investment factors in their decision-making processes.¹⁹⁸ Additionally, Massachusetts established regulations and

¹⁸⁸ See CAL. PUB. RES. CODE §§ 71340(a)-(b), 71341 (West 2021)

¹⁸⁹ See COLO. REV. STAT. § 25-1-1302(b)-(c) (2021).

¹⁹⁰ CONN. GEN. STAT. § 22a-200a(a)(1)-(4), (c) (2021); see CONN. GEN. STAT. § 22a-200e(a) (2021)

¹⁹¹ HAW. REV. STAT. § 226-4(1)-(2) (2021); See Associated Press, Honolulu Commits to Decrease Emissions by 45% by 2025, U.S. News (Apr. 24, 2021), <https://www.usnews.com/news/best-states/hawaii/articles/2021-04-24/honolulu-commits-to-decrease-emissions-by-45-by-2025>.

¹⁹² See HAW. REV. STAT. § 226-109.

¹⁹³ *Id.* § 225P-3(a).

¹⁹⁴ *Id.* § 342B-71.

¹⁹⁵ See *id.* § 226-65(a).

¹⁹⁶ *Id.* § 269-48(1)-(2).

¹⁹⁷ See 415 ILL. COMP. STAT. 5 / 9.10(a)(1)-(10) (2021).

¹⁹⁸ 30 ILL. COMP. STAT. 238 / 20(a) (2021).

concomitant administrative bodies to handle the impacts of climate change in the state and to mitigate its damage, especially from weather-related events.¹⁹⁹ Massachusetts also established territory-wide greenhouse gas emissions limits as well as the methods through which the state and municipal governments might meet them.²⁰⁰

In Maine, there is a requirement for the creation and periodic updating of a climate action plan which includes the designation of the Maine Climate Council as an advisory body.²⁰¹ In Minnesota, similar adopted legislation provided for greenhouse gas emissions plans as well as a climate change action plan.²⁰² In conjunction with this, Minnesota has established energy savings and optimization as policy goals to be used in reducing greenhouse gas emissions and energy consumption.²⁰³

New Jersey has adopted the Global Warming Response Act as a significant and coordinated system for responding to climate change and related issues, including greenhouse gas emissions reductions and reporting mechanisms.²⁰⁴ Additionally, the New Jersey Department of Environmental Protection has been vested with the ability to assist municipalities with climate change vulnerability assessments.²⁰⁵ In New York, there is significant focus on climate change and related issues.²⁰⁶ Further, beginning in 2022, New York plans to create a funding assistance and support system for climate change mitigation projects.²⁰⁷

Oregon has created a Global Warming Commission as a governance response to the issues associated with climate change,²⁰⁸ as has Rhode Island with the Climate Risk Reduction Act,²⁰⁹ and Vermont with the Climate Action Plan.²¹⁰ In Pennsylvania, there is an extensive Climate Change Act which requires, among other things, the creation of a greenhouse gas

¹⁹⁹ See MASS. GEN. LAWS, ch. 21N § 10 (2021).

²⁰⁰ *Id.* § 4(a)-(b).

²⁰¹ ME. STAT. tit. 38 §§ 577(1), 577-A(8)(A) (2021).

²⁰² See MINN. STAT. § 216H.02(1)-(2) (2021).

²⁰³ *Id.* § 216B.2401(a)(1)-(7).

²⁰⁴ N.J. REV. STAT. § 26:2C-41(a)-(c) (2021).

²⁰⁵ *Id.* § 40:55D-28.1.

²⁰⁶ See *e.g.*, N.Y. ENV'T CONSERV. LAW § 75-0103 (McKinney 2021).

²⁰⁷ *Id.* § 58-0703(c).

²⁰⁸ OR. REV. STAT. § 468A.215(1)-(2) (2021).

²⁰⁹ See 23 R.I. GEN. LAWS § 23-84-2 (2021).

