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I. INTRODUCTION

The North American Free Trade Agreement (NAFTA)[2] is now history, and, depending on where you are, as of July 1, 2020, the Canada-United States-Mexico Agreement (CUSMA) in Canada,[3] the United-States-Mexico-Canada (USMCA) in the United States,[4] or the Tratado entre México, Estados Unidos y Canadá (T-MEC)[5] is in force.[6] The renegotiation of NAFTA fulfilled candidate Donald Trump's promise to scrap or renegotiate NAFTA in order to protect and restore United States

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[2] North American Free Trade Agreement (NAFTA), Dec. 17, 1992, 32 I.L.M. 289.

[3] *See* Government of Canada, A New Canada-United States-Mexico Agreement, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/index.aspx (last visited Mar. 1, 2021). In French, it is called l'Accord Canada-États-Unis-Mexique (ACEUM). *Id.*

[4] *See* Office of the United States Trade Representative (USTR), United States-Mexico-Canada Agreement, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement (last visited Mar. 1, 2021).

[5] *See* Government of Mexico, Tratado entre México, Estados Unidos y Canadá (T-MEC) (Spanish only), https://www.gob.mx/t-mec (last visited Mar. 31, 2021).

[6] One is left to wonder why the three countries were unable to agree on a single name for the pact in English, and why the agreement's official name makes no reference to trade or investment, leaving a vague but false impression that it deals comprehensively with all matters of mutual concern to the signatories. One set of commentators observed that "[t]he seemingly trivial brand-name change from NAFTA to USMCA evinces a deeper problem of deinstitutionalization," or weakening of the post-Cold War international order more broadly. Gustavo A. Flores-Macías & Mariano Sánchez-Talanquer, *The Political Economy of NAFTA/USMCA*, OXFORD RESEARCH ENCYCLOPEDIA OF POLITICS 17 (Aug. 28, 2019), https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1662. This article will refer to the agreement as NAFTA's replacement or CUSMA-USMCA.

jobs and industrial capacity and increase economic growth,[7] themes that consistently helped define his trade agenda politically as President.[8] But what about the environment? When NAFTA was finalized early in the Clinton Administration in 1993, North American environmental groups insisted that the agreement address their concerns that liberalized trade and investment would lead to environmental dumping, environmental backsliding, weak environmental enforcement and scale effects (i.e., more trade equals more environmental impact).[9] The environmental provisions of NAFTA and its environmental side agreement, the North American Agreement on Environmental Cooperation (NAAEC),[10] responded to many of those concerns, at least on paper, and set the broad contours of United States trade and environment policy ever since.

Broadly speaking, rising socio-economic trends such as population, gross domestic product (GDP), foreign direct investment and many kinds of production and consumption, correlate strongly with rising ecological impacts, such as climate change, loss of biodiversity and other pressures on critical planetary boundaries of safe operating space for humanity.[11] Consistent with this correlation, while NAFTA and its progeny have taken effect over the past three decades, the aggregate ecological impacts of human activity, with international trade a major driver, have worsened according to many key measures. Within the hierarchy of planetary boundaries, climate change and biosphere integrity are reasonable proxies for broad-scale ecological impact because they are global-scale boundaries that are "highly integrated, emergent system level phenomena . . . connected to all of the other [boundaries]."[12] From January 1994 to January 2021, the atmospheric concentration of carbon dioxide measured

[7] Emily Stephenson & Amanda Baker, *Trump Vows to Reopen, or Toss, NAFTA Pact with Canada and Mexico,* Reuters (June 28, 2016, 3:06 AM), https://www.reuters.com/article/us-usa-election-idUSKCN0ZE0Z0; Mary E. Burfisher et al., *NAFTA to USMCA: What is Gained?,* (IMF, Working Paper No. 19/73, Mar. 26, 2019), https://www.imf.org/en/Publications/WP/Issues/2019/03/26/NAFTA-to-USMCA-What-is-Gained-46680.

[8] Dan Ciuriak, How U.S. Trade Policy Has Changed Under President Donald Trump – Perceptions From Canada (Mar. 29, 2019), https://ssrn.com/abstract=3362910.

[9] *See* Geoffrey Garver, *Forgotten Promises: Neglected Environmental Provisions of the NAFTA and the NAAEC, in* NAFTA and Sustainable Development: History, Experience and Prospects for Reform 15 (Hoi L. Kong & L. Kinvin Wroth eds., 2015); Linda J. Allen, *The Environment and NAFTA Policy Debate Redux: Separating Rhetoric from Reality*, 42 William & Mary Env't L. & Pol'y Rev. 965, 970-71 (2018).

[10] North American Agreement on Environmental Cooperation (NAAEC), Sept. 14, 1993, 32 I.L.M. 1480.

[11] *See* Will Steffen et al., *Planetary Boundaries: Guiding Human Development on a Changing Planet,* 347 Science 1259855, 1259855-8 (2015); Xuemei Bai et al., *Plausible and desirable futures in the Anthropocene: A new research agenda,* 39 Global Environmental Change 351 (2016).

[12] Steffen et al., *supra* note 11, at 8.

at Mauna Loa rose sixteen percent, from to 358.24 ppm to 415.28 ppm.[13] Biodiversity loss, measured by risk of species extinction, overall species abundance or biodiversity intactness, steadily worsened over this period as well.[14] International trade has contributed significantly to this loss of biodiversity, particularly as higher-income countries have increased their consumption of goods from lower-income countries where habitat loss and other threats to biodiversity are especially severe—as in Mexico and other parts of Latin America and the Caribbean.[15] Trade has also factored significantly in the ongoing rise in ecological footprint globally, in North America, and in Canada, Mexico and the United States individually since 1994, despite some relative (but not absolute) decoupling of some ecological impacts from trade-related consumption.[16]

So, what kind of environmental provisions would a new NAFTA, negotiated with no evident consideration of these broad regional and global ecological trends, at the insistence of a climate skeptic, environmentally insouciant President backed initially with Republican majorities in both houses of Congress, include?[17] In the end, the NAFTA's replacement made no radical changes for better or worse in regard to the environment. Indeed, the agreement has been described as mostly "old wine in a new bottle."[18] The agreement brings North American trade and environment policy more or less in line with post-NAFTA trade agreements of the three countries without changing the basic structure for approaching trade and environment that, with some small tweaks, has been in place since NAFTA. And, that is precisely the problem. The trade and environment policy regime of CUSMA-USMCA perpetuates an approach that remains blind to, and ineffective in confronting, the most pressing ecological challenges that global and regional trade and investment help drive.

In this article, I will first review, analyze and critique the key changes that NAFTA's replacement made to the environmental provi-

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[13] Monthly CO2, *Mauna Loa CO_2: January 2021*, CO2 Earth, https://www.co2.earth/monthly-co2 (last visited Mar. 23, 2021). *See also* Quentin Karpilow et al., NAFTA: 20 Years of Costs to Communities and the Environment 6 (Mar. 2014) (noting that from 1990 to 2005, greenhouse gas emissions rose by 17% in the United States, 26% in Canada and 37% in Mexico).

[14] *See* WWF, Living Planet Report 2020: Bending the Curve of Biodiversity Loss 28 (R.E.A. Almond et al., eds., 2020) (Switz.) (hereinafter LPR 2020).

[15] *See* LPR 2020, *supra* note 14, at 17-20, 52.

[16] WWF, Living Planet Report 2008 28-29 (Chris Hails et al. eds., 2008) (Switz.). For more detail regarding the rising ecological footprint in North America, *see* discussion *infra* Section III.A.

