INTRODUCTION, AFTER NAFTA: THE UNITED STATES-MEXICO-CANADA AGREEMENT AND SUSTAINABILITY

Introduction for Papers Presented at a March 20, 2021 Virtual Workshop Sponsored by Vermont Law School

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This book of articles addresses from various angles the effects on environmental sustainability arising from the differences between the North American Free Trade Agreement (NAFTA) and its recently adopted successor, the United States-Mexico-Canada-Agreement (USMCA).[1]

NAFTA and its side agreement, the North American Agreement on Environmental Cooperation (NAAEC), had been in effect since 1994[2] before being replaced in 2020 by the USMCA and its supplemental Environmental Cooperation Agreement (ECA).[3] This

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[1] *See generally* United States-Mexico-Canada Agreement, July 1, 2020, OFF. OF THE U.S. TRADE REP., https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between [hereinafter USMCA]. Each country party to the USMCA typically refers to it beginning with that country's name; in Canada, the USMCA is commonly referred to as the Canada-United States-Mexico Agreement (CUSMA), and in Mexico the USMCA is commonly referred to as *el Tratado entre México, los Estados Unidos, y Canadá* (T-MEC). *See A new Canada-United States-Mexico Agreement*, GOV'T OF CAN., https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/index.aspx?lang=eng (last updated Nov. 16, 2021); *Hoy entra en vigor el Tratado entre México, Estados Unidos y Canadá (T-MEC)*, GOBIERNO DE MÉXICO, (July 1, 2020), https://www.gob.mx/se/articulos/hoy-entra-en-vigor-el-tratado-entre-mexico-estados-unidos-y-canada-t-mec?idiom=es.

[2] *See generally* North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289 (pts. 1–3), 32 I.L.M. 605 (pts. 4–8, annexes) [hereinafter NAFTA]; North American Agreement on Environmental Cooperation, Sept. 14, 1993, 32 I.L.M. 1480 [hereinafter NAAEC] (establishing trade agreements between the United States, Mexico, and Canada, and providing subsequent environmental considerations). Both acts were written in 1993 but signed into effect in 1994. *See* USMCA, supra note 1, at USMCA Protocol.

[3] *See* USMCA, *supra* note 1; Agreement on Environmental Cooperation among the

replacement concluded a fraught political and legislative process that began in 2017 when, despite earlier indications that the United States (U.S.) might abandon NAFTA, the Trump Administration began renegotiation discussions with Canada and Mexico.[4] For over a year, renegotiation was a moving target. Negotiations involving complex issues lurched forward and backward on a day-to-day basis with the end uncertain and no official progress reports. In November 2018, however, the Parties agreed on the initial text of the USMCA and ECA, and negotiations began between the Trump Administration and Congress on specific issues.

On December 10, 2019, the Parties agreed to a Protocol of Amendment to the USMCA that modified key elements of the original text. Congress agreed to the revised USMCA text later that month and ratified the USMCA in January 2020.[5] Mexico approved the December text, and after formal Canadian ratification in April 2020, the three countries agreed to move forward with implementation. The USMCA took effect on July 1, 2020.[6] The ECA, as signed by the Parties in December 2018, took effect simultaneously with the USMCA.[7] The Free Trade Commission established under the USMCA has since

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Governments of the United States of America, the United Mexican States, and Canada (Dec. 18, 2018), https://www.epa.gov/sites/production/files/2018-11/documents/us-mxca_eca_-_final_english.2.pdf [hereinafter ECA]. Each participating country signed the ECA in 2018; however, the ECA did not become effective until the USMCA entered into force. *See id.* at 9–10 (showing each country's representatives signing the ECA in 2018); 19 C.F.R. § 182.0 (2020) (entering the USMCA into force by publication in the U.S. Federal Register).

[4] *See* Press Release, Off. of the U.S. Trade Rep., Trilateral Statement on the Conclusion of NAFTA Round One (Aug. 20, 2017), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/august/trilateral-statement-conclusion (documenting negotiations between the United States, Mexico, and Canada about updating NAFTA).