²¹⁰ See VT. STAT. ANN. tit. 10, § 592 (2021).

inventory for the state.²¹¹ The State of Washington has adopted requirements to create an initial climate response strategy, as well as greenhouse gas emissions reductions reporting requirements.²¹² These provisions are furthered by the creation of the Comprehensive Green Economy Job Growth Initiative.²¹³ In some instances, states which object to aspects of national regulation of greenhouse gas emissions, particularly carbon emissions, will adopt laws which give primacy to State policies, although the constitutionality of these actions can be questioned.²¹⁴

ii. Energy

Given the critical role of California in the environmental law and regulatory process, it is perhaps not surprising that the state has dedicated a significant amount of financial and regulatory resources to renewable energy promotion, including the implementation of the California Renewables Portfolio and associated standards.²¹⁵ At the same time, the State has made a commitment to divestment of public pension funds from thermal coal power.²¹⁶ California also has enacted legislation to provide for public interest energy strategies and their implementation and oversight.²¹⁷

Florida has created an energy security plan in relation to greenhouse gases and climate change.²¹⁸ This plan includes the creation of incentives for renewable energy and green government projects,²¹⁹ the creation of mitigation banks for water and related purposes,²²⁰ and the encouragement of and support for the solar energy industry in Florida.²²¹

²¹¹ 71 PA. CONS. STAT. § 1361.4(a), (c) (2021).

²¹² WASH. REV. CODE §§ 70A.05.020(1)-(2)(a), 70A.45.020(2) (2021).

²¹³ *See id.* § 43.330.310(1).

²¹⁴ *E.g.*, ARK. CODE ANN. § 8-3-203(a)(1)-(2) (2021); *See* KY. REV. STAT. ANN. § 224.20-125(1)-(2) (West 2021); W. VA. CODE, § 22-23-1(n)-(o) (2021) (noting that state responses are premature if adopted before the Senate ratifies of the Kyoto Protocol).

²¹⁵ *See* CAL. PUB. UTIL. CODE § 399.11(a)-(b) (West 2021).

²¹⁶ CAL. GOV'T. CODE § 7513.75(c) (West 2021).

²¹⁷ *See generally* CAL. PUB. RES. CODE § 25305 (West 2021).

²¹⁸ *See* FLA. STAT. § 377.601(2)(a)-(k) (2021).

²¹⁹ *See id.* § 377.802.

²²⁰ *Id.* § 373.4135(2).

²²¹ *Id.* § 288.041(2).

In Massachusetts, the state law provides for energy access and encouragement of renewable energy sources at the municipal level.²²² Further, Maryland has established the Strategic Energy Investment Program as a system of encouraging the development of renewable energies.²²³ Relatedly, Maine's law provides for the creation and implementation of smart grid infrastructure throughout the state.²²⁴ Additionally, Minnesota has established planning requirements for energy use and generation.²²⁵

In New Hampshire, there is a commitment to energy investment through the Electric Renewable Portfolio Standard.²²⁶ Nevada established the Clean Energy Fund in order to support the legislatively adopted priority designation for implementation of the clean energy policy.²²⁷ Rhode Island established a statewide renewable energy growth program as a means of promoting and encouraging the diversification of energy sources.²²⁸ Virginia established an energy governance system through the Commonwealth Clean Energy Policy.²²⁹ In Vermont, the 25 percent by 2050 energy reduction plan for all aspects of public and private life is intended to serve as an extension of the Vermont's renewable energy goals.²³⁰

iii. Environmental protection and assessment

As a general matter, the majority of U.S. states have a dedicated administrative department tasked with environmental law enforcement, regulation, oversight, as well as state policies for environmental protection.²³¹ For example, Connecticut's state environmental policy relates to conservation and protection of land, air, and water-based resources for current and future

²²² See MASS. GEN. LAWS ch. 164, § 1A(g).

²²³ See MD. CODE ANN., STATE GOV'T., § 9-20B-03 (West 2021).

²²⁴ ME. STAT. tit. 35, § 3143(3)(A)-(G).

²²⁵ MINN. STAT. § 216C.05(2)(1)-(4).

²²⁶ N.H. REV. STAT. ANN. § 362-F:1 (2021).

²²⁷ See NEV. REV. STAT. § 701B.930 (2021).

²²⁸ See generally 39 R.I. GEN. LAWS. § 39-26-6 (2021).

²²⁹ See VA. CODE ANN. § 45.2-1706.1(A)-(D) (2021).

²³⁰ VT. STAT. ANN. tit. 10, § 580(a), (c); see generally VT. STAT. ANN. tit. 30, § 8001.