[17] *See* Ruth Zavala, *El ACAAN y sus instituciones como catalizadores de la gobernanza ambiental en Meéxico: del TLCAN al T-MEC* (*The NAAEC and Its Institutions as Catalysts for Environmental Governance in Mexico: From NAFTA to the USMCA*), 15 Norteamérica 9 (2020).

[18] Flores-Macías & Sánchez-Talanquer, *supra* note 6, at 16.

sions of NAFTA and the NAAEC. I will then explain why the environmental provisions of CUSMA-USMCA and its ancillary Environmental Cooperation Agreement (ECA),[19] like the environmental policy approach typical of post-NAFTA trade and investment agreements, are woefully inadequate for helping to solve urgent challenges, like climate change and loss of biodiversity, that the human enterprise faces in these ecologically dire times.

II. Comparison of CUSMA-USMCA's Environmental Provisions To Those of NAFTA and NAAEC

Like nearly all post-NAFTA trade and investment agreements involving at least one of the NAFTA parties, the CUSMA-USMCA includes an environment chapter,[20] no longer relegating environment largely to a side agreement.[21] Only time will tell whether this change will give greater weight to the environment in the North American trade arena or will lead to party-to-party enforcement of environmental matters that are now subject to the agreement's dispute resolution provisions.[22] However, there are many reasons for suspecting that the environmental revisions in NAFTA's replacement will have only modest impact, at best.

A. Adopting, Maintaining and Improving on High Levels of Environmental Protection

Akin to the sailor's trick of tying many knots if you do not know the right one, the parties loaded NAFTA and the NAAEC with many overlapping efforts to stymie any conceivable effort to make the adoption or maintenance of ever higher levels of environmental protection in North America in any way enforceable. Both NAFTA and the NAAEC made

[19] Agreement on Environmental Cooperation among the Governments of Canada, the United States of America, and the United Mexican States (ECA) (2019), https://www.international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/cusma-aceum/cusma-ECA.pdf (hereinafter Environmental Cooperation Agreement).

[20] United States-Mexico-Canada Agreement art. 24, Sept. 30, 2018, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement (hereinafter CUSMA-USMCA or ECA).

[21] I.e., the NAAEC.

[22] For a cautiously optimistic perspective, *see* Anne-Catherine Boucher, *The USMCA Contains Enhanced Environmental Protection Provisions but Will They Lead to Substantive Environmental Protection Outcomes?*, American Bar Association (Nov. 20, 2020), https://www.americanbar.org/groups/environment_energy_resources/publications/ierl/20201120-the-usmca-contains-enhanced-environmental-protection-provisions/. Canada's and the United States' self-serving environmental reviews are also quite optimistic about the agreement's environmental provisions; *see* discussion *infra* Section II.C.

the desire for ever-improving environmental standards explicit policy. In NAFTA's preamble, the parties stated their aim "to strengthen the development and enforcement of environmental laws and regulations,"[23] and in the NAAEC preamble they noted "the importance of the environmental goals and objectives of the NAFTA, including *enhanced* levels of environmental protection."[24] The NAAEC also included the agreed objective to "foster the protection and *improvement* of the environment in the territories of the Parties for the well-being of present and future generations."[25] Yet, these statements of policy objectives would need teeth to make them credible and meaningful.

The text of NAFTA and the NAAEC clearly did not provide those teeth, despite the use of "shall" in regard to some of the relevant mandates. The requirement in NAAEC article 3 that each party "shall ensure that its laws and regulations provide for high levels of environmental protection" is fatally qualified by the parties' recognition in the same article of each party's "right to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and regulations."[26] Further, article 3 requires only that each party "shall *strive* to continue to improve those laws and regulations,"[27] a hobbled mandate that is likewise subject to the parties' right to establish or modify their domestic levels of environmental protection. Article 906(2) of NAFTA, which suggested a policy of upward harmonization of North American health, environmental and safety standards, diluted any mandate to do so with language that the parties "shall, *to the greatest extent practicable*, make compatible their respective standards-related measures, so as to facilitate trade in a good or service between the Parties."[28] NAFTA article 714(1) uses nearly identical language with regard to sanitary and phytosanitary measures.[29] The strongest suggestion of a policy of non-regression in either NAFTA or the NAAEC, in NAFTA article 1114(2), avoided the use of "shall" altogether and provided party-to-party consultations as the sole remedy:

> The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party *should not* waive or otherwise derogate from, or

[23] NAFTA Preamble.
[24] NAAEC Preamble.
[25] NAAEC art. 1(a) (emphasis added).
[26] NAAEC art. 3.
[27] *Id.* (emphasis added)
[28] NAFTA art. 906(2) (emphasis added).
[29] NAFTA art. 714(1).

> offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.[30]

When NAFTA was adopted, these environmental "mandates" were widely seen to be mere aspirational policy statements.[31] Not surprisingly, then, these provisions of NAFTA and the NAAEC have been entirely ineffectual in preventing environmental backsliding in Canada, Mexico and the United States, all of which have done so,[32] or in ensuring significant upward harmonization of North American environmental standards.[33] Indeed, despite numerous instances of weakening of environmental laws and regulations among the NAFTA parties, no party has ever sought consultations or even developed a means for tracking the other parties' compliance with this soft mandate.[34]

In contrast, the CUSMA-USMCA jettisoned any ambition for upward harmonization of environmental standards but retained soft requirements for the parties to achieve high levels of environmental protection of their own choosing and to avoid environmental backsliding. Article 24.3 preserves the unenforceable mandate to "strive" for high levels of environmental protection,[35] as well as the qualification that each party reserves its sovereign right "to establish its own levels of domestic environmental protection and its own environmental priorities, and to establish, adopt, or modify its environmental laws and policies accordingly."[36] However, CUSMA-USMCA chapters 9 (Sanitary and Phytosanitary Measures) and 28 (Good Regulatory Practices), undercut any objective

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[30] NAFTA art. 1114(2) (emphasis added).

[31] *See* Garver, *supra* note 9, at 25-26.

[32] *See id.* at 22-25; GEOFFREY GARVER, ECOLOGICAL LAW AND THE PLANETARY CRISIS: A LEGAL GUIDE FOR HARMONY ON EARTH 193-95 (2021).

[33] *See* Halil Hasic, *Article 1110 of NAFTA: Investment Barriers to Upward Harmonization of Environmental Standards*, 12 SW. J. L. & TRADE AM. 137, 139 (2005). Nonetheless, successes such as Mexico's phase out of DDTs and its adoption of a national pollutant release and transfer inventory, the *Registro de Emisiones y Transferencia de Contaminantes*, akin to Canada's National Pollutant Release Inventory and the United States' Toxics Release Inventory are noteworthy. *See* Government of Mexico, *Registro de Emisiones y Transferencia de Contaminantes (RETC)*, https://www.gob.mx/semarnat/acciones-y-programas/registro-de-emisiones-y-transferencia-de-contaminantes-retc.

[34] During the author's time on the JPAC from 2010 to 2013, it became clear through informal discussions with government representatives that no systems were in placed to track other parties' performance in this regard. In addition, a search of relevant government websites revealed no evidence of such efforts.

[35] CUSMA-USMCA, art. 24.3(2).

[36] CUSMA-USMCA, art. 24.3(1).

of strengthened environmental measures with provisions that prohibit such measures from being any stronger than necessary.[37] In essence, the CUSMA-USMCA, like nearly all contemporary free trade agreements, adopts a reverse precautionary approach, whereby instead of promoting precaution to ensure that environmental measures are not too weak, it promotes trade-protective precaution to ensure that they are not too strong.