[5] *See generally* United States-Mexico-Canada Agreement Implementation Act, Pub. L. 116-113, 134 Stat. 11 (2020) (implementing the USCMA by adopting related domestic provisions, including procedural authority, trade requirements, and environmental considerations).

[6] *See* USMCA, *supra* note 1.

[7] *See generally* CONGR. RSCH. SERV., THE UNITED STATES-MEXICO-CANADA AGREEMENT (USMCA) 1–13, https://sgp.fas.org/crs/row/R44981.pdf (last updated July 27, 2020) (documenting the ratification and implementation process between the USCMA and ECA).

issued two decisions establishing detailed implementation procedures.[8]

The USMCA, composed of 34 chapters and 12 side letters,[9] retains most of NAFTA's market-opening commitments, but with some notable changes and new provisions.[10] Principal changes and additions are summarized below.

Market Access: Motor Vehicles. *Rules of origin* requirements were increased from 62.5% North American content to 75% (70% for steel), and wage requirements were added.[11]

Market Access: Dairy. U.S. dairy access was increased to 3.59% of the Canadian market, and U.S. import quotas for Canadian dairy and sugar products were increased.[12]

Dispute Settlement. NAFTA's state-to-state mechanism was maintained, except investor-state settlement provisions were eliminated with Canada and maintained in modified form with Mexico.[13]

Intellectual Property Rights. NAFTA's core protections were retained, except for biological data. The copyright term was extended to 70 years; other protective provisions were enhanced.[14]

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[8] *See generally* OFF. OF THE U.S. TRADE REP., EXEC. OFF. OF THE PRESIDENT, DECISION NO. 1 OF THE FREE TRADE COMMISSION OF THE CUSMA, T-MEC, USMCA ("AGREEMENT") (July 2, 2020), https://ustr.gov/sites/default/files/files/agreements/usmca/USMCAFTC1English.pdf (establishing the rules of procedure, role of the Secretariat, and interpretation of certain provisions of the USMCA).

[9] "Side letters are instruments negotiated in conjunction with free trade agreements. The purpose of a side letter is to clarify bilateral matters between the two parties that do not affect the rights and obligations of the other signatories." *Canada-United States-Mexico Agreement (CUSMA) – Side Letters*, GOV'T OF CAN., https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/letters-lettres.aspx?lang=eng (last updated Jan. 29, 2020).

[10] *See U.S.-Mexico-Canada (USMCA) Trade Agreement*, CONG. RSCH. SERV., https://crsreports.congress.gov/product/pdf/IF/IF10997/16 [hereinafter CONG. RSCH. SERV., *Trade Agreement*] (last updated Jan. 14, 2021) (providing a summary of changes and additions contained in the USMCA).

[11] *Id.*

[12] *U.S.-Mexico-Canada (USMCA) Trade Agreement*, CONG. RSCH. SERV., https://crsreports.congress.gov/product/pdf/IF/IF10997/15 (July 1, 2020).

[13] CONG. RSCH. SERV., *Trade Agreement*, *supra* note 10.

[14] *Id.*

Energy. NAFTA's Energy chapter was removed, but similar protections remain. A new chapter was added recognizing Mexico's 2013 constitutional energy reforms.[15]

Labor and Environment. Dispute resolution and other provisions were revised and strengthened. Environment provisions formerly in the NAAEC were incorporated in the USMCA.[16]

Government Procurement. The USMCA provisions apply only to U.S.-Mexico procurement. Canada remains covered by the World Trade Organization (WTO) Government Procurement Agreement, with a higher monetary threshold.[17]

E-Commerce, Data Flows, and Data Localization. There are new digital trade provisions, broad cross-border data flow provisions, and restrictions on data localization requirements.[18]

New provisions in the USMCA include:

- Binding obligations on currency misalignment;
- A sunset clause with a review at year six and expiration 16 years later if no mutual agreement;
- A new chapter on State-Owned Enterprises;
- *De minimis* duty-free and tax-free thresholds; and
- Allowing Party withdrawal if another Party enters into a free trade agreement with a non-market economy.[19]

In one respect, however, the USMCA-ECA carries forward an important component of the NAFTA regime: the structural provisions of the NAAEC establishing the Commission for Environmental Cooperation (CEC)—consisting of cabinet-level representatives of the three Party states, administered by the Secretariat, including the *Submissions on Enforcement Matters* (SEM) process, and advised by the Joint Public Advisory Council (JPAC)—continue with relatively few changes.[20]

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[15] *Id.*
[16] USMCA, *supra* note 1, chs. 23–24.
[17] CONG. RSCH. SERV., *Trade Agreement*, *supra* note 10.
[18] *Id.*
[19] *Id.*
[20] *See* USMCA, *supra* note 1, art. 24; ECA, *supra* note 3, at 2.

In 2017, we set out to bring our 2015 essay collection, *NAFTA and Sustainable Development*,[21] up to date in light of the renegotiation. With that process concluded by the USMCA's ratification and implementation, we invited a group of interested individuals to present works-in-progress at a one-day virtual workshop. The workshop considered the effects and future direction of the USMCA in areas such as dispute resolution; sustainability issues; the SEM process; and changes in the application of the USMCA in environmental protection, trade, and ecological law.

We co-chaired and participated in the virtual workshop entitled, *After NAFTA: The U.S. Mexico Canada Agreement and Sustainability*, at Vermont Law School on March 20, 2021. The 11 participants represented law schools and international agencies in the U.S., Canada, the United Kingdom, Mexico, and Peru. The participants presented summaries of works in progress in four panels addressing the following aspects of USMCA: (1) Environmental Governance and Jurisprudence; (2) Treaty Text, Investment Implications, and Impact on National Climate Initiatives; (3) Changes to the CEC and SEM in Comparative and Theoretical Perspective; and (4) Ecological Law. The four articles that follow developed from summaries presented at the workshop, which is the most recent in a long-running series of conferences and workshops sponsored or joined by Vermont Law School with Canadian and other colleagues addressing a variety of trans-border issues.[22]

Tracy D. Hester is an Associate Instructional Professor at the University of Houston Law Center. He is a founding co-director of the Center for Carbon Management in Energy, an elected member and Trustee of the American College of Environmental Lawyers, an elected member of the American Law Institute, and served several years on the

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[21] *See generally* H. KONG & L.K. WROTH, NAFTA AND SUSTAINABLE DEVELOPMENT: THE HISTORY, EXPERIENCE AND PROSPECTS FOR REFORM (2015) [hereinafter KONG & WROTH] (documenting the role of NAFTA in propagating sustainable development practices through international agreements and domestic implementation).

[22] *See generally* L.K. Wroth, *Introduction, From Environmental to Ecological Law: The Future Lies Ahead*, 43 VT. L. REV. 415 (2019). For a listing of previous publications, see KONG & WROTH, *supra* note 21, at 6 n.20.

governing Council of the American Bar Association's Section on Environment, Energy & Resources.

Professor Hester's article addresses a gap in the USMCA:[23] The USMCA does not mention climate change. According to Hester, the question that arises from this absence is "whether the Parties' conscious and deliberate choice to exclude discussion of anthropogenic climate change hobbles the USMCA's power to govern trade issues affected by climate change policies or effects."[24]

Hester argues that it does not. He claims that the gap in the text preserves the issue for future consideration under the USMCA's general provisions. To arrive at this conclusion, Hester examines how international and domestic law generally address gaps in treaty law. He then examines the USMCA, including its broad language, its specific references to topics that invoke climate change risks, and its provisions that implement multilateral environmental agreements that address climate change. Hester concludes from this analysis that the Parties can act on climate change concerns under the USMCA.