²³¹ See e.g., *Health and Environmental Agencies of U.S. States and Territories*, EPA, <https://www.epa.gov/aboutepa/health-and-environmental-agencies-us-states-and-territories> [https://perma.cc/T7AB-SXMH]; ARK. CODE ANN. § 8-1-103; KAN. STAT. ANN. §65-1,229 (2021); OR. REV. STAT. § 468.015.

generations, including a set of proxy considerations which must be taken into account when determining impacts and interests of future generations.²³²

In terms of departmental functions, generally these entities are vested with jurisdiction over air pollution, water pollution, waste pollution, land and soil pollution, and marine environmental issues.²³³ At the state planning level, California has established an environmentally and preservation-centered system which clearly includes climate change concerns for the long and short term.²³⁴ In conjunction with this, California has adopted parameters for environmental impact reports in the contexts of both public and private activities.²³⁵ Similar environmental impact assessments and evaluations exist in Colorado²³⁶ and Connecticut.²³⁷

Delaware has established the priority of balancing between development and conservation as a matter of law, primarily in the regulatory context.²³⁸ Florida has adopted the extensive Environmental Protection Act, which includes pollution prevention and control measures for land, air, and water resources.²³⁹ This includes labeling and public information disclosure requirements relating to products making environmental claims or representations.²⁴⁰ Further, as with many states, Florida has adopted brownfields legislation to facilitate the remediation and clean-up of contaminated sites.²⁴¹

Hawaii state law establishes extensive policy guidelines for creating and implementing environmental protection laws, including environmental preservation.²⁴² Additionally, Hawaii has specific requirements for the contents and use of environmental

²³² CONN. GEN. STAT. § 22a-1 (2021); *id.* § 22a-1a(b).

²³³ *See e.g.* ALASKA STAT. § 46.03.020 (2021).

²³⁴ *See generally* CAL. GOV'T. CODE § 65041.1 ; *see also* *Climate Action Plans*, Institute for Local Government, <https://www.ca-ilg.org/climate-action-plans> [<https://perma.cc/65S9-SRQ3>].

²³⁵ *See* CAL. GOV'T CODE § 21061.

²³⁶ *See* COLO. REV. STAT. § 43-1-128(1)(a), (c), (3) (2021).

²³⁷ *See* CONN. GEN. STAT. § 22a-1b(b)(1), (3).

²³⁸ *See generally* DEL. CODE ANN. tit. 7, § 6001 (2021).

²³⁹ *See generally* FLA. STAT. §§ 403.412(5), 403.021(1)-(5), (10), 376.78(1)-(2) (2021).

²⁴⁰ *Id.* § 403.7193(1)-(2)..

²⁴¹ *See generally id.* § 376.81.

²⁴² *See generally* HAW. REV. STAT. §§ 344-4, 226-12.

impact statements for all forms of development in the public and private sphere.²⁴³

Illinois has adopted an individual and enforceable right to a healthy environment as part of its constitutional terms.²⁴⁴ Connected with this right is the adoption of pollution control requirements for activities on land, air, and water within the Illinois' territory, and the creation of environmentally focused procurement practices.²⁴⁵ In Massachusetts, there are legal provisions which authorize citizen suits based on equity jurisdiction when alleging damage to the environment.²⁴⁶ Similar rights exist in Minnesota, where citizens' rights to environment are justiciable and enforceable as a matter of law.²⁴⁷ Under Montana's constitution, there is an individual and state obligation to "maintain and improve a clean and healthful environment in Montana for present and future generations,"²⁴⁸ with specific avenues that can be sought for claims arising out of these obligations.²⁴⁹ Many of these rights and obligations are echoed in the Virginia Environmental Justice Act through its focus on environmental justice initiatives.²⁵⁰

In North Carolina, there is a state policy of environmental conservation and preservation for current and future generations.²⁵¹ Nebraska has adopted the Environmental Trust Act as the vehicle through which to grant legal status to conservation and protection of the environment for current and future generations.²⁵² As a matter of course, many U.S. states have some form of environmental impact assessment requirement enshrined in their laws, although the scope and requirements of

²⁴³ *Id.* § 343-2 (suspended through the disaster emergency relief period as designated by Supplemental Emergency Proclamation for COVID-19).