In addition, the "should" in NAFTA's toothless article 1114(2) became a "shall" in CUSMA-USMCA article 24.4(3), which states that "a Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental laws in a manner that weakens or reduces the protection afforded in those laws in order to encourage trade or investment between the Parties."[38] As well, the remedy for environmental regression under article 24.4(3) is full dispute resolution under CUSMA-USMCA's chapter 31 on dispute settlement, not consultations as under NAFTA article 1114(2).[39] Yet, that has been the case for many of Canada's and the United States' post-NAFTA trade and investment agreements,[40] which have incorporated environmental chapters with similar language directly into the agreement and not relegated them to a side

[37] *See, e.g*., CUSMA-USMCA art. 9.6(2) ("Each Party has the right to adopt or maintain sanitary and phytosanitary measures necessary for the protection of human, animal, or plant life or health, *provided that those measures are not inconsistent with the provisions of this Chapter*") (emphasis added). Those other provisions include requirements to adopt the least trade restrictive measures possible. *See* CUSMA-USMCA arts. 9.6(10), 9.13(8). In general, CUSMA-USMCA chapter 28 is replete with bureaucratic procedures that seem aimed at rendering the adoption or maintenance of regulations more time-consuming and difficult, with one objective being to "avoid unnecessary restrictions on competition in the marketplace" (art. 28.4(1)(f)). For example, the parties are required to have in place processes for assessing regulatory impacts (art. 28.4(1)(e)), to publish a list of anticipated regulations a year in advance with an indication of any expected significant impact on international trade and investment (art. 28.6), to develop a website dedicated to providing the information required under chapter 28 (art. 28.7), to expand opportunities for comments on regulations and to evaluate all such comments in writing (art. 28.9), and to have a process for retrospective reviews of regulations with a view to modifying or repealing them on its own initiative or at the request of any interested person (arts. 28.13, 28.14). One commentator concludes that Chapter 28 is a big win for multinational corporations and that it "places significant burdens on regulatory agencies that are, in many cases, already under-resourced." Kyla Tienhaara, *NAFTA 2.0: What are the implications for environmental governance,* 1 Earth System Governance 1, 2 (2019).

[38] CUSMA-USMCA art. 24.4(3).

[39] CUSMA-USMCA art 24.32.

[40] *See, e.g.,* US-Peru Trade Promotion Agreement art. 18.3(2); US-Panama FTA art. 17.3(2); KORUS FTA art. 20.3(2); Trans-Pacific Partnership Agreement art. 20.3(6); Canada-Colombia FTA art. 1702; Canada-EU Comprehensive Economic and Trade Agreement art. 24.5(2). Some U.S. agreements, such as CAFTA-DR and the US-Chile FTA, use the weaker "shall strive to ensure" instead of "shall." *See* CAFTA-DR, art. 17.2(2); US-Chile FTA, art. 19.2(2). *See generally* Free Trade Agreements, Office of the U.S. Trade Representative, https://ustr.gov/trade-agreements/free-trade-agreements (last visited Mar. 31, 2021); *and* Trade and Investment Agreements, Government of Canada, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx (last visited Mar. 31, 2021).

agreement like the NAAEC. Not surprisingly, neither Canada, the United States nor any of their trading partners has ever initiated a dispute regarding weakened environmental laws under provisions akin to CUSMA-USMCA article 24.4(3). Not only would a such a claim require proof that a waiving or derogation of an environmental law (terms that the agreement does not define or contextualize) was done in order to promote trade or investment, but the party making the claim would also have to contend with other provisions, such as CUSMA-USMCA article 24.3, that give the parties wide discretion to choose and modify (i.e., strengthen *or* weaken) the level of environmental protection they deem appropriate.

Chapter 24 of CUSMA-USMCA actually is replete with party mandates regarding the environment, expressed using "shall", that are now technically subject to dispute settlement under chapter 31. For example, each party "shall promote public awareness of its environmental laws and policies,"[41] "shall provide for the receipt and consideration of written questions or comments from persons of that Party regarding its implementation of this Chapter,"[42] "shall" ensure that certain procedures are available to redress environmental harms,[43] "shall take measures to prevent the pollution of the marine environment from ships,"[44] "shall take measures to prevent and reduce marine litter,"[45] "shall" encourage corporate social responsibility and responsible business conduct,[46] "shall promote and encourage the conservation and sustainable use of biological diversity, in accordance with its law or policy,"[47] "shall seek to operate a fisheries management system that regulates marine wild capture fishing,"[48] "shall" promote the conservation of marine species,[49] "shall" take action to end certain fisheries subsidies,[50] and "shall" cooperate or exchange information on a number of topics.[51] However, nearly all of these "shall" mandates are either not of a nature that would likely lead to a trade dispute or contain modifying language that makes them virtually unenforceable. Additional weaknesses of the mandates in chapter 24 are discussed below, in connection with the provisions on environmental en-

[41] CUSMA-USMCA art. 24.5(1).
[42] CUSMA-USMCA art. 24.5(2).
[43] CUSMA-USMCA art. 24.6.
[44] CUSMA-USMCA art. 24.10(1).
[45] CUSMA-USMCA art. 24.12(2).
[46] CUSMA-USMCA art. 24.13.
[47] CUSMA-USMCA art. 24.15(2).
[48] CUSMA-USMCA art. 24.18(1).
[49] CUSMA-USMCA art. 24.19.
[50] CUSMA-USMCA art. 24.20.
[51] *See*, *e.g.*, CUSMA-USMCA arts. 24.15(6) (biodiversity), 24.21(2)(g) (illegal fishing), 24.22(2) (illegal trade in species), and 24.23(5) (forest management).

forcement, environmental impact assessment and multilateral environmental agreements.

B. Addressing Weak or Ineffective Environmental Enforcement

The CUSMA-USCMA retains, with some modifications, the two primary mechanisms in the NAAEC for addressing concerns that a party is failing to effectively enforce its environmental law: (1) the submissions on enforcement matters (SEM) process, which allows North American persons or organizations to seek preparation by the CEC Secretariat of a detailed factual record regarding allegations of ineffective environmental enforcement by a party;[52] and (2) the party-to-party dispute resolution process in NAAEC Part V, which allowed a party to seek remedies for another party's persistent pattern of failing to effectively enforce its environmental law.[53] In the case of the SEM process, the CUSMA-USMCA and the ECA include modest revisions regarding follow up to factual records. They allow the new Environment Committee[54] and the Council to consider cooperative activities that respond to information in factual records,[55] and the CUSMA-USMCA requires the parties to "provide updates to the Council and the Environment Committee on factual records, *as appropriate*."[56]

These mostly cosmetic changes to the SEM process fail to address the most prominent concerns that users and observers of the process have raised since its inception. The chief concern is that the process lacks adequate independence from the parties, acting individually or collectively as the Council, to be credible and effective.[57] Party or Council interference with the independence of the process, and the Secretariat's role in administering it, has occurred most egregiously in Council votes on whether to authorize the Secretariat to prepare a factual record for a submission and in factual record instructions where one is authorized.

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[52] *See* NAAEC art. 14, 15; CUSMA-USMAC art. 24.27, 24.28.

[53] *See* NAAEC art. 22 et seq.; *cf.* CUSMA-USMCA art. 24.4(1), (2).

[54] *See* discussion *infra* Section II.E.