His interpretation of U.S. domestic law supports this conclusion. Hester anticipates that U.S. approaches to treaty interpretation will allow for a broad interpretation of the USMCA that would allow the Parties to address climate change. He concedes that U.S. courts applying certain canons of construction may limit this kind of interpretation. However, he argues that the USMCA Implementation Act and legislative history may support a broad interpretation, particularly if the executive branch advocated for such a broad reading in future litigation.

Hester concludes by identifying the practical consequences of his proposed interpretation of the USMCA. The most significant is that individual Parties will be able to address climate change without risking a challenge that this kind of action constitutes a discriminatory trade practice or expropriation.

Avidan Kent is an Associate Professor of Law and **Valentine Kunuji** is a Ph.D. candidate at the University of East

[23] Tracy D. Hester, *Saved By Silence: Climate Change, Treaty Lacunae, and the U.S.-Mexico-Canada Agreement*, 46 VT. L. REV. 240, 240 (2021).
[24] *Id.* at 241.

Anglia. Professor Kent has a focus in international law, founding the University of East Anglia's International Law Research Group. Professor Kent has written several books and articles on international environmental law, international economic law, dispute resolution, and migration resulting from climate change. While studying and working as a Research Assistant at the University of East Anglia, Valentine Kunuji is focusing on international investment law and the intersection of international business and human rights law. In their article, Kent and Kunuji argue that critics of international investment law shaped the content of the USMCA. Kent and Kunuji claim that in response to these critics, the USMCA limits the rights of American, Canadian, and Mexican investors and constrains their ability to enforce the rights they have.[25] The goal of these limits, the authors claim, is to promote sustainability and protect the rights of States to regulate. Kent and Kunuji argue that despite these laudable aims, the USMCA may prevent the Parties from achieving sustainable development goals.[26]

The critics of Investor-State Dispute Settlement mechanisms argue that they are undemocratic and undermine state sovereignty because they divert disputes from the state judicial systems. According to Kent and Kunuji, the USMCA responded to this criticism by precluding Canadian investors, and American and Mexican investors in Canada, from submitting disputes under the treaty to Investor-State Dispute Settlement. Kent and Kunuji argue that this measure is counterproductive. If investors cannot receive the protections that they seek under the USMCA, they may turn to negotiating private agreements. These contracts, the authors argue, may not include the sustainable development safeguards that the USMCA provides.

Kent and Kunuji identify a second criticism of Investor-State Dispute Settlement mechanisms. Critics target the instruction to protect investors' legitimate expectations, which is often included in investment treaties. Critics argue that this vague language is open to an overbroad interpretation. According to this interpretation, investors could legitimately expect that the regulatory environment be frozen at the time of an investment.

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[25] Adivan Kent & Valentine Kunuji, *The Investment-Sustainability Conundrum Under the USMCA: An Evolution?*, 46 VT. L. REV. 288, 289 (2021).
[26] *Id.* at 290.

Kent and Kunuji argue that the USMCA's narrow language precludes this interpretation. Yet, the authors argue this narrowing of language can have perverse effects. According to Kent and Kunuji, private investors can rely on vague and open-ended language in investment treaties to protect their investments in sectors, such as renewable energy, that promote sustainable development goals. Vague treaty terms, such as *legitimate expectations*, can protect investors from States that would make unilateral changes to agreed-upon terms. As a consequence, Kent and Kunuji argue, these terms can increase investor confidence and ensure the long-term sustainability of the relevant sectors. The authors conclude that the USMCA's narrow language precludes this means of achieving sustainable development goals.

Hoi L. Kong is the Rt. Hon. Beverley McLachlin, P.C., UBC Professor in Constitutional Law at the Peter A. Allard School of Law, University of British Columbia, a former tenured faculty member and Associate Dean at the McGill Faculty of Law, and has taught at Columbia, Queens, and Cornell universities. He holds undergraduate, graduate, and law degrees from McGill University and LL.M. and J.S.D. degrees from Columbia University. Professor Kong has worked on a variety of initiatives with the NAFTA (and now the USMCA) CEC.