²⁴⁴ ILL. CONST. art. XI, § 2.

²⁴⁵ See 15 ILL. COMP. STAT. 215 / 2; 30 ILL. COMP. STAT. 500 / 45-26(b).

²⁴⁶ *E.g.*, MASS. GEN. LAWS ch. 214, § 7A.

²⁴⁷ See MINN. STAT. § 116B.01.

²⁴⁸ MONT. CONST. art. IX, § 1(1).

²⁴⁹ See MONT. CODE ANN. § 75-1-102(1)(a)-(b) (2021).

²⁵⁰ See generally VA. CODE ANN. § 2.2-235 (2021).

²⁵¹ N.C. GEN. STAT. § 113A-3 (2021).

²⁵² NEB. REV. STAT. § 81-15,168 (2021).

these assessments, as well as the events and proposals that trigger them, vary.²⁵³

iv. Natural resources and species

Under Alabama law, there is a recognition of water rights throughout the state, as well as the concomitant responsibility for water resource protections through a dedicated regulatory system.²⁵⁴ California law contains provisions relating to the need to protect and preserve water resources for current and future generations.²⁵⁵ Measures through which this can be implemented include the establishment of a coastal climate change adaptation and infrastructure readiness program.²⁵⁶

In Arizona, there is an express statutory provision under which wildlife is classified as inherently state property and subject to Arizona laws, rules, and protections.²⁵⁷ California provides for the identification of species and habitats in need of conservation at the regional level, as well as methods of investment in their protections.²⁵⁸ This works in conjunction with the powers granted to the involved regulatory agencies in California to approve a regional conservation investment strategy.²⁵⁹ Many States, such as Delaware, have established systems for licensing and permitting requirements involving the use and taking of wildlife in their territories, for example, through allowed forms of hunting and fishing.²⁶⁰ Given the vulnerability of biodiversity across the Hawaiian islands to invasive species, Hawaii has adopted significant legislation regarding the limitation of importation of non-native plants to the territory regarding strict licensing provisions for micro-organism importation.²⁶¹

²⁵³ See e.g., CAL. PUB. RES. CODE §§ 21081, 21100(a); MASS. GEN. LAWS ch. 30, § 62B.; MINN. STAT. § 116D.04; N.Y. ENV'T CONSERV. LAW § 8-0109(2); S.D. CODIFIED LAWS § 34A-9-4 (2021); *but see* IND. CODE § 13-12-4-10 (2021).

²⁵⁴ See ALA. CODE §§ 9-10B-2, 10B-5.

²⁵⁵ See CAL. PUB. RES. CODE §§ 80001(a)(1), (18).

²⁵⁶ *Id.* § 35616(a).

²⁵⁷ ARIZ. REV. STAT. ANN. § 17-102 .

²⁵⁸ CAL. FISH & GAME CODE § 1850(a) (West 2021).

²⁵⁹ *Id.* § 1852(a).

²⁶⁰ DEL. CODE ANN. tit. 7, § 102(a),(c) (2021).

²⁶¹ See HAW. REV. STAT. §§ 150A-6.1, 150A-41.

Many U.S. states have adopted laws which authorize the designation and creation of wildlife management and protection areas within their territory.²⁶² These can function independent of, or in conjunction with, federal authorities and neighboring states.²⁶³

III. Potential Governance Gaps

The sub-national laws discussed above highlight the overwhelmingly important role played by these actors in environmental regulation and protection, as well as advancing legal and regulatory constructs of climate change responses and greenhouse gas controls. The laws also illustrate the many ways in which investment, investors, producers, and consumers – including those in other nations – can be impacted and governed by the legal regimes established in sub-national contexts. Indeed, as has been the case when national governmental systems fail to act on critical environmental and other issues, sub-national entities can play a vital role in bridging the gap and protecting the interests of their communities. Thus, there is good reason to extrapolate the concept of U.S. states as laboratories of democracy to the Canadian provinces and Mexican state.