[55] CUSMA-USMCA art. 24.28(7); ECA art. 4(1)(m).

[56] CUSMA-USMCA art. 24.28(8) (emphasis added). This language effectively makes the provision of updates discretionary, not mandatory. Based on experience to date following revised SEM guidelines adopted in 2012 with similar language, it is likely that these updates will rarely if ever be provided. *See* Council Ministerial Statement (July 11, 2012) (revised guidelines "call for Parties to follow up on concluded submissions with information on any new developments and actions taken regarding matters raised in such submissions.")

[57] *See* Garver, *supra* note 32, at 200; Paul Stanton Kibel, *Awkward Evolution: Citizen Enforcement at the North American Environmental Commission,* 32 Env't. L. Rep. News & Analysis 10769 (2002) *passim.*

For example, in the case of several submissions, the Council has either voted against preparation of a factual record or issued instructions, typically drafted by the party whose environmental enforcement is the target of the submission, that significantly diverged from what the submission asked for and what the Secretariat recommended.[58] In the Species at Risk submission involving Canada, the scope of the factual record authorized by the Council diverged so significantly from what the Submitters requested and what the Secretariat recommended that the Submitters withdrew the submission instead of allowing a distorted factual record to be published.[59] Because of these concerns, the JPAC informed the Council in 2011, following a survey, that the credibility and utility of the process as an independent accountability mechanism was seriously eroded in that many environmental NGOs found the process did not provide information they were seeking or resolve their concerns.[60] The modest changes made in the CUSMA-USMCA and the ECA do virtually nothing to address the most serious flaws in the SEM process, the most prominent of which is the built-in conflict of interest[61] that parties face as both targets and (through the Council) active manipulators and overseers of the process.

Under the regime of NAFTA and the NAAEC, Part V of the NAAEC never came to life. Canada, Mexico and the United States never adopted the rules of procedure for Part V required under NAAEC Article 28 or established a roster of Part V arbitrators as required under NAAEC

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[58] GARVER, *supra* note 32, at 200; JPAC, Advice to Council 11-04 — Submissions on Enforcement Matters (SEM) and Cross Border Movements of Chemicals in North America 2 (December 7, 2011), http://www.cec.org/files/documents /jpac_advice_council/jpac-advice-11-04-en.pdf ("JPAC advises the Council that its focus . . . should be on the timeliness and accessibility of the process, *on giving more deference to the Secretariat's independent recommendations and interpretations in the process*, and on follow-up to factual records") (emphasis added).

[59] Letter from Devon Page, Ecojustice, to Evan Lloyd, CEC Secretariat (Jan. 17, 2011), http://www.cec.org/wp-content/uploads/wpallimport/files/06-5-not_en.pdf.

[60] JPAC, Advice to Council 11-04, *supra* note 58.

[61] *See* Garver, *supra* note 9, at 26; JPAC, Advice to Council 03-05 — Limiting the scope of factual records and review of the operation of CEC Council Resolution 00-09 related to Articles 14 and 15 of the North American Agreement on Environmental Cooperation 3 (Dec. 17, 2003), http://www.cec.org/files/documents/jpac_advice_council/jpac-advice-03-05-en.pdf (noting "an emerging perception of Council being in conflict of interest" and recounting public testimony at a JPAC meeting that "Council is having a hard time differentiating their role-when they are acting as a Council and when they are acting individually as Parties"); Geoff Garver, *Tooth decay* 25 ENV'T F. 34, 38 (May/June 2008) ("Providing the CEC secretariat with greater discretion to define the scope of factual record investigations would address a fundamental concern about the process: the inherent conflict of interest that the NAFTA governments face in being both council members who vote on factual records and also, since the council is composed of the three countries' environmental ministers, targets of individual submissions."); David Markell, *The Role of Spotlighting Procedures in Promoting Citizen Participation, Transparency, and Accountability*, 45 WAKE FOREST L. REV. 425, 440 (2010).

Article 25. Further, no party to the NAAEC has ever initiated a Part V dispute with another party, just as no government party to any of the myriad post-NAFTA agreements[62] with this type of provision targeting persistent failures to effectively enforce environmental law has ever initiated such a dispute. This wholesale failure to use Part V and similar provisions is most likely because of serious structural flaws in the dispute process, especially key definitions and burdens of proof.[63] In particular, a successful party claimant would have to defeat exceptions for *bona fide* decisions to allocate enforcement resources to higher priority matters and for reasonable exercise of enforcement discretion, as well as to prove a sustained or recurring course of action amounting to a persistent pattern of weak environmental enforcement linked to trade.[64] Despite a risible clarification in the CUSMA-USMCA that sustained or recurring failure to effectively enforce environmental law is presumed to be "in a manner affecting trade or investment between the Parties, unless the responding Party demonstrates otherwise,"[65] disputes regarding such failures of environmental enforcement are likely to remain "a Pandora's box no government is likely to open."[66]

C. Environmental Impact Assessment

Chapter 24 of CUSMA-USMCA includes new language making it mandatory for each party to have "*appropriate* environmental impact assessment procedures for assessing the environmental impact *of proposed projects* that are subject to an action *by that Party's central level of government* that may cause significant effects on the environment,"[67] and that these include provisions for public disclosure of information and public participation.[68] Putting aside that the word "appropriate" renders this language effectively unenforceable, the need for this provision is elusive, because Canada, Mexico and the United States all have had environmental impact assessment requirements for their federal govern-

[62] *See, e.g.,* US-Colombia FTA, Articles 18.3(1), 18.12; DR-CAFTA, Articles 17.2(1), 17.10; US-Peru TPA, Articles 18.3(1), 18.12; US-Panama TPA, Articles 17.3(1), 17.11; US-Chile FTA, Articles 19.2(1), 19.6; US-Australia FTA, Articles 19.2(1), 19.7; Canada-EU Comprehensive Economic and Trade Agreement art. 24.5(3); Comprehensive and Progressive Agreement for Trans-Pacific Partnership art. 20.3(4); Canada-Colombia Agreement on the Environment art.2(2).

[63] *See* NAAEC art. 22 et seq.

[64] *See* Garver, *supra* note 9, at 27-28.

[65] CUSMA-USMCA, art. 24.4(1) note 5.

[66] Garver, *supra* note 9, at 28 (quoting Geoff Garver, *Tooth Decay*, 25 Env't. F. 34, 39 (May/June 2008)).

[67] CUSMA-USMCA art. 24.7(1) (emphasis added).

[68] CUSMA-USMCA art. 24.7(2).

ments since before NAFTA.[69] Moreover, the agreement excludes sub-national levels of government, whose projects can elude federal requirements,[70] and strategic or regional environmental impact assessments of policies and programs, which are mandatory at the federal level in the United States but not in Canada or Mexico.[71] If the intent was to preserve the mandate in the NAAEC requiring each party to "assess, as appropriate, environmental impacts,"[72] the governments opted to weaken the requirement by referring only to federal projects rather than strengthen it by expanding it explicitly to include sub-national levels of government and strategic impact assessment.

Ironically, both Canada and the United States conducted environmental impact assessments of the CUSMA-USMCA,[73] both of which fall far short of the gold standard for rigorous and objective scientific impact assessment designed to identify and avoid or mitigate significant environmental impacts. The United States Trade Representative's (USTR's) environmental review,[74] conducted without the rigor generally applied under NEPA, is more of a pro-USMCA public relations pamphlet than a credible environmental impact assessment. It mostly touts the expected benefits of the environmental provisions that were included, states that no significant negative environmental impacts were identified and glaringly excludes analysis of climate impacts, despite a few references to pre-existing binational or trinational cooperation on some climate issues

[69] Canada may have sought to include this provision, which it has included in some post-NAFTA agreements. *See, e.g.*, Canada-Colombia Agreement on the Environment art. 2(5).

