

Spring 2013

## Disaggregated State in Transnational Environmental Regulation, The

Hoi L. Kong

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Hoi L. Kong, *Disaggregated State in Transnational Environmental Regulation, The*, 78 Mo. L. REV. (2013)  
Available at: <https://scholarship.law.missouri.edu/mlr/vol78/iss2/5>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact [bassettcw@missouri.edu](mailto:bassettcw@missouri.edu).

# The Disaggregated State in Transnational Environmental Regulation

Hoi L. Kong\*

## I. INTRODUCTION

This Article argues against a positivist view of international environmental law that (i) conceives of states as unitary entities that speak with one voice in pursuit of a single national interest,<sup>1</sup> and that focuses on (ii) authoritative sources of law and (iii) the binding force of these sources of law. Further, this Article argues for a view of transnational law that (i) views the state as disaggregated, rather than unitary, (ii) focuses on informal legal mechanisms that do not have authoritative status and (iii) directs attention towards law's facilitative functions and away from law's binding force. This special issue's theme of transnational administrative law is specifically addressed by looking at a case study of transnational regulation, and an examination of the antecedents for this form of regulation in the administrative structures of Canadian federalism. But first, a point about terminology.

"International environmental law" is typically categorized as a subset of public international law, which is "a body of law created by nation states for nation states, to govern problems that arise between nation states."<sup>2</sup> International environmental law is further typically defined in terms of its authorita-

---

\* Hoi L. Kong, Associate Professor and Hydro Québec Scholar in Sustainable Development Law, McGill University. I thank participants in the Administrative Law Discussion Group's 2012 Luxembourg meeting and a faculty seminar at Cambridge University's Lauterpacht Centre for International Law. I am particularly grateful to Catherine MacKenzie and Marcus Gehring for the extent and generosity of their comments. Andra Syvanen, Marie Andrée Plante, Paul Girard, Allison Rhoades, and William Martin Chin provided excellent research assistance at various points in this project. I gratefully acknowledge the financial support provide by Hydro Québec, the Research Office of the Faculty of Law, McGill University, and the Secrétariat aux affaires intergouvernementales canadiennes.

1. For the concept of a unitary state, see ANNE MARIE SLAUGHTER, A NEW WORLD ORDER 32 (2004). She writes that a unitary state is understood to be "represented by the head of state and the foreign minister, represented in other countries and international organizations by professional diplomats. These representatives, in turn, purportedly articulate and pursue a single national interest." *Id.*

2. LAKSHMAN GURUSWAMY & BRENT HENDRICKS, INTERNATIONAL ENVIRONMENTAL LAW IN A NUTSHELL 1 (1997). Authors note that public international law governs international organizations and non-state actors, as well as states. See, e.g., PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 124 (2d ed. 2003).

tive binding sources<sup>3</sup> and the subject matter it regulates, namely the environment.<sup>4</sup> In this Article, I use the term “transnational environmental law” to denote the body of law that regulates environmental matters that lie beyond the capacity of individual states to regulate. This body of law is not necessarily created by states acting as unitary entities, nor does it necessarily regulate such states.

This Article analyzes a particular administrative form of transnational environmental law that arises from interactions among sub-national units and draws on three bodies of literature: transnational network theory, global administrative law, and theories of federalism. These bodies of theoretical writing are drawn upon in order to demonstrate that transnational environmental regulation can involve disaggregated, rather than unitary states, as well as regulatory instruments that have neither an authoritative source nor binding effects; this form of transnational administrative regulation can further be explained in non-positivist and federalist terms. The Article aims to make two main contributions. First, through a discussion of concrete examples, it aims to illustrate and refine the theories it applies. Second, the Article aims to demonstrate that the dominant positivist conception of international environmental law is incomplete. In particular, the Article argues that a non-positivist theory of transnational environmental regulation that draws on transnational network theory, global administrative law, and theories of federalism can account for forms of transnational environmental regulation that the dominant positivist conception of environmental regulation is incapable of adequately explaining.

Before engaging the main arguments of this paper, the theories upon which this Article draws are briefly outlined and the contrast between these theories and a positivist view of international law will be highlighted. The following paragraphs will indicate how the literature on transnational network theory and global administrative law contrast with elements of the positivist view of international law, and how the literature on environmental federalism

---

3. The standard enumeration of the sources of international law is found in Article 38(1) of the Statute of the International Court of Justice. *See* Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1031 (1945). In addition to these binding sources of authority, international environmental law is governed by soft-law or non-binding agreements that are lower on the hierarchy of sources, and that are similar to the instruments that we will examine in Part III. *See* ULRICH BEYERLIN & THILO MARAUHN, INTERNATIONAL ENVIRONMENTAL LAW 291-94 (2011). It is worth noting, however, that while the soft-law is normally understood to consist of arrangements between states that have the capacity to enter into formal legal agreements, the arrangements described in Part III arise between entities that do not have this capacity. The arrangements in Part III resemble Memoranda of Understanding (MOU) that are entered into by institutional actors that do not have the capacity to engage in treaty-making. *Id.* at 294. For a discussion of such MOU’s and examples of them, see *id.* at 294-95.

4. For various definitions of the “environment” in international law, see SANDS, *supra* note 2, at 15-18.

and non-positivist federalism can be interpreted to contrast with the positivist view.

First, consider transnational network theory, whose proponents argue that relationships among states are increasingly shaped by interactions among actors from various states who work within the legislative, adjudicative and administrative branches of their respective states, and in particular, in regulatory agencies.<sup>5</sup> These emerging regulatory networks displace the form of international cooperation that Professor Kal Raustiala has called “liberal internationalism”, which is “[b]ased on multilateral treaties, often coupled with international organizations[.]”<sup>6</sup> The liberal internationalist vision of international cooperation can be characterized as positivist because it rests on a voluntarist theory, in which international law is understood to emanate from the sovereign will of states. This voluntarist theory presupposes a general positivist conception of law, in which a law is valid only if it represents an exercise of a state’s sovereign will.<sup>7</sup> Network theorists challenge the liberal internationalist view of international relations. According to Professor Anne-Marie Slaughter, a network conception of international relations sees

a world of governments, with all the different institutions that perform the basic functions of government – legislation, adjudication, implementation – interacting both with each other domestically and also with their foreign and supranational counterparts.<sup>8</sup>

Raustiala points out that these networks, which are comprised of the disaggregated elements of various states, can at times make the implementation of treaties more effective and can facilitate negotiations over treaties.<sup>9</sup> Moreover, Raustiala makes a claim that is particularly pertinent for this paper when he writes that “where treaties are politically or economically precluded” these networks can “provide an alternative mode of cooperation.”<sup>10</sup> Therefore, the network theory of transnational regulation, and specifically Raustiala’s interpretation of the theory, is a counterpoint to a positivist conception of international law. Instead of focusing exclusively on acts of sovereign will by unitary states or on formal legal artifacts such as treaties, network theory analyzes relationships and interactions among actors *within* dif-

---

5. See Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT’L L. 1, 3-4 (2002).

6. *Id.* at 2.