However, as noted in Section I, these legal and regulatory regimes are not included in, or referenced by, the definition of designated systems to which the USMCA applies.²⁶⁴ Instead, the legal scope of the USMCA is constrained to the national laws of the State Parties.²⁶⁵ Although this might have been a common practice throughout the history of trade agreements when they were relatively simple and did not create sophisticated governance mechanisms for related issues such as environment, international trade law has evolved. However, even recent and wide-ranging free trade agreements such as the USMCA have not yet evolved to address the role of sub-national entities as agents with the power to influence the functioning of these agreements. In this Section, the article will discuss several critical examples of the potential for

²⁶² See ALA. CODE § 9-11-300 ; FLA. STAT. §§ 259.105(2)(a)(9), (11); IDAHO CODE § 36-103 (2021).

²⁶³ ALA. CODE § 9-11-300.

²⁶⁴ See USMCA *supra* note 1.

²⁶⁵ See USMCA *supra* note 1.

sub-national laws to impact trade as defined in the USMCA as well as the lack of enforcement or remedy established for this in the terms of the Agreement.

While the governance systems in Canada, Mexico, and the U.S. have established that sub-national efforts to impose laws creating less stringent legal regimes than those used nationally are invalid, they also allow sub-national legal regimes to extend their requirements and restrictions beyond national laws. In this context, the adage is that national laws should be regarded as a floor rather than a ceiling, and this is certainly the case in the context of environmental law. Indeed, as discussed above, many of the surveyed sub-national entities have adopted advanced environmental protection laws. For example, those requiring in-depth environmental impact studies and pollution protection measures.²⁶⁶ Yet, none of these laws create an exception for cross-border trade application, or to cross-border business interests, and there has been no language in the USMCA to suggest that any of these sub-national environmental laws would be abrogated in order to fulfill the Agreement's terms.²⁶⁷ Indeed, in such a situation it would be anticipated that the sub-national entity would, at the very least, seek national court review of any such measures.

Relatedly, while USMCA State Parties have adopted environmental impact assessment laws for various nationally impactful undertakings, these laws do not extend to most activities taking place in the sub-national context.²⁶⁸ However, such assessments can play important roles in cross-border trade and the facilitation of cross-border investment, as well as the promotion of small and medium sized enterprises. The same is true of climate and similar forms of assessments, which seek to evaluate the impacts of proposed projects across a range of concerns and areas to advance positive climate change policies.²⁶⁹ Chapter 24 of the USMCA does not expressly include or make provisions for environmental impact assessments as within the parameters of covered environmental law activities, this again is solely in the context of national laws.²⁷⁰

²⁶⁶ See generally *supra* Section II. HOW ARE WE DOING THESE

²⁶⁷ See generally *id.*

²⁶⁸ See *supra* Section iii.A.iii. HOW ARE WE DOING THESE

²⁶⁹ See generally *id.*

²⁷⁰ See USMCA *supra* note 1.

An emerging area of law that has become critical due to the failure of all three USMCA State Parties to adopt a national carbon market system is the use of carbon taxation and carbon markets at the sub-national level. These laws and rules tend to create extensive regulatory systems for implementation, suggesting the political and legal will to ensure compliance, as well as greenhouse gas emissions restrictions and efforts to achieve carbon neutrality.²⁷¹ Each of these concepts requires investment by all sectors of the economy, and there are many ways in which cross-border trade and the classification and taxation of cross-border goods will be impacted. However, until the State Parties adopt national laws that explicitly fill these fields, such legal and governance gaps pose an increasingly real challenge to the terms of the USMCA.

As previously noted, procurement decisions are addressed by the USMCA's protections which bar the application of laws that create a prejudice to non-national bidders except in a limited set of circumstances. Sub-national entities have come to the forefront of incentivizing and requiring green forms of procurement by their administrative and other organs, typically requiring that bidders comply with designated targets and practices to be eligible for bid awards.²⁷² It is perhaps evident that this could immediately impact the application of the USMCA's terms and yet there are no statements regarding how this gap would be filled in practice. Given the parameters of the SEM system,²⁷³ it is unlikely that this matter could be brought at that level, meaning that recourse would likely fall to a national court system, bringing with it attendant sovereignty issues.