[70] Negotiation of the Transboundary Environmental Impact Assessment (TEIA) agreement called for under NAAEC Article 10(7) collapsed in 1999, in part because of Mexico's concern that a Texas low-level nuclear waste site, which was subject to state environmental assessment law but not NEPA, would not be covered by a TEIA agreement. Because such a project would trigger a federal environmental impact assessment in Mexico, the Texas example revealed a serious lack of reciprocity among the parties. *See* Geoffrey Garver & Aranka Podhora, *Transboundary Environmental Impact Assessment as Part of the North American Agreement on Environmental Cooperation*. 26 Impact Assessment and Project Appraisal 253, 259 (2008).

[71] In the United States, the National Environmental Policy Act (NEPA) mandates environmental impact assessment for major federal actions, which includes programs and policies. 42 U.S.C. § 4332(2)(C). In Canada, regional and strategic impact assessments are discretionary. Impact Assessment Act (S.C. 2019, c. 28, s. 1) §§ 92, 95(1). Mexico has no federal mandate to conduct strategic environmental assessments for federal policies or programs.

[72] NAAEC, art. 2(1)(e).

[73] The author could find no environmental assessment of T-MEC by Mexico.

[74] USTR, Final Environmental Review of the United States-Mexico-Canada Agreement (2019), https://ustr.gov/sites/default/files/files/agreements/usmca/USMCA_Final_Environmental_Review.pdf. The review was conducted not under NEPA, but under the Clinton-era Executive Order 13141, which includes language that insulates environmental reviews of trade agreements from judicial review. E.O. 13141 § 7 (Nov. 16, 1999). In Public Citizen v. United States Trade Representative, 5 F.3d 549, 553 (D.C. Cir. 1993), *cert. denied*, 510 U.S. 1041 (1994), the D.C. Circuit held that negotiation of trade agreements such as NAFTA is not subject to judicial review, effectively precluding application of NEPA to trade agreements.

that will continue after the agreement is in force.[75] And Canada's environmental review is dated July 14, 2020,[76] two weeks *after* CUSMA-USMCA took effect. Thus, one can hardly expect it to have met the core objective of environmental assessment to consider potential impacts early in the decision-making process so any important environmental impacts can be avoided or mitigated. Instead, it appears to be mostly a post-hoc analysis and justification of the agreement.[77] The review notes that "CUSMA generally carries forward the key provisions of NAFTA, including virtually tariff-free market access, and therefore important environmental considerations of relevance to North American trade are not expected to change significantly with the transition to the new Agreement."[78] Despite this forecast of no significant change from NAFTA and the exclusion of climate change in the CUSMA-USMCA, the review optimistically concludes:

> Based on the environmental impact studies undertaken on NAFTA, as well as on the qualitative chapter-by-chapter assessment of the environment-related provisions under CUSMA, this report finds that CUSMA's impacts on the environment will be more positive than NAFTA as the new Agreement is expected to strengthen environmental protection and governance practices in North America.[79]

D. Enforcement of Multilateral Environmental Agreements Through CUSMA-USMCA

The CUSMA-USMCA goes beyond NAFTA, which gave three multilateral environmental agreements (MEAs) qualified precedence over NAFTA,[80] by referring to a longer list of seven MEAs[81] and requiring each party to "adopt, maintain, and implement laws, regulations, and

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[75] USTR, *supra* note 74.

[76] Government of Canada, Final Environmental Assessment of the Canada-United States-Mexico Agreement (CUSMA) (July 16, 2020), https://www.international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/cusma-aceum/final_ea-ee_finale-en.pdf.

[77] *Id.*

[78] *Id.* at 3.

[79] *Id.* at 4. The environmental review is entirely devoid of any rigorous explanation or justification for this expectation.

[80] NAFTA art. 104. The listed agreements included the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol), and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention), which prevailed over inconsistent provisions of NAFTA "to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement." NAFTA art. 104(1).

all other measures necessary to fulfill its respective obligations" under them.[82] This party obligation is enforceable through the agreement's party-to-party dispute settlement provisions, as long as the alleged violation is "in a manner affecting trade or investment between the Parties."[83] This is one of the more significant new enforceable provisions, although whether and how any such violations will be addressed through the dispute settlement mechanism, and whether the arbitrators to any such disputes will be competent to adequately address claims regarding MEAs, remains to be seen. Moreover, the exclusion of the Paris Climate Agreement from the list of MEAs, along with the absence of other significant provisions in the agreement regarding mitigation of or adaptation to climate change, is a glaring omission.[84]

E. Environment Committee

Although the CUSMA-USMCA and the ECA retain the CEC Council,[85] the CUSMA-USMCA also establishes an Environment Committee "composed of senior government representatives, or their designees, of the relevant trade and environment central level of government authorities of each Party"[86] whose purpose is to oversee implementation of Chapter 24.[87] By contrast, the CEC Council is made up of "the cabinet-level or equivalent representatives responsible for environmental affairs of the Parties, or their designees."[88] The CUSMA-USMCA calls for the Environment Committee to meet within one year of the July 1, 2020, entry into force of the agreement,[89] but as of April 2021, the committee

[81] The seven listed MEAs are "the Convention on International Trade in Endangered Species of Wild Fauna and Flora, done at Washington, March 3, 1973, as amended; the Montreal Protocol on Substances that Deplete the Ozone Layer, done at Montreal, September 16, 1987, as adjusted and amended; the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, done at London, February 17, 1978, as amended; the Convention on Wetlands of International Importance Especially as Waterfowl Habitat, done at Ramsar, February 2, 1971, as amended; the Convention on the Conservation of Antarctic Marine Living Resources, done at Canberra, May 20, 1980; the International Convention for the Regulation of Whaling, done at Washington, December 2, 1946; and the Convention for the Establishment of an Inter-American Tropical Tuna Commission, done at Washington, May 31, 1949." CUSMA-USMCA art. 24.8(4).

[82] CUSMA-USMCA art. 24.8(4).

[83] CUSMA-USMCA art. 24.8 note 6.

[84] *See* Press Release, NRDC, NAFTA Rewrite Fails Key Climate Test (Dec. 9, 2019), https://www.nrdc.org/media/2019/191209.

[85] *See* NAAEC arts. 8-10 (Part III).

[86] CUSMA-USMCA art. 24.26(2).

[87] CUSMA-USMCA art. 24.26(3).

[88] ECA, art. 3(1).

[89] CUSMA-USMCA art. 24.26(4).

does not appear to have been established.[90] The agreement leaves much to be clarified in regard to the relationship between the Environment Committee, whose focus appears to be Chapter 24,[91] and the Council, whose focus appears to be the ECA.[92] Whether these two trinational committees will be complementary or conflictual remains to be seen; certainly, the formal inclusion of trade-related officials on the Environment Committee could lead to conflicts with the more environmentally oriented Council, although pre-existing domestic interagency processes within the federal governments of Canada, Mexico and the United States already provide fertile ground for such trade and environment conflicts.