In his article, Professor Kong describes and analyzes the SEM process—the citizen dispute resolution mechanism established in the NAAEC in 1994 and carried forward with slight modifications in Chapter 24 of the USMCA and the ECA in 2020.[27]

Part I.A of the Article provides an account of the political background from which the NAAEC emerged—a compromise between the goals of environmental and industrial groups necessary to win support for passage of NAFTA—and the interbranch struggles over passage of the USMCA in which the SEM process survived. Part I.B describes and compares in detail the NAAEC and USMCA-ECA structures, including the CEC, governed by the Council consisting of cabinet-level representatives of the three Party states,

[27] Hoi L. Kong, *The Submissions on Enforcement Matters Process: Changes in Law and Theory*, 46 VT. L. REV. 265, 266 (2021).

administered by the Secretariat including the SEM process, and advised by the JPAC.[28] Professor Kong identifies differences between these structures as established in the NAAEC and in the USMCA-ECA, including reduction in size and function of the JPAC and five differences in the SEM process: (1) the USMCA is limited in application to federal law in each of the Party states; (2) the USMCA permits "any person of a Party" to make a submission, potentially broadening access to the process by for-profit corporations; (3) there are significant changes in the timelines governing submissions; (4) the USMCA calls for publication of a factual record unless two Parties object, in contrast to the NAAEC provision requiring two Parties vote for submission; and (5) the ECA requires the Parties to cooperate by providing information to the Secretariat relevant to preparation of a factual record.[29]

In Part II, Professor Kong identifies and elaborates on specific criticisms of the NAAEC and the USMCA-ECA: (1) a conflict of interest is presented by the fact that the Council includes a representative of the Party state against which a factual record might be prepared and published; and (2) the SEM process is "toothless." The NAAEC included neither an enforcement procedure nor a monitoring process, and the USMCA-ECA provides only discretionary cooperative and updating processes. More generally, the USMCA-ECA is inadequate to address current environmental issues such as climate change or the development of ecological law.

Part III is intended to justify the continuing—and future—resort to the SEM process despite these criticisms. Initially, Professor Kong describes reasons for which the process has been effective: that publication of an adverse factual record can have both domestic and international political impact that leads to remedial action by the affected state; and the opportunity for private actors to "pull a fire alarm" by initiating the SEM process may cause governments to act on problems that they would otherwise ignore.

In Part III.A, after a careful and extensive development of the interactional theory of international law developed by Jutta Brunnée and Stephen Toope from the ideas of Lon Fuller, Professor Kong

[28] *Id.* at 268–74.
[29] ECA, *supra* note 3, art. 8.

applies to the SEM process two of the theory's principles of legality: (1) legal norms concerning conduct must be general rules, not ad hoc decisions; and (2) laws must not be contradictory, not permitting and prohibiting at the same time. Communities of practice, developed around these rules and continually testing them and permitting them to evolve or be abandoned, determine their legality. The evolution of the SEM process to date suggests that it meets the tests of legality, but the parties' future actions could put its legality in doubt. As to the allegation that the SEM process is "toothless," the Brunnée-Toope theory does not require formal institutional enforcement for legality. It is sufficient if internal practices and use by non-state participants make the process effective. The process provided for SEM by the USMCA-ECA satisfies this test.

Part III.B addresses the more general concern that the USMCA-ECA is insufficient to address matters such as climate change or the development of ecological law by applying transnational network theory—the theory that interactions between individuals employed in various branches of multiple state governments can address issues of mutual concern. Professor Kong notes that the broad mandate of the CEC, composed of representatives of the three Party states, can provide this opportunity. The SEM process can provide similar interactions between a range of non-governmental actors, creating relationships that may be useful in addressing other environmental regulatory issues.