In the energy sector, the number of sub-national entities implementing laws which seek to provide support for a vast array of renewable energy technologies and innovation continues to increase. This poses the potential to create an issue under the USMCA given the funding and incentivization measures that often accompany such laws. Concomitantly, and as noted above, some sub-national entities have begun to require specific labeling

²⁷¹ See generally *supra* Section II. HOW ARE WE DOING THESE

²⁷² See *supra* Section I. HOW ARE WE DOING THESE

²⁷³ See USMCA *supra* notes 12, 13 and accompanying text; see The Saint-Adolphe-D'Howard Citizens Advisory Committee *supra* note 14 and accompanying text.

information to inform consumers regarding energy sources.²⁷⁴ As has been demonstrated in other trade law contexts, labeling can circumvent anti-competition laws and can create additional impediments on market access. In such circumstances, the potential for issues to arise in the context of the USMCA exists and could prove difficult without a designated system for addressing them other than high-level dispute settlement between the State Parties, to which the sub-national entities are not necessary parties. Further, corporate social responsibility in the energy sector is an element of several sub-national legal regimes, especially for corporate energy actors that are controlled by sub-national entities.²⁷⁵ At the same time, corporate social responsibility is encouraged for USMCA State Parties' soft law systems and yet these types of systems do not fully address the dynamics of corporate activities in the energy sector.²⁷⁶

Importantly, sub-national entities across all USMCA State Parties have adopted legally enforceable citizen rights of right to the environment and a right to a healthy environment, often accompanied by obligations for environmental protection.²⁷⁷ Since these are enforceable and justiciable, they constitute grounds through which claims against cross-border entities operating in an entity could be brought and which are not addressed in the parameters of the USMCA.²⁷⁸ Similarly, by specifically including Indigenous communities in public participation and dialogue rights, many sub-national legal systems have expanded the basis on which claims can be brought based on allegations of incomplete public consultation and the failure to involve the required actors.²⁷⁹

This section has set out some of the areas in which the failure to include sub-national entities in the terms of the USMCA can generate governance gaps in the environmental context. While

²⁷⁴ See *supra* section I.A.iii .

²⁷⁵ See USMCA *supra* note 11.

²⁷⁶ See *id.*

²⁷⁷ See *e.g.*, Environmental Rights Act *supra* notes 62, 63, 65; see *e.g.* Environmental Bill of Rights, *supra* note 66 see *e.g.* Environmental Protection Act, *supra* notes 64, 67.

²⁷⁸ See USMCA *supra* note 7; see Environmental Rights Act *supra* notes 62, 63, 65; see Environmental Protection Act, *supra* notes 64, 67; see Environmental Bill of Rights, *supra* note 66.

²⁷⁹ See Wildlife Act, *supra* note 107; see Ley de Pesca y Acuacultura Sustentables para el Estado de Baja California, *supra* note 141; see Ley Sobre Poblaciones Típicas y Lugares de Belleza Natural del Estado de Campeche, *supra* note 146.

illustrative, and hardly exhaustive, it is a critical area of potential disruption or growth of the USMCA implementation regime depending on how the State Parties elect to address the concerns raised. And, while this article examines the environmental elements of the issue, there are several other areas in which the interplay between the federally focused USMCA and the role of sub-national actors in each State Party will pose governance gaps.

CONCLUSION

The USMCA is a multifaceted free trade agreement that seeks to bridge multiple trade interests as well as civil and common law systems. At the core of the USMCA sit three federal systems of government which have established powerful and innovative sub-national entities that have generated sizeable environmental and related laws and rules. Despite this, the USMCA's terms solely address the national laws of the State Parties, with no reference to or inclusion of sub-national entities and their laws except to the extent that they are also subject to national laws. Indeed, even the CEC Secretariat, which exists to hear complaints regarding the enforcement of national laws on the environment in each State Party, is vested with jurisdiction over national laws and has inferred only questionable authority to address sub-national laws and rules when brought in conjunction with claims regarding national laws.

Set against this background, and the increasing involvement of sub-national entities in environmental and climate change related legal regimes, it can be anticipated that the identified governance gaps can and will pose challenges to the USMCA system. And, bearing in mind the shifting political realities existing between Canada, Mexico, and the US, these types of challenge can take on a more profound impact. While the time to include sub-national entities in the official text of the USMCA has passed, it is essential that these issues be addressed and that plans for their incorporation in some form be generated to avoid the need for another treaty re-negotiation.