F. Tri-National Environmental Cooperation

The ECA, which is parallel to the CUSMA-USMCA, maintains the Commission for Environmental Cooperation (CEC) established under the NAAEC and its three main constituent bodies, the Council, the Secretariat and a smaller Joint Public Advisory Committee (JPAC).[93] The Council retains its broad authority to establish the strategic priorities and work program of the CEC, and the ECA identifies the following initial priorities for cooperation: "[s]trengthening environmental governance;" "[r]educing pollution and supporting strong, low emissions, resilient economies;" "[c]onserving and protecting biodiversity and habitats;" "[p]romoting the sustainable management and use of natural resources;" and "[s]upporting green growth and sustainable development."[94] Overall, the CUSMA-USMCA does not set in motion any major changes in the functioning or structure of the CEC.

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[90] Neither the USEPA nor the Environment and Climate Change Canada webpages that list the committees related to the CUSMA-USMCA's environmental provisions included the Environment Committee in early April 2021. USEPA, International Cooperation, https://www.epa.gov/international-cooperation/epas-role-north-american-commission-environmental-cooperation-cec (last visited Apr. 7, 2021); Government of Canada, International Affairs and the environment, https://www.canada.ca/en/environment-climate-change/corporate/international-affairs.html (last visited Apr. 7, 2021). However, in an e-mail communication with the author, the Government of Canada indicated that plans for holding the first formal meeting of the Environment Committee prior to July 1, 2021, were underway as of the end of March 2021. E-mail from CUSMA Inquiry, Global Affairs Canada, to Geoffrey Garver (Mar. 30, 2021).

[91] *See* CUSMA-USMCA art. 24.26(3).

[92] *See* ECA art. 4.

[93] ECA art. 2. The JPAC must now consist of at least nine members, instead of fifteen as the NAAEC mandated. ECA art. 6.

[94] ECA art. 10(2).

G. Modification of the Investor-State Dispute Mechanism

The CUSMA-USMCA includes significant changes in regard to investor-state disputes that were possible under NAFTA Chapter 11.[95] NAFTA Chapter 11 included an unprecedented waiver of sovereign immunity that allowed a private investor to sue a NAFTA government in arbitration that bypassed national judicial systems if the investor believed the government treated the investment unfairly under NAFTA's investment rules, and environmental groups have highlighted evidence that these investor-state disputes have undermined environmental regulation and protection in North America.[96] Most notably, the CUSMA-USMCA phases out investor-dispute settlement between Canada and the United States, thereby removing in part the potentially chilling effect that those disputes can have on strong environmental laws and regulations.[97] Nonetheless, they are retained with some modifications for Mexico and the United States, and the Trans-Pacific Partnership Agreement includes an investor-state dispute mechanism that applies to Canada and Mexico as signatories to that agreement.[98] Although the diminution in the scope of investor-state disputes in the CUSMA-USMCA takes away one avenue for private entities to create a chill on environmental regulation, the inclusion of new regulatory obstacles in Chapter 28 mitigates this gain,[99] especially because they are backed with the possibility of party-to-party dispute settlement through Chapter 31. How much of a meaningful difference the changes in the investor-state dispute mechanism will make remains to be seen.

H. Other Provisions

One interesting new feature of CUSMA-USMCA is the sunset clause in Chapter 34, under which the agreement expires after 16 years unless the parties explicitly agree to extend it for another 16 years.[100] Although this clause has been criticized for creating business uncertainty

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[95] *See* NAFTA arts. 1101-39 (Part V).

[96] *See* Karpilow et al., *supra* note 13, at 7-9.

[97] *See* Garver, *supra* note 32, at 201; Karpilow et al., *supra* note 13, at 8-9 (quoting a Canadian government official who related examples of U.S. law firms representing industry clients raising Chapter 11 concerns in pressuring the Canadian government to back off a wide range of regulations).

[98] *See* Tienhaara, *supra* note 37, at 2.

[99] *See id.* at 2-3.

[100] CUSMA-USMCA art. 34.7.

that could impede investment among the three countries,[101] it could benefit the environment if it prevents locking in ecologically harmful long-term investments driven by the GDP growth imperative or other economic considerations. Another novel feature of CUSMA-USMCA is a provision that allows a party to adopt or maintain measures deemed "necessary to fulfill its legal obligations" toward Indigenous peoples[102]—as long as the measure is "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."[103] Given the hurdles environmental measures have faced historically when challenged as discriminatory or as disguised trade restrictions,[104] it is too soon to assess whether this qualified nod to the rights of Indigenous peoples is more than an optical illusion.[105] Last, the CUSMA-USMCA also eliminated the energy proportionality clause that prevented Canada from reducing the proportion of energy exports to the United States.[106] This added flexibility for Canada is an environmental improvement in the agreement.

III. The Lost Opportunity To Move Toward Ecologically Sustainable Trade and Investment

Brigham Daniels coined the term "tragic institutions" to refer to institutions designed to address an environmental Tragedy of the Commons problem that themselves become tragic in that they lack the authority, capacity or flexibility to fulfill their original objectives or to adapt to new information and circumstances.[107] They are tragic not only

[101] David A. Gantz, *Important New Features in the USMCA*, Rice University's Baker Institute for Public Policy Issue Brief (May 5, 2020), https://www.bakerinstitute.org/files/15846/; Flores-Macías & Sánchez-Talanquer, *supra* note 6, at 16.

[102] CUSMA-USMCA art. 32.5.

[103] *Id.* As with Chapters 9 and 28 with respect to environmental measures, the language qualifying this exception suggests a reverse precautionary approach that could inhibit strong protections for Indigenous peoples.

[104] *See* Daniel C. Esty & James Salzman, *Rethinking NAFTA: Deepening the Commitment to Sustainable Development*, in A Path Forward for NAFTA 125, 127 (C. Fred Bergsten & Monica de Bolle eds., 2017) (discussing environmentally problematic GATT rulings in the 1990s *tuna-dolphin* and *shrimp-turtle* cases).

[105] *Id.* (contending that NAFTA softened the requirement that environmental measures be the least trade restrictive option such that no challenges to such measures have been pursued under NAFTA, and the same might be true with respect to measures to meet obligations to Indigenous peoples).

[106] *See* M. Angeles Villereal & Ian F. Fergusson, The United States-Mexico-Canada Agreement (USMCA) 19, Congressional Research Service, No. R44981 (July 27, 2020), https://crsreports.congress.gov/product/pdf/R/R44981.

[107] Brigham Daniels, *Emerging Commons and Tragic Institutions,* 37 Env'T Law 515, 539 (2007).

because they are ineffective wastes of public resources, but also because they block the adoption of better alternatives for the policy space they occupy. In North America, no better example exists than the environmental regime of NAFTA and now CUSMA-USMCA, which can be lumped together as a continuum of failure, because CUSMA-USMCA represents another tragedy: the rare and now wasted opportunity to learn the right lessons about the gross inadequacy of the original NAFTA environmental regime and make a serious change in course.

A. The Lost Opportunity of NAFTA's Replacement

Trade and investment agreements like CUSMA-USMCA are negotiated first and foremost from the perspective that trade generates wealth and opportunity for many as it spreads goods, services, capital and information around the world.[108] This is the narrative in which the General Agreement on Trade and Tariffs (GATT), the World Trade Organization (WTO), relevant pronouncements of the G20 nations and the United Nations, and regional trade arrangements such as the European Union and NAFTA are rooted. Globalized trade and finance are cornerstones of the globally dominant growth-insistent economic system in which protection of private property rights and state sovereignty and limited regulation of ever-expanding market regimes are strongly and presumptively favored and environmental protections are limited, secondary and ultimately woefully inadequate.[109] Indeed, the resistance of the international trade policy community to even including environmental concerns in trade agreements, which persisted into the 1990s and lingers still, is well known. The mounting dilemma is that the dominant paradigm for trade and investment continually perpetuates and locks in a fundamental lack of scientific understanding and appreciation of the ultimate impossibility of its implicit assumptions about ecological sustainability and of the key role of international trade and finance as drivers of significant and worsening ecological impacts on Earth's ecosystems.[110] Falling far short of bringing a needed end to this ecological illiteracy in the international trade and finance regime, CUSMA-USMCA represents yet another lost

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[108] *See* Oran Young et al., *The Globalization of Socio-Ecological Systems: An Agenda for Scientific Research*, 16 Global Env't Change 304, 307-310 (2006).