Professor Kong concludes that the USMCA-ECA evidences the Parties' political decision to retain a significant degree of control over the SEM, its structure, and scope. Drawing on interactional and network theories of international law, his article argues that it is the interaction of the CEC's institutions, governmental representatives, and civil society that determine the SEM's legitimacy and relevance.

Geoffrey Garver is currently a researcher with the Leadership for the Ecozoic at McGill University and an Adjunct Professor of environmental law. He is a former director of the NAFTA SEM at the CEC and member of the CEC's JPAC. He has a University of Michigan J.D. and an LL.M. and Ph.D. in Geography from McGill. **Carla Sbert** is a former Legal Officer at the NAFTA CEC and currently an independent researcher focused on ecological law, with a Harvard

LL.M. and a Ph.D. in law from the University of Ottawa. Both Garver and Sbert are leaders in the continuing development of ecological law from the different perspectives expressed in their joint Article.[30]

By way of introduction, the authors state that their purpose is to examine the USMCA from the perspective of *ecological law*, which they define as an emerging, still largely theoretical, body of principles with which to address the failings of current environmental law.

Part I.A of the Article sets forth in detail the features of ecological law that flip the relationship between human activity and nature. Contemporary environmental law limits the protection of ecological integrity to the extent necessary to permit human activity leading to continuing economic growth. Ecological law imposes the protection of ecological integrity as a limit on human activity, recognizing that humans are a part of nature with other forms of life, the interests of which must be protected. Part I.B then briefly describes the "lens of ecological law," principles of ecocentrism, ecological primacy, and ecological justice developed by Sbert to analyze the relationship of existing law to ecological law.

Part II.A provides an overview of the USMCA, comparing its structure briefly to that of NAFTA and describing the principal aims set forth in its Preamble. Part II.B summarizes the following ten USMCA provisions that address those Preamble aims and are critically analyzed in Part III:

1. Liberalized trade in goods and services;
2. Investment;
3. Intellectual Property;
4. Least trade-restrictive regulations;
5. Good regulatory practice;
6. Levels of environmental protection and environmental obligations;
7. Environmental enforcement;
8. Environmental cooperation;
9. Public participation and transparency; and
10. Treatment of Ministerial Engagement Agreements (MEAs).

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[30] Geoffrey Garver & Carla Sbert, *Looking at NAFTA's Replacement Through the Lens of Ecological Law*, 46 VT. L. REV. 200, 201–02 (2021).

Part III applies the three principles of the "lens of ecological law" to analyze in detail the USMCA provisions summarized in Part II.A. Part III.A describes the principle of *ecocentrism*—that the law should "[r]ecognize and respect the value of all beings and the interconnectedness among them, equitably promoting the interests of human and nonhuman members of the Earth community." Measured by this principle, the USMCA is "profoundly anthropocentric," but it would not by itself bar satisfaction of the principles of ecological primacy and ecological justice. Part III.B describes the principle of *ecological primacy*—that the law should "[e]nsure that social and economic behaviour and systems are ecologically bound, respecting planetary boundaries." The article concludes that the USMCA is "almost entirely inconsistent" with this principle. Part III.C describes the principle of ecological justice—that the law should "[e]nsure equitable access to the Earth's sustaining capacity for present and future generations of humans and other beings, and avoid the inequitable allocation of environmental harms." This Part concludes that the USMCA is "ecologically unjust." Its purpose is to increase economic growth, and it does not balance meeting human needs with meeting those of other members of the Earth community.

Part IV suggests that, in the present growth-driven climate of international trade law, even small steps in domestic law designed to put pressure on importers to address climate change would be heavy-going if challenged under applicable WTO and USMCA provisions. The Article then offers a model of a system of ecologically driven trade law, illustrated by the example of the automobile industry. The model recognizes that the road to its attainment is long, involving significant conceptual, social, and structural changes that are needs-based and ecosystem-protective. In Part V, a brief concluding summary expresses the urgent need to take every opportunity to move toward that goal.

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On behalf of all the workshop participants, we wish