7. For a summary of this position in international law and an analysis of its antecedents in theories of domestic law, see Mehrdad Payandeh, *The Concept of International Law in the Jurisprudence of H.L.A. Hart*, 21 EUR. J. INT’L L. 967, 970-71 (2010).

8. SLAUGHTER, *supra* note 1, at 5.

9. Raustiala, *supra* note 5, at 6.

10. *Id.*

ferent states and highlights the normative force of interactions among regulators of different states that do not necessarily involve formal international law.<sup>11</sup>

The writing on global administrative law is the second body of literature upon which this Article draws. As do network theorists, authors writing on global administrative law reject positivist theories which claim that the sovereign will of unitary states is the ultimate source of validity for international law. Professor Benedict Kingsbury argues:

Instead of neatly separated levels of regulation (private, local, national, inter-state), a congeries of different actors and different layers together form a variegated ‘global administrative space’ that includes international institutions and transnational networks, as well as domestic administrative bodies that operate within international regimes or cause transboundary regulatory effects.<sup>12</sup>

Kingsbury adds to this disaggregated conception of the state a particular view of transnational law. As mentioned above, Raustiala sees networks as complementing and supplementing formal international law, as defined by the liberal internationalist paradigm.<sup>13</sup> Kingsbury goes further. He claims that “global administrative law” consists of “shared sets of norms and norm-guided practices that are in some cases regarded as obligatory, and in many cases are given some weight, even when they are not obviously part of national (state) law or standard inter-state law.”<sup>14</sup> Kingsbury’s claim rests on a distinctive conception of law, which does not understand the norms and practices that “are not obviously part of national (state) law or standard inter-state law” to be supplements or non-legal alternatives to international law. Kingsbury rather argues that these norms and practices can themselves be a form of law. In order to arrive at this conclusion he draws on Lon L. Fuller’s jurisprudence concerning the rule of law.<sup>15</sup>

According to Kingsbury, a norm or practice in the global administrative law context does not necessarily become law because it emanates from an authoritative source, such as the sovereign wills of states.<sup>16</sup> Instead, Kingsbury argues that a norm or practice becomes law by virtue of the fact that it satisfies the normative requirements of “publicness” and Kingsbury

---

11. For a pluralist view of international law that similarly de-centers formal sources and structures of international law, see NICO KRISCH, BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW 60-103 (2010).

12. Benedict Kingsbury, *The Concept of ‘Law’ in Global Administrative Law*, 20 EUR. J. INT’L L. 23, 25 (2009) [hereinafter Kingsbury, *Global Administrative Law*].

13. See notes 8-10 and accompanying text.

14. Kingsbury, *Global Administrative Law*, *supra* note 12, at 26.

15. See *id.* at 38-41.

16. *Id.* at 40.

draws on Fuller's conception of the rule of law to make this argument.<sup>17</sup> According to Kingsbury, the norms and practices of global administrative law satisfy the requirements of "publicness" even if they have not been authorized or delegated by states,<sup>18</sup> and Kingsbury sets out an indicative list of principles that gives specific content to this general idea of publicness, in much the same way that Fuller sets out a set of indicia that give specific content to his idea of the rule of law.<sup>19</sup> Kingsbury argues that these principles have the effect of "channeling, managing, shaping and constraining political power."<sup>20</sup>

Whereas a positivist conception of international law focuses on the binding effects of law, the Fullerian conception upon which Kingsbury draws focuses instead on law's capacity to facilitate the pursuit of the public good by those publics who are affected by global administrative law.<sup>21</sup> The relevant publics include (i) "global administrative public entities (apart from states)[,]"<sup>22</sup> (ii) "states and agencies of a particular state[,]"<sup>23</sup> and (iii) "individuals and other private actors."<sup>24</sup> The practices and norms of the institutions in the Canadian examples and the transnational case study evince this Fullerian conception of law, and the transnational case study provides an example of Kingsbury's conception of global administrative law. These instances of regulation exhibit the facilitative functions of Fuller's jurisprudential theory and do not have the kinds of binding effect that some positivists would understand to be a necessary feature of all law, including international law.<sup>25</sup>

---

17. *Id.* at 30-31. Kingsbury directly links his conception of global administrative law to Fuller's ideas about the "inner morality of law." *Id.* at 38-39 (internal quotation marks omitted).

18. *Id.* at 40.

19. *Id.* at 32. The list includes the principles of legality, rationality, proportionality, the rule of law and human rights. *Id.* at 32-33.

20. *Id.* at 32.

21. *Id.* at 39-40. On this difference in emphasis, see Benedict Kingsbury, *Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law*, 13 EUR. J. INT'L L. 401, 424-25 (2002) [hereinafter Kingsbury, *Legal Positivism*].

22. Kingsbury, *Global Administrative Law*, *supra* note 12, at 26. Kingsbury gives as an example of such an entity the World Trade Organization. *Id.*

23. *Id.* at 37.

24. *Id.* For an analysis of Fuller that understands the facilitative function to be central to his conception of law, see KRISTEN RUNDLE, *FORMS LIBERATE: RECLAIMING THE JURISPRUDENCE OF LON L. FULLER* (2012).

25. I am aware that such an essentially "command theory" of international law is not accepted by all international law positivists. For a description of the command theory, see Payandeh, *supra* note 7, at 969-70. For normative accounts of positivism that do not rest on such a command theory, see, e.g., *id.*; Kingsbury, *Legal Positivism*, *supra* note 21. However, whether one views international law as conforming to the command theory or the more sophisticated versions of international law positivism, it remains the case that authors typically define international law, generally and interna-

The third body of literature on which this paper draws is the theoretical writing on environmental and non-positivist federalism. This Article refers to the recent work of Professor Wallace Oates in order to examine the conditions under which actors within a federation will regulate environmental problems.<sup>26</sup> Oates' model presupposes a positivist conception of federalism. In this conception, federations are understood to be created by entrenched constitutions that authoritatively delineate the spheres of authority of the orders of government. In some accounts, the legally binding nature of a constitution's division of powers provisions is essential to securing goals associated with federalism, including those that relate to the capacity of sub-federal units to function as "alternative locations of independently derived government power."<sup>27</sup>

This Article argues that Oates' model can be extended to a non-positivist theory of federalism that can in turn be applied to the transnational context. Professor Iris Marion Young argued in favor of a conception of federalism, whose non-positivist features include the fact that it does not rely on sharply and authoritatively defined jurisdictional boundaries.<sup>28</sup> She called this conception "regional federalism" and applied it to metropolitan regions.<sup>29</sup> The fluidity of boundaries implied by this conception of federalism is evident in Young's claim that "[t]he scope of a polity . . . ought to coincide with the scope of the obligations of justice which people have in relation to one another because their lives are intertwined in social, economic and communicative relations that tie their fates."<sup>30</sup> Although the specifics of Young's model of federalism need not be discussed here, what is of particular interest is her

---

tional environmental law in particular, in terms of their binding effects. *See, e.g.*, SANDS, *supra* note 2, at 12. In this standard view, international law, in its legislative function creates "legal principles and rules which impose binding obligations requiring states and other members of the international community to conform to certain norms of behaviour." *Id.* The administrative function of international law involves the application of these principles and norms. *Id.* at 12-13.

26. WALLACE E. OATES, *A Reconsideration of Environmental Federalism*, in ENVIRONMENTAL POLICY AND FISCAL FEDERALISM: SELECTED ESSAYS OF WALLACE E. OATES 125 (2004).

27. Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2218-19 (1998). Professor Jackson argues against authors who, according to her, "undervalue the role that the constitutional status of states may play in maintaining political stability." *Id.* at 2182; *see also* Jacob T. Levy, *Federalism, Liberalism, and the Separation of Loyalties*, 101 AM. POLITICAL SCI. REV. 459, 475 (2007). For an argument that frames the value of constitutionally entrenched federalism arrangements in terms of the norm of non-interference, *see* Jacob T. Levy, *Self-determination, Non-domination, and Federalism*, 23 HYPATIA 60, 68 (2008).

28. *See generally* IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 198, 267 (2000).

29. *Id.* at 198.

30. *Id.* at 228.

argument in favor of political institutions in metropolitan regimes that facilitate interactions and negotiations among local governments in metropolitan regions.<sup>31</sup> Unlike positivist account of federalism, the focus in Young's account was not on constitutionally entrenched jurisdictional boundaries or subject matter limitations. Rather, she emphasized institutions that facilitate interactions among governments in territories and over subject matters whose limits are defined by the shared interests of citizens, rather than by authoritative and binding legal instruments such as constitutions. If extended to the transnational context and coupled with Oates' theory of environmental federalism, Young's account can counter a positivist view of international environmental law that relies on fixed and authoritatively defined jurisdictional boundaries.

This Article draws on these bodies of theoretical writing on transnational network theory, global administrative law and non-positivist and environmental federalism in order to demonstrate that transnational environmental regulation can involve disaggregated, rather than unitary states, as well as regulatory instruments that have neither an authoritative source nor binding effects. This form of transnational administrative regulation can further be explained in non-positivist federalist terms. In order to provide background for this argument, Part II describes developments in Canadian administrative federalism. This description will (i) illustrate how administrative federalism functions in a domestic setting, (ii) highlight aspects of the theories surveyed above, and (iii) situate administrative federalism and those theories in the context of standard administrative law debates. Part III, examines Oakes' writing on environmental regulation in the federalism context and demonstrates how administrative regulation in the Canadian federation can illustrate Oakes' model and suggest refinements to it. Part IV examines a specific transnational administrative institution and shows how it can be interpreted to further extend Oakes' model to a non-positivist and transnational form of administrative federalism that is similar to the Canadian form.

This case study aims to provide support for a general theory of transnational administrative law that advances the non-positivist trends in the transnational network theory, global administrative law, and federalism literatures surveyed above. I begin by describing how the practices and institutions of Canadian administrative federalism reflect the concerns of the literatures summarized above, as well as general themes in administrative law scholarship.

---

31. *Id.* at 232-33.



## II. THE ADMINISTRATIVE STRUCTURES OF COOPERATIVE FEDERALISM: A DOMESTIC ANTECEDENT TO THE TRANSNATIONAL CASE

Scholars of Canadian federalism have noted that in the past three decades, across a range of regulatory fields, it is in the interactions between administrative agencies that the greatest innovations in cooperation among the federal and provincial governments have been undertaken. These innovations are called administrative federalism. In part, the cooperation has arisen because avenues for constitutional change have been closed due to some highly visible and politically costly failed attempts at amending the Canadian Constitution.<sup>32</sup> Canada provides a particularly good case study for administrative federalism because political actors were highly motivated to innovate due to these failures at constitutional reform. This section aims to demonstrate that the Canadian regulatory state has introduced sub-constitutional, administrative innovations to how the different orders of government interact and in the regulatory instruments they use. These innovations evidence a willingness on the part of governments to deploy a range of regulatory forms in the pursuit of varied regulatory values; they evidence an acknowledgment that regulatory problems cross jurisdictional and departmental boundaries; and they demonstrate a willingness to use information-pooling mechanisms to draw together a variety of stakeholders in common purpose. Several features of this evolution in the federal administrative state illustrate elements of the literatures surveyed above and reflect the concerns of administrative law theorists.

Consider four points of overlap between changes in Canadian administrative federalism and the sets of literatures surveyed above. First, the changes have occurred at all levels of federal and provincial governance practice. In addition to summits among first ministers, there have been introduced meetings among ministers with similar portfolios (i.e., ministers of health), as well as meetings of officials from all orders of government who share practices and experiences.<sup>33</sup> Administrative federalism in Canada, like the networks analyzed by transnational network theory, reflects a disaggregated image of the state and sub-national state units in which regulators working across jurisdictional boundaries play a particularly significant role. Second, the evolution in Canadian administrative federalism has involved a range of regulatory instruments, including intergovernmental agreements, block and individual transfers of funds from the federal to the provincial governments

---

32. For this diagnosis of the evolution of cooperative federalism, see generally Herman Bakvis & Grace Skogstad, *Canadian Federalism: Performance, Effectiveness and Legitimacy*, in *CANADIAN FEDERALISM: PERFORMANCE, EFFECTIVENESS, AND LEGITIMACY* (Herman Bakvis & Grace Skogstad, eds., 2002).

33. *Id.* at 8.

and individual citizens, and jointly constituted administrative bodies.<sup>34</sup> These diverse regulatory instruments, which aim to respond to diverse sets of publics within the Canadian federation, resemble the kinds of regulatory instruments that Kingsbury describes in his account of global administrative law. Third, representatives of the relevant communities of interests gather to discuss common concerns in institutions that resemble the ones prescribed by Young's non-positivist conception of federalism. Fourth, the evolving instruments of Canadian administrative federalism reflect a variety of values that have significance for theories of federalism, including the theory of environmental federalism articulated by Oates. Specific instruments attempt to accommodate regional diversity, at the same time as they try to achieve regulatory coordination and set baseline national standards.

In addition to echoing the concerns of the literature on transnational network theory, global administrative law and environmental and non-positivist federalism, the regulatory instruments and institutions of Canadian administrative federalism reflect values that preoccupy administrative law theorists. Consider the diversity of administrative structures available to the orders of government in the Canadian federation. Governments sometimes deploy administrative structures that are directly under the line control of ministerial departments, and in which the possibility for political control and accountability is relatively high. At other times, governments use arm's length non-profit organizational structures in which the control and accountability runs from and to a council of ministers, rather than to a particular minister.<sup>35</sup> Sometimes governments will choose to regulate using agencies that fall under a single portfolio that calls upon the expertise of a single department, while at other times they will use agencies that are cross-sectoral and call upon the expertise of several departments.<sup>36</sup>

Each of these choices of administrative structure has implications for how governments within the Canadian federation will work together, and each attracts traditional concerns of administrative law theory about democratic controls on administrative actors, the expertise of administrative actors, and the degree of independence from political control that such actors need in order to be effective.<sup>37</sup> Moreover, governments can deploy regulatory in-

---

34. For a description of this range of instruments, see generally Carolyn M. Johns, Patricia L. O'Reilly & Gregory J. Inwood, *Intergovernmental Innovation and the Administrative State in Canada*, 19 GOVERNANCE: INT'L J. POL'Y, ADMIN., & INSTITUTIONS 627 (2006).

35. For examples of these two institutional forms, see Bakvis & Skogstad, *supra* note 32.

36. For a discussion of these two agency forms and their implications for inter-governmental relations, see J. Stefan Dupré, *The Workability of Executive Federalism in Canada*, in FEDERALISM AND THE ROLE OF THE STATE 236, 240 (Herman Bakvis & William M. Chandler, eds., 1987).

37. For a standard treatment of such concerns in administrative law, see generally RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* (4th ed. 2002).

struments, including information databases, tax incentives, standards, prescriptive regulations, and public-private partnerships with universities and community groups.<sup>38</sup> This range of regulatory instruments evidences the claim made by administrative law scholars working in the instrument choice tradition that different kinds of instruments can be deployed by governments to respond to different kinds of regulatory problems.<sup>39</sup>

An example from the past decade of federal-provincial cooperation will give a flavor of recent innovations in the Canadian administrative state that reflect the above trends in administrative federal governance.<sup>40</sup> The 2003 Accord on Health Care Renewal aimed to promote accountability and transparency by establishing the Health Council of Canada as an independent body to inform Canadians about health care matters.<sup>41</sup> In the 2004 Ten Year Plan, the First Ministers required annual public reports.<sup>42</sup> The 2003 Accord outlined the nature of the Council, and stated,

[t]he Health Council will publicly report through federal/provincial/territorial Ministers of Health and will include representatives of both orders of government, experts and the public. To fulfill its mandate, the Council will draw upon consultations and relevant reports, including governments' reports, the work of the Federal/Provincial/Territorial Advisory Committee on Governance and Accountability and the Canadian Institute for Health Information (CIHI).<sup>43</sup>

In the decade since its creation, the Council has fulfilled its mandate, as it has provided information to the public and to policy makers and govern-

---

38. For a description of some innovative instruments that place the emphasis on citizen engagement, see Rod Dobell & Luc Bernier, *Citizen-Centered Governance: Implications for Inter-Governmental Canada*, in ALTERNATIVE SERVICE DELIVERY: SHARING GOVERNANCE IN CANADA 250 (Robin Ford & David Zussman, eds., 1997).

39. Roderick A. Macdonald, *The Swiss Army Knife of Governance*, in DESIGNING GOVERNMENT: FROM INSTRUMENTS TO GOVERNANCE 203, 214-24 (Pearl Eliadis et al., eds., 2005).

40. This example is drawn from the discussion in HOI KONG, *Section 36(1), New Governance Theory and the Spending Power in Canada*, in OPEN FEDERALISM AND THE SPENDING POWER 193, 227-29 (2012).

41. 2003 *First Ministers' Accord on Health Care Renewal*, HEALTH CANADA, <http://www.hc-sc.gc.ca/hcs-sss/delivery-prestation/fptcollab/2003accord/index-eng.php> (last modified May 8, 2006) [hereinafter *2003 Accord*].

42. *First Minister's Meeting on the Future of Health Care 2004: A 10-year plan to strengthen health care*, HEALTH CANADA (Sept. 16, 2004), <http://www.hc-sc.gc.ca/hcs-sss/delivery-prestation/fptcollab/2004-fmm-rpm/index-eng.php>.

43. *2003 Accord*, *supra* note 41.

ments about progress in health management and has identified best practices that have helped to shape innovative health policy.<sup>44</sup>

This section hopes to have established that the Canadian regulatory state has introduced sub-constitutional, administrative innovations to how the different orders of government interact and in the regulatory instruments they use. These innovations evidence a willingness on the part of governments to deploy a range of regulatory forms in the pursuit of varied regulatory values; they evidence an acknowledgment that regulatory problems cross jurisdictional and departmental boundaries; and they demonstrate a willingness to use information-pooling mechanisms to draw together a variety of stakeholders in common purpose. As discussed *supra* these developments in Canadian administrative federalism reflect the concerns of authors writing on transnational network theory, global administrative law and environmental and non-positivist federalism. Part IV explains that these Canadian developments can be considered antecedents of a transnational regulatory structure that aims to address environmental concerns. But first, a discussion of how Oates' theory of environmental federalism applies to the Canadian context and can both illustrate and refine that theory.

### III. ENVIRONMENTAL FEDERALISM: GENERAL REGULATORY TRENDS IN CANADA

This Part's discussion of recent theoretical insights on environmental regulation in federations, and their application to the Canadian federation, will frame the case study in Part IV. The scholarship on environmental regulation in the federalism context has largely involved proponents and opponents of centralized regulation. One particularly intense subset of the debate has addressed the question of whether decentralized regulation leads to a race to the bottom, in which sub-federal jurisdictions pursue policies that are harmful to the environment, in an attempt to lower the cost of operating businesses within their jurisdiction and to compete with other jurisdictions for businesses. The evidence is mixed, with some scholars, perhaps most prominently among them, Richard Revesz, noting that sub-federal jurisdictions have initiated some of the most innovative regulatory programs, in the absence of federal regulation.<sup>45</sup> By contrast, Kirsten Engel, among others, has argued that the presence or absence of federal regulation is only one factor that motivates states to regulate, and Engel concludes that there is a prima

---

44. For a summary of the Council's activities and a description of its structures and developing initiatives, see its strategic plan: HEALTH COUNCIL OF CANADA, STRATEGIC DIRECTIONS 2011: FIVE-YEAR STRATEGIC PLAN (2011), [http://healthcouncilcanada.ca/tree/HCC\\_StratPlan2011\\_Final.pdf](http://healthcouncilcanada.ca/tree/HCC_StratPlan2011_Final.pdf).

45. The classic article is Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992).

facie case for the claim that races to the bottom will occur, in the absence of federal regulation of environmental issues.<sup>46</sup>

In a significant recent contribution to the debate, Oates argues that it is important to separate analytically different kinds of environmental pollution.<sup>47</sup> The analytical precision of Oates' work illustrates when a race to the bottom is likely and what kinds of regulatory responses are necessary to address specific kinds of environmental harms within federations. Oates identifies three cases of pollution in a federation. The first involves a pure public good and in this case, a unit of polluting emission has the same effect on the direction of the quality of the national environment, irrespective of where that unit is emitted. Examples of this kind of pollution include those that contribute to climate change and deplete the ozone layer. The second case involves a pure local public good. In this case, the effects of environmental pollution are felt exclusively in the jurisdiction where the pollution is emitted. Examples of this kind of pollution include pollution of local drinking water sources and "the collection and disposal of local refuse." The third case of pollution involves spillover effects. In this case, pollution in one jurisdiction has effects on neighboring jurisdictions, and includes situations of unidirectional flows, either downwind or down-water, as well as spillovers that are reciprocal, as is the case when multiple jurisdictions share a body of water and relatively similar segments of their respective shorelines are exposed to pollutants that are emitted into the water by any one of the jurisdictions.

According to Oates, different kinds of regulatory responses are effective for regulating the different cases of pollution. For the first case of pollution, argues Oates, decentralized regulation is inefficient, as only centralized regulation can respond to the aggregate harms that result from pollution emitted in multiple jurisdictions. The second case is the one that typically gives rise to race to the bottom concerns. Oates notes that there is at least one clear case when decentralized regulation is efficient: when the effects on present property values of regulating the local sources of pollution are evident, known and positive. If, however, decentralized regulation yields a race to the bottom, which creates significant inefficiencies, the question arises as to what the appropriate central government response might be and potential responses include subsidies and centralized directive regulation. For the final case, involving interjurisdictional spillovers, the most efficient regulatory response involves cooperation among jurisdictions, and uniform centralized location is inefficient, argues Oates, because it will not account for local variations. Moreover, Oates suggests that the incentives for interjurisdictional cooperation vary. Jurisdictions are most incentivized to cooperate when the spill-

---

46. See, e.g., Kirsten H. Engel, *Whither Subnational Climate Change Initiatives in the Wake of Federal Climate Legislation?*, 39 PUBLIUS: J. FEDERALISM 432 (2009); Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "To the Bottom"?*, 48 HASTINGS L. J. 271 (1997).

47. OATES, *supra* note 26, 125-56. The two paragraphs in the main text following this note summarize Oates' argument in chapter 7.

overs are reciprocal and least incentivized when spillovers are unidirectional. Oates' rubric for analyzing environmental regulation can be used to evaluate trends in Canadian environmental regulation.

### *A. Canadian Federalism Jurisprudence*

The general trend in Canadian federalism jurisprudence over the second half of the twentieth century and the early decades of this one has yielded a general expansion of the scope of federal jurisdiction across a host of subject matters and an increase in areas of jurisdictional overlap between the federal and provincial competences.<sup>48</sup> This evolution of division of powers doctrine has had an effect on the instruments that governments have chosen in order to regulate environmental affairs. Scholars note that for much of the twentieth century, federal jurisdiction was limited by a generally narrow reading of the federal powers that might bear on environmental matters, and as a consequence, private law actions, which fall within exclusive provincial jurisdiction, were the primary means of regulating environmental harms.<sup>49</sup> Scholars further note that to the extent that the federal government was involved in environmental regulation, it tended to be in areas that fell under specific subject matters clearly within its jurisdiction, such as fisheries, rather than under open-ended powers to regulate the environment itself.<sup>50</sup>

By the 1980's and 90's the Supreme Court of Canada developed doctrinal bases for broad federal jurisdiction over the environment, most notably under the open-ended criminal and peace, order and good government powers.<sup>51</sup> Moreover, the Court expressly noted that the environment was an area of shared jurisdiction between the provinces and the federal government.<sup>52</sup> As authors have noted, these shifts in constitutional doctrine opened the way for both an increased federal presence in environmental regulation and greater cooperation among the federal government and the provinces in the regulation of environmental issues.<sup>53</sup> The regulatory means available to federal and

---

48. For one account of this history, describing recent developments, see Wade K. Wright, *Facilitating Intergovernmental Dialogue: Judicial Review of the Division of Powers in the Supreme Court of Canada*, 51 SUP. CT. L. REV. 625 (2010).

49. For an overview of these historical periods, see Michael Howlett & Sima Joshi-Koop, *Canadian Environmental Politics and Policy*, in OXFORD HANDBOOK OF CANADIAN POLITICS 470, 474-77 (John C. Courtney & David E. Smith eds., 2010).

50. O.P. DWIVEDI ET AL., SUSTAINABLE DEVELOPMENT AND CANADA: NATIONAL AND INTERNATIONAL PERSPECTIVES 51 (2001).

51. See *R. v. Hydro-Quebec*, [1997] 3 S.C.R. 213 (Can.); *R. v. Crown Zellerbach Can. Ltd.*, [1988] 1 S.C.R. 401 (Can.).

52. *Friends of the Oldman River Soc'y v. Can. (Minister of Transp.)*, [1992] 1 S.C.R. 3 (Can.).

53. See, e.g., Mark S. Winfield, *Environmental Policy and Federalism*, in CANADIAN FEDERALISM: PERFORMANCE, EFFECTIVENESS, AND LEGITIMACY 124, 126 (Herman Bakvis & Grace Skogstad eds., 2002).

provincial governments to regulate the environment have thus multiplied. Governments in Canada now have available to them the means necessary to regulate all three of Oates' cases, and the ability to make the optimal regulatory choice in each case. Further, the general trends in Canadian federal administrative structures identified above are evidenced in Canadian environmental regulatory choices.

### *B. Pure Public Goods Pollution*

Consider first the regulation of those kinds of pollution that Oates identifies as pure public goods. As his classificatory scheme would suggest, the federal government has taken a role in the regulation of the relevant kinds of pollution, and as the administrative law theorists we have surveyed might predict, the regulatory choices in this and the second and third cases have demonstrated a willingness to deploy a range of regulatory instruments and involve a spectrum of stakeholders. For instance, a Liberal government in 2000 created an Action Plan on Climate Change that involved significant spending on programming that aimed to reduce greenhouse gas emission; in 2002, Environment Canada released a greenhouse gas inventory that measured emissions against Canada's international commitments to greenhouse gas reductions; and in 2005, the federal government entered into an agreement with automakers that entailed voluntary commitments to lower greenhouse gas emissions from automobiles.<sup>54</sup> Yet, although the federal government is in a better position to regulate these kinds of public goods, relative to the provinces, in recent years, the Conservative government has ratcheted back the federal role, backed off of international commitments and has advanced as one of its arguments for doing so the fact that Canadian initiatives would likely be futile and costly, in light of inaction by other countries.<sup>55</sup> Authors have argued that this re-entrenched federal role has opened policy space for sub-federal regulatory innovations in this area,<sup>56</sup> and the next Part explains one transnational instance of such innovation.

### *C. Local Effects Pollution*

Consider now the second case of environmental regulation in a federation identified by Oates, namely that in which pollution has entirely local effects. Oates' model would suggest that in this case, the provinces should

---

54. Peter J. Stoett, *Looking for Leadership: Canada and Climate Change Policy*, in *CHANGING CLIMATES IN NORTH AMERICAN POLITICS* 47, 52 (Henrik Selin & Stacy D. VanDeveer eds., 2009).

55. *Canada Pulls Out of Kyoto Protocol*, THE GUARDIAN (Dec. 12, 2011), <http://www.theguardian.com/environment/2011/dec/13/canada-pulls-out-kyoto-protocol>.

56. Stoett, *supra* note 54, at 55.

take a lead role and that federal regulation would be inefficient.<sup>57</sup> In this area, federal involvement has tended to be facilitative rather than directive. Under the *Canadian Environmental Protection Act*, Environment Canada established, in consultation with industry actors, guidelines based on a “best practicable technology” approach, yet these guidelines have no legal force unless the provinces enact them.<sup>58</sup> Such a regulatory approach seems consistent with Oates’ theory: because impacts of asphalt paving and cement plants (for instance) are overwhelmingly local, they fall within exclusive provincial jurisdiction, and it is therefore the primary responsibility of the provinces to regulate them. Nonetheless, because the federal government has a superior capacity to gather information and to negotiate and interact with powerful industry actors, it retains a role in defining and making available best practice standards.

#### D. Spillover Pollution

In the third and final case of environmental regulation that Oates identifies – the case of spillovers<sup>59</sup> – we see in the Canadian experience a significant number of intergovernmental bodies that facilitate the kind of agreements that Oates suggests are optimal regulatory instruments. For example, in order to facilitate cooperation among the provinces, as well as between the provinces and the federal government, the Canadian Council of Ministers of the Environment adopted in 1988 a “Statement on Interjurisdictional Cooperation on Environmental Matters” that included a commitment that governments would work together to “harmonize environmental legislation, policies and programs across jurisdictions.”<sup>60</sup> The Council was instrumental in facilitating negotiations among the federal and provincial governments that led to a Harmonization Accord in which all provinces (except Quebec) and the federal government agreed to coordinate activities, publicize their work, and enter into sub-agreements.<sup>61</sup> It is notable that some of the Council’s key initiatives, such as Canada-wide Acid Rain Strategy for Post-2000, target pollution that has spillover effects and whose patterns are not predictably unidirectional.<sup>62</sup>

---

57. See *supra* note 47 and accompanying text.

58. DWIVEDI ET AL., *supra* note 50, at 128.

59. See *supra* note 47 and accompanying text.

60. DWIVEDI ET AL., *supra* note 50, at 73.

61. For a description of the Council’s structure and its accomplishments, see CANADIAN COUNCIL OF MINISTERS OF THE ENVIRONMENT, A CANADA-WIDE ACCORD ON ENVIRONMENTAL HARMONIZATION, [http://www.ccme.ca/assets/pdf/accord\\_harmonization\\_e.pdf](http://www.ccme.ca/assets/pdf/accord_harmonization_e.pdf).

62. For the details of the strategy, see FEDERAL/PROVINCIAL/TERRITORIAL MINISTERS OF ENERGY AND ENVIRONMENT, SUPPORTING DOCUMENT FOR THE CANADA-WIDE ACID RAIN STRATEGY FOR POST-2000 (1998) [hereinafter ACID RAIN STRATEGY], [http://www.ccme.ca/assets/pdf/1998\\_acid\\_rain\\_strategy\\_e.pdf](http://www.ccme.ca/assets/pdf/1998_acid_rain_strategy_e.pdf).



In this category of regulatory initiatives, partial confirmation of Oates' analysis of spillover effects can be seen. As is consistent with his analysis, agreements among affected sub-federal units have been a primary regulatory instrument. Yet, there has also been in this context a significant federal role, which suggests that a refinement to Oates' model is in order. Recall that he argues that uniform federal regulation would be suboptimal in this context, because it would not be able to take into consideration sub-federal variations.<sup>63</sup> The Canadian experience suggests two adjustments to his analysis. First, the federal government can, in collaboration with affected provinces, play a role in defining regulatory strategies for regions within the country, such as the Southeast. The federal government has a role to play because it has committed Canada to international standards, and because it can negotiate with other state actors, such as the United States, whose activities have a direct impact on the Southeastern Canadian provinces most affected by sulfur dioxide and nitrogen oxide emissions.<sup>64</sup> Second, the federal government has a role to play in cases of spillovers, because certain sources of emissions fall within federal jurisdiction, and so it makes sense for the federal government to enter into agreements with a province, such as Ontario, in order to address emissions in the Great Lakes Basin.<sup>65</sup> In short, in the case of spillover pollution in Canada that has regional effects, the federal government has a role to play, although Oates is correct to say that if the federal government were to enact uniform national standards, such standards would be inefficient because they would not take into consideration regional variations.

#### *E. Conclusion*

This Part has shown how the Canadian experience with environmental regulation confirms Oates' analysis of standard cases of pollution and the optimal regulatory responses to them and suggests refinements to that analysis. In what follows, the analyses that have been developed in this Part and the previous one will be applied to an instance of transnational environmental regulation.

#### IV. THE DISAGGREGATED STATE IN TRANSNATIONAL ENVIRONMENTAL REGULATION: THE EXAMPLE OF THE NEW ENGLAND GOVERNORS (NEG) AND EASTERN CANADIAN PREMIERS (ECP)

This Part will show how a case of transnational environmental regulation (i) illustrates and further refines Oates' analysis of environmental feder-

---

63. See *supra* note 47 and accompanying text.

64. ACID RAIN STRATEGY, *supra* note 62, at 2, 5, 7. For a description of some of these international commitments see DWIVEDI ET AL., *supra* note 50, at 107-12.

65. *Id.*

alism, and (ii) reflects the trends in Canadian administrative federalism, as well as the general concerns raised by the theorists surveyed in the Introduction and by administrative law theorists. The specific case study selected—the NEG-ECP annual conference—offers a strong counterpoint to the positivist conception of international environmental law insofar as it involves neither unitary states expressing national purposes nor authoritative sources of law that have binding effects. Instead, the case study (i) represents disaggregated, rather than unitary states, (ii) focuses on informal legal mechanisms that do not have authoritative status and (iii) directs attention towards law's facilitative functions and away from law's binding force.

The NEG-ECP annual conference draws together two regional organizations – the Council of Atlantic Premiers and the New England Governors' Conference – and comprises participants from six states (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont) and five provinces (New Brunswick, Newfoundland, Nova Scotia, Prince Edward Island and Quebec).<sup>66</sup> It was established in 1973,<sup>67</sup> and the Conference has five main functions: “developing networks and relationships, taking collective action, engaging in regional projects and endorsing projects by others, undertaking research, and increasing public awareness of shared interests.”<sup>68</sup> Over its history, the NEG-ECP conference has addressed a wide range of areas of common interest, including issues of energy policy and concerns about acid rain and mercury pollution.<sup>69</sup> According to Professor Debora VanNijnatten, although the premiers and governors meet at the annual conference, the real work is done by “mid-level officials and experts via collaborative research projects, joint seminars (often for training air quality officials in the two countries), and the preparation of policy papers.”<sup>70</sup> The NEG-ECP conferences have generated a variety of action plans, including the Joint Climate Change Action Plan in 2001, which set out the following nine actions and goals to reduce greenhouse gas emissions: (i) establish a regional standardized greenhouse gas (GHG) emissions inventory, (ii) establish a plan for reducing GHG emissions and conserving energy, (iii) promote public awareness, (iv) state and provincial governments to lead by example, (v) reduce greenhouse gases from the electricity sector, (vi) reduce total energy demand through conservation, (vii) reduce and/or adapt to negative social, economic

---

66. Henrik Selin & Stacy D. VanDeveer, *Climate Leadership in Northeast North America*, in CHANGING CLIMATES IN NORTH AMERICAN POLITICS, *supra* note 54, at 111, 112-13.

67. *Id.* For a history of the Conference, see ULRIKE RAUSCH, *THE POTENTIAL OF TRANSBORDER COOPERATION: STILL WORTH A TRY?* (1997).

68. *New England Governors and Eastern Canadian Premiers' Annual Conference (NEG/ECP)*, COUNCIL OF ATLANTIC PREMIERS, <http://www.cap-cpma.ca/default.asp?mn=1.98.3.26> (last visited Apr. 10, 2013).

69. *Id.*

70. Debora L. VanNijnatten, *Analyzing the Canada-U.S. Environmental Relationship: A Multi-Faceted Approach*, 33 AM. REV. CAN. STUD. 93, 110 (2003).

and environmental impacts of climate change, (viii) decrease the transportation sector's growth in GHG emissions, and (ix) create a regional emissions registry and explore a trading mechanism.<sup>71</sup>

In addition to bringing together the relevant political actors in order to formulate action plans, the NEG-ECP conference has created and drawn on a network of civil servants, universities, government agencies and private actors to support its activities.<sup>72</sup> Scholars note that crown corporations and private actors, in particular, have incentives to support regional environmental regulation. For instance, Professors Selin and VanDeever note that Hydro Quebec can benefit from reductions in fossil fuel use in the region and owners of power plants in particular New England States have incentives to ensure that regulatory measures undertaken by one state apply to competitors across the region.<sup>73</sup> Moreover, one existing network upon which the NEG-ECP drew for support was the Ouranos consortium, which is a collaboration among the Canadian government, provincial government actors (including Hydro Quebec), universities (including UQAM, Laval and McGill), and independent research institutions (including the Institut national de la recherche scientifique).<sup>74</sup> The consortium focuses on the themes of *Climate Sciences* and *Impacts and Adaptation* and generates data on regional climate change that is useful to the NEG-ECP.<sup>75</sup> Based on recent reports, the NEG-ECP initiatives have yielded tangible results. In the most recent annual conference, it was reported that, based on available evidence "the region is likely to meet or exceed its GHG reduction target for 2010."<sup>76</sup>

The NEG-ECP conference confirms and extends the insights of transnational network, global administrative law and non-positivist and environmental theorists surveyed in this paper. The NEG ECP also represents an extension into the transnational sphere of trends in domestic administrative federalism. Consider first the fit between the insights of transnational net-

---

71. NEW ENGLAND GOVERNORS & EASTERN CANADIAN PREMIERS, CLIMATE CHANGE ACTION PLAN 2001 (2001), <http://www.gov.ns.ca/nse/climate.change/docs/NEG-ECP.pdf>.

72. For the interaction between Ouranos and the NEG-ECP, see Selin & VanDeever, *supra* note 66, at 111, 113.

73. Henrik Selin & Stacy D. VanDeever, *Canadian-U.S. Environmental Cooperation: Climate Change Networks and Regional Action*, 35 AM. REV. CAN. STUD. 353, 364 (2005).

74. For a full list of Ouranos members, see *Structure*, OURANOS: CONSORTIUM ON REGIONAL CLIMATOLOGY & ADAPTATION TO CLIMATE CHANGE, <http://www.ouranos.ca/en/our-organisation/structure.php> (last visited Apr. 10, 2013).

75. For a description of the consortium and its research mission, see *Mission and Context*, OURANOS: CONSORTIUM ON REGIONAL CLIMATOLOGY & ADAPTATION TO CLIMATE CHANGE, <http://www.ouranos.ca/en/our-organisation/mission-and-context.php>.

76. CANADIAN INTERGOVERNMENTAL CONFERENCE SECRETARIAT, RESOLUTION 35-5 RESOLUTION CONCERNING CLIMATE CHANGE (2011), <http://www.scics.gc.ca/english/conferences.asp?a=viewdocument&id=1660>.

work theory and the institutional arrangements of the NEG-ECP conference. The NEG-ECP conference is an example of the transnational network theorist's conception of the disaggregated state. Recall that transnational network theorists argue that transnational relations are conducted between actors within the component elements of various states, and not only between representatives, such as heads of states and foreign ministers, who claim to speak on behalf of the state as a whole.<sup>77</sup> As seen above, network theorists place particular emphasis on networks of regulators. In the NEG-ECP conference, it is not only actors within the legislative, adjudicative and administrative branches of various governments who are empowered to enter into treaties that conduct transnational relations. The NEG-ECP conference provides examples of representatives of states and province who do not have the legal capacity to enter into treaties conducting transnational relations. Moreover, the NEG-ECP conferences reach beyond the state to involve universities, actors in civil society and businesses in the task of regulating environmental issues of transnational significance. The NEG-ECP conferences provide institutional examples of transnational regulation that does not rest on the positivist assumptions of liberal internationalism. The conferences therefore fit into transnational network theory's shift in focus away from conceiving international relations as exclusively comprised of exercises of the sovereign will of unitary state towards a more layered and nuanced view of international relations.

The NEG-ECP conference also confirms the claims about the functions of transnational law made by global administrative law theorists. Recall that global administrative law theorists shift attention away from the positivist's focus on norms and practices that have binding force, towards the facilitative function of norms and practices that may not have binding legal effects.<sup>78</sup> According to Kingsbury, global administrative law addresses itself towards various publics and permits those publics to pursue the public good.<sup>79</sup> The NEG-ECP conference fits this description of global administrative law. It creates forums and mechanisms for publics, including provincial and state governments, the agencies of those governments, and civil society actors within the territory covered by the political boundaries of the NEG-ECP's members. These various publics pursue through the NEG-ECP conferences their conception of the public good, including that element of the public good which is related to shared environmental concerns.<sup>80</sup> Recall further that ac-

---

77. See *supra* notes 6-11 and accompanying text.

78. Professor Kristen Engel argues that American states participating in regional networks are likely constitutionally precluded by the Commerce Clause from setting mandatory requirements and imposing them on one another. Kirsten H. Engel, *Mitigating Global Climate Change in the United States: A Regional Approach*, 14 N.Y.U. ENVTL. L.J. 55, 73, 77 (2005).

79. See *supra* notes 12-25 and accompanying text.

80. Professor Debora VanNijnatten has argued that the conference has "little actual decision-making power, but the group's regular meetings have spawned con-

According to Kingsbury, global administrative law is valid law because it conforms with principles that have the effect of “channeling, managing, shaping and constraining political power.”<sup>81</sup> Consider the principle of rationality, which according to Kingsbury puts “pressure on decision-makers (and in some countries, on rule-makers) to give reasons for their decisions.”<sup>82</sup> Although the NEG-ECP does not have a system of judicial review, which is a standard means of giving effect to the principle of rationality, it does create a system of accountability that places pressure on its members to give reasons for their actions. The action plans generated at the conferences, along with the data produced by the Ouranos consortium, place pressure on the members of the NEG-ECP to justify the policy choices that bear on regional climate change.<sup>83</sup> These informal mechanisms, therefore, can be conceived of as valid global administrative law, according to Kingsbury’s account, because they conform to the principle of rationality.

The experience of the NEG-ECP suggests several possible refinements to the work of the federalism theorists considered in this Article and is consistent with the domestic developments in administrative federalism surveyed above. The NEG-ECP experience suggests that the federal role in environmental regulation imagined by Oates can be overstated. Oates presupposes that the federal government is always a significant player (whether through action or forbearance) in the regulation of matters affecting sub-federal actors.<sup>84</sup> Yet the experience of the NEG-ECP shows us that an effective regulatory network can be constituted by sub-federal actors who are affected by a particular governance challenge and who have mutual interests in regulating a matter. Far from being necessary to an effective solution to climate change, federal governments can be an impediment to such solutions. Indeed, as scholars who have examined recent agreements among cities from across the globe have noted, the failure of nation states to coordinate effectively and sign treaties with respect to climate change, has led sub-national entities such as states, provinces and cities to enter into their own agreements.<sup>85</sup> The NEG-ECP is one instance of this emerging trend, which suggests a challenge

---

siderable cooperative data-gathering and policy collaboration in areas such as air quality management and energy issues, and, most recently, CO2 emissions.” VanNijnatten, *supra* note 70, at 96.

81. Kingsbury, *Global Administrative Law*, *supra* note 12, at 32.

82. *Id.* at 33.

83. NGOs have played a key role in evaluating the progress of the member states and provinces. One example is the report cards issued by the Climate Action Network, Canada. See *2006 Report Card on Climate Change Action*, CLIMATE ACTION NETWORK (2006), <http://climateactionnetwork.ca/archive/e/publications/scorecard-cc-2006.pdf>.

84. See *supra* note 47 and accompanying text.

85. See, e.g., Richard B. Stewart, *States and Cities as Actors in Global Climate Regulation: Unitary vs. Plural Architectures*, 50 ARIZ. L. REV. 681, 683-84, 694 (2008).

to a positivist conception of federalism and support for non-positivist conceptions, such as Young's.<sup>86</sup> The coordinating function that federalism theorists imagine the federal government playing is filled instead by a collective body constituted by sub-federal actors of different federations. This collective body further resembles the ones illustrated above in the discussion of Canadian administrative federalism and is consistent with Young's ideas about federalism and her institutional prescriptions. Recall that Young argues that the relevant boundaries of her "regional federalism" should be defined by communities of interest rather than political borders and that she prescribes institutions within which the relevant interests could be discussed.<sup>87</sup> The NEG-ECP represents a regional community of interest – one that is not bounded by the borders of United States and Canada – and it provides a forum for interested parties in the region to discuss matters of common concern, including those related to climate change.

The experience of the NEG-ECP further suggests that Oates' model can be extended to include actors other than governments. Oates argues that governments of sub-federal units, when faced with reciprocal spillover pollution, will have incentives to cooperate in order to manage the costs of this kind of pollution. The NEG-ECP case suggests that similar incentives may exist for *non-state actors* to regulate where there are reciprocal economic effects that result from the regulation of pollution. As previously explained, Hydro Quebec and private power companies in New England states are motivated to push for regional pollution measures in order to gain a competitive advantage in the region or to ensure that regulation by any single state does not give an advantage to competitors in other states in the region. The relevant pool of actors who respond to spillover effects therefore extends beyond governments.

In conclusion, the NEG-ECP can be the source of novel insights for administrative law scholars. Instrument choice theorists tend to assume that state actors deploy regulatory instruments either by producing them directly or by entering into agreements with other actors who produce them.<sup>88</sup> The NEG-ECP case suggests a third possibility. Rather than being *selected* by the state, certain regulatory instruments can emerge as effective when different networks of policy actors interact with one another. The data generated by the Ouranos consortium became an effective regulatory instrument when it was passed from the network of researchers in the consortium to the network of policy makers and analysts in the NEG-ECP.<sup>89</sup> The regulatory instrument did not come into being at the express bidding of the state, but rather emerged

---

86. See *supra* notes 28-31 and accompanying text.

87. See *supra* notes 28-31 and accompanying text.

88. See Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, in *THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE* 1, 1-2 (Lester M Salamon & Odus V. Elliot eds., 2002) (discussing this aspect of the instrument choice theory).

89. Selin & Vandever, *supra* note 73, at 359-60.

as an effective tool when members of different networks with shared interests in climate regulation came into contact with one another and translated the information into policy action.

## V. CONCLUSIONS

This Article has pursued two broad goals. First, it has attempted to demonstrate how network theory, the theory of global administrative law, and theories of environmental and non-positivist federalism, find support in on-the-ground developments in administrative federalism and transnational regulation. The Canadian federation and the NEG-ECP conference were the case studies for these developments, and the domestic example provided a national analogue for the transnational case. A subsidiary objective has been to counter a positivist conception of international law, and while the non-positivist position argued in this Article is an alternative to the dominant positivist account, this Article does not intend to argue that the non-positivist position can replace that dominant account.

Second, this Article has attempted to demonstrate how a recent instance of transnational environmental regulation may advance theorists' work and may suggest future directions for policy makers. It is this Article's aim to contribute to the collective work of the group of scholars who gathered in Luxembourg. I hope that this Article may prove to be a useful contribution to the growing literature on comparative administrative law, and that more specifically, the analysis of the case study in Part IV will prove to be a useful contribution to the collective discussion of the conference theme of transnational administrative law. Finally, the case study treated in Part IV suggests that transnational networks of scholars can be effective vectors of ideas about administrative structures and policies. The participants in this discussion group and this research network are an important node in the emerging global network of administrative law scholars, and it is a delight to contribute, in however small a way, to this transnational project.