[109] *See* Rachel Beddoe et al., *Overcoming Systemic Roadblocks to Sustainability: The Evolutionary Redesign of Worldviews, Institutions, and Technologies*, 106 PNAS 2483, 2486 (2009); David W. Orr, Hope Is an Imperative 151 (2011); Geoffrey Garver, *The Rule of Ecological Law: The Legal Complement to Degrowth Economics*, 5 Sustainability 316, 325 (2013).

[110] *See* William E. Rees, *Globalization and Sustainability: Conflict or Convergence?*, Bulletin of Science, Technology & Soc'y 22 (Aug. 2002).

opportunity to envelope trade and investment rules within ecological constraints.

Like most national and sub-national systems of environmental law,[111] the international policy on trade and environment has focused policy ambitions and, more rarely, legally binding action on discrete environmental impacts rather than on a comprehensive, systems-based and holistic approach for monitoring and decreasing aggregated and cross-scale ecological effects. One well known tool for tracking aggregate ecological impacts of human activity is the ecological footprint,[112] which is "a comprehensive sustainability metric that aims to capture all aspects of human consumption that derive from mutually exclusive bioproductive areas."[113] In the North American context, despite a JPAC recommendation in 2010 to "develop common metrics for tracking progress on greening the economy, such as ecological footprint, material and energy flow accounts, or other appropriate measures,"[114] neither Canada, Mexico nor the United States, nor the CEC, yet frames comprehensive policies around bringing the countries' or the region's ecological footprint, or other holistic metric of ecological impact, back to ecologically sustainable levels.[115] Although the per capita and total ecological footprint in North America has stabilized or slightly decreased since the 1990s,[116] the region's total and per capita footprints remain among the highest

[111] *See generally* Garver, *The Rule of Ecological Law*, *supra* note 109.

[112] Mathis Wackernagel and William Rees developed the leading ecological footprint methodology in the mid-1990s. MATHIS WACKERNAGEL & WILLIAM E. REES, OUR ECOLOGICAL FOOTPRINT: REDUCING HUMAN IMPACT ON THE EARTH (1996). *See also generally* GLOBAL FOOTPRINT NETWORK, https://www.footprintnetwork.org.

[113] David Lin et al., *Ecological Footprint Accounting for Countries: Updates and Results of the National Footprint Accounts, 2012-2018*, 7 RESOURCES 58, at 16.

[114] JPAC, Advice to Council 10-03 - The Strategic Plan of the Commission for Environmental Cooperation 2010-2015, at 3-4 (October 8, 2010), http://www.cec.org/files/documents/jpac_advice_council/jpac-advice-10-03-en.pdf. The JPAC advised: "Given that the sustainable ecological footprint is estimated to be about 2 hectares person globally and the North American average is about 7.8 hectares per person (9.4 in the U.S., 7.1 in Canada and 3.4 in Mexico), greening the economy must be about greatly increasing the efficiency of material and energy use in North America." The Council never responded to this advice.

[115] Some federal agencies, states, provinces and local governments do make marginal use of ecological footprint. *See, e.g., Empreinte écologique du Québec*, Rapport du Commissaire du développement durable, 2007-08 (2008); GLOBAL FOOTPRINT NETWORK, *San Francisco*, Case Studies (Aug. 15, 2011), https://www.footprintnetwork.org/2011/08/15/san-francisco-looks-footprint-2/; GLOBAL FOOTPRINT NETWORK, *The Ecological Footprint and Biocapacity of California* (Mar. 2013), http://footprintnetwork.org/images/article_uploads/EcologicalFootprint BiocapacityOfCalifornia_2013.pdf.; GLOBAL FOOTPRINT NETWORK, *Calgary*, Case Studies (Apr. 10, 2015), https://www.footprintnetwork.org/2015/04/10/calgary/; GLOBAL FOOTPRINT NETWORK, *Vancouver kicks off neighborhood Footprint Campaign* (Feb. 20, 2017), https://www.footprintnetwork.org/2017/02/20/vancouver-kicks-off-neighborhood-footprint-campaign/; GLOBAL FOOTPRINT NETWORK, *State of the States Report* (July 14, 2015), https://www.footprintnetwork.org/2015/07/14/states/.

[116] Lin et al., *supra* note 107, at 11.

globally and require a drastic decrease. Instead of tracking and responding to aggregate, holistic indicators like ecological footprint, the reductionist and fragmented approach to environmental policy in North America, which is particularly weak in the international trade and investment context, implicitly and unjustifiably relies on the thermodynamically flawed assumption that economic growth will yield technological innovations that will sufficiently increase the efficiency of material and energy throughput to address aggregate ecological concerns.[117]

Simply put, the weak environmental safeguards in the NAFTA model, even with modifications in its replacement, the CUSMA-USMCA, and other post-NAFTA trade and investment agreements, are insufficient to regulate the drivers of ecological pressures associated with increasing international exchange of goods and services and strong protection of foreign investments. Worse, even those weak provisions have not been adequately implemented. Again, this failing approach to environmental regulation of trade and investment is hard-wired into policy, not only in North America but globally.

B. The Need for Stronger Advocacy for Counter-Narratives to the NAFTA and Post-NAFTA Framing of Trade and Environment

A strong, united shift in the positions of North American environmental NGOs could help shift public debate, and ultimately trade policy, to align it better with a rigorous response to the region's and the world's looming ecological crisis.[118] In 1993, environmental NGOs in North America were divided on the merits of the trade and environment compromise that resulted from President Clinton's insistence on labor and environment side agreements to the final NAFTA text that he inherited.[119] The Sierra Club, Friends of the Earth, the Humane Society, Greenpeace, the Council of Canadians, and Public Citizen were prominent groups insisting that NAFTA and the NAAEC did not go far enough in protecting the environment, pointing in particular to the chilling effect

[117] For examples of unsubstantiated assumptions that GDP growth will lead to environmental improvements, *see* Jeffrey D. Sachs, Common Wealth: Economics for a Small Planet (2008); UNEP, *Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication – A Synthesis for Policymakers* (2011), https://www.unep.org/resources/report/pathways-sustainable-development-and-poverty-eradication.

[118] *See* Robert Housman, *The North American Free Trade Agreement's Lessons for Reconciling Trade and the Environment,* 30 Stanford J. Int'l L. 379, 390 (1994) ("international alliances among environmental groups are vital to advancing an environmental agenda in trade fora").

[119] NAFTA was negotiated and signed during the Bush Administration, but it had not yet received Congressional approval when the Clinton Administration took over in January 1993.

that Chapter 11 and other NAFTA provisions could have on effective environmental regulation and enforcement.[120] The Natural Resources Defense Council (NRDC), the Audubon Society, the Center for International Environmental Law (CIEL), the Environmental Defense Fund (EDF), Conservation International, the National Wildlife Federation (NWF), and the World Wildlife Fund (WWF) sided with the Clinton Administration and supported Congressional ratification of NAFTA in light of the NAAEC.[121]

International trade is undeniably an intricate part of a globalized economy that is exacting a mounting and critical toll on Earth's ecosystems. The precise contribution of NAFTA to regional and global ecological impacts is impossible to determine, and some of the worst environmental fears about NAFTA (such as massive environmental dumping to less developed countries due primarily to laxer environmental law) have not materialized. However, the general demise and neglect of many of NAFTA's and the NAAEC's environmental provisions, such as the SEM process, should warrant some consternation on the part of the environmental NGOs that supported NAFTA. A search of the EDF, NWF, Conservation International, National Audubon Society[122] and WWF websites for USMCA or NAFTA returned no results regarding the renegotiation of NAFTA, and those organizations no longer have active work programs regarding trade. CIEL has an active work program on international trade and investment and signed onto statements by several environmental NGOs opposing "Trump's NAFTA 2.0".[123] NRDC focused its attention during NAFTA's renegotiation on the failure to include the Paris Climate Agreement in the CUSMA-USMCA, and also submitted a comment to the House Ways and Means Committee in June 2019 calling for stronger enforcement mechanisms for the new agree-

[120] *See* Keith Schneider, *Environment Groups Are Split on Support For Free-Trade Pact*, N.Y. TIMES, Sept. 16, 1993, at A1; Annette Baker Fox, *Environment and Trade: The NAFTA Case*, 110 POL. SCIENCE Q. 49, 64-66 (1995); Council of Canadians v. Canada (Attorney General), [2006] OJ No 4751, 277 DLR (4th) 527 (Ont. C.A.).

[121] *See* Schneider, *supra* note 120; Fox, *supra* note 120. However, CIEL, NRDC and the Audubon Society filed an amicus brief in support of Public Citizen's unsuccessful litigation to subject NAFTA to environmental impact assessment under NEPA. CTR. FOR INT'L ENV'T L. (CIEL), *1993 Annual Report* (1994), http://www.ciel.org/wp-content/uploads/2015/06/CIEL_Report_1993.pdf.

[122] *But see* Raillan Brooks, *New Trade Agreements Gut Environmental Protections,* AUDUBON (July-Aug. 2014), https://www.audubon.org/magazine/july-august-2014/new-trade-agreements-gut-environmental (last visited Mar. 26, 2021).

[123] *See* Press Release, Sierra Club et al., New NAFTA Deal Threatens Our Air, Water, and Climate, CIEL (Nov. 26, 2018), https://www.ciel.org/news/new-nafta-threatens-air-water-climate (last visited Mar. 26, 2021); Sierra Club et al., NAFTA Talks Have Ignored Environmental Concerns (May 16, 2018), https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/NAFTA%20Environmental%20Letter%20May%202018.pdf (last visited Mar. 26, 2021).

ment's environmental provisions.[124] The groups that opposed NAFTA in 1993 by and large also opposed the CUSMA-USMCA.[125]

The Council of Canadians, perhaps the most consistent Canadian organization raising concerns about trade liberalization and globalization, concisely captured the central idea around which environmental groups and other civil society groups in North America and beyond should coalesce and rally: "As trade and globalization contribute to the climate crisis, it is vital to have a new NAFTA agreement that not only doesn't worsen the crisis, but contributes to addressing it."[126] Of course, it is not just the global climate that is facing dire threats from human economic activity, but many of the features of regional and global ecosystem functioning that are reflected by planetary boundaries. The ecological limits that planetary boundaries of safe operating space represent are not a straitjacket that will lead to human misery and deprivation, but a set of guidelines that offer "the flexibility to choose a myriad of pathways for human well-being and development."[127] The increasingly sophisticated development of "doughnut economics," which combines the planetary boundaries with a set of criteria for establishing a social baseline for just and equitable societies, is showing ever more clearly what these pathways look like.[128] The challenge, then is to start with structures based on planetary boundaries and doughnut economics, or similar ecologically-limited models, and then consider what kind of trade and investment makes sense. The outdated CUSMA-USMCA approach is still firmly grounded in a completely inverse logic that no longer makes sense in a world in ecological crisis.

IV. Conclusion

As climate change, biodiversity loss and other urgent ecological crises facing North America and the rest of world worsen, the failure of

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[124] *See* NRDC, Press Release: NAFTA Rewrite Fails Key Climate Test (Dec. 9, 2019), https://www.nrdc.org/media/2019/191209 (last visited Mar. 26, 2021); NRDC& Sierra Club, Comment letter to the House Ways and Means Committee on "Enforcement in the New NAFTA" (June 5, 2019), https://www.nrdc.org/sites/default/files/comment-house-ways-and-means-nafta-enforcement-06052019.pdf (last visited Mar. 26, 2021).

[125] *See* Brooks, *supra* note 121; Sierra Club et al., *supra* note 122.

[126] Council of Canadians, *CUSMA – The "New" NAFTA*, https://canadians.org/nafta (last visited Mar. 25, 2021).

[127] Johan Rockström et al., *Planetary Boundaries: Exploring the Safe Operating Space for Humanity*, 14 Ecology and Society 32, 2009, at 6, http://www.ecologyandsociety.org/vol14/iss2/art32/ES-2009-3180.pdf.

[128] *See generally* Kate Raworth, Doughnut Economics: Seven Ways to Think Like a 21st Century Economist (2017). Amsterdam is working to apply doughnut economics to a large urban center. Daniel Boffey, *Amsterdam to embrace 'doughnut' model to mend post-coronavirus economy*, Guardian, Apr. 8, 2020.

contemporary law to regulate the human activities that drive this global change is becoming more and more apparent. International trade and environment agreements like NAFTA and the CUSMA-USMCA are intended to increase economic activity that, despite some improvements in resource efficiency, inevitably builds pressure on the ecosystems that sustain humanity. Environmental law is subservient to this approach to provisioning human societies, a weak cousin to the laws and policies that protect rights to produce and consume and support endless economic growth.[129] Alternatives to managing the social metabolism of humanity are not only possible, but critically necessary. To pursue those alternatives, ecologically-limited approaches to law are essential, in which only options for trade, investment and other economic activity that respect planetary boundaries such as climate change are allowed. The Paris Climate Agreement is an outlier in environmental law, because its foundational goal of limiting global heating to 1.5 degrees C is based on ecological limits, rather than on technological or economic feasibility. Whether the nations of the world take that goal seriously and achieve it remains to be seen, but the agreement includes mechanisms for tighter requirements over time. The CUSMA-USMCA, which completely ignored the Paris agreement, employs an outdated and failing approach to integrating trade and the environment and falls far short of meeting 21st century ecological challenges. It is a tragic lost opportunity. It is past due time for civil society, the broader public and ultimately the nations of the world to unite around an ecological approach to trade that leaves the NAFTA and CUSMA-USMCA approach in the bins of history.

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[129] *See* Ecological Law and Governance Association (ELGA), Oslo Manifesto for Ecological Law and Governance (June 2016), https://elgaworld.org/oslo-manifesto (last visited Mar. 26, 2021), which states:

> Among the flaws of environmental law are its anthropocentric, fragmented and reductionist characteristics. It is not only blind to ecological interdependencies, but also politically weak as it competes with other, more powerful areas of law such as individualized property and corporate rights. As a consequence, the legal system has become imbalanced and unable to secure the physical and biological conditions, upon which all human and other life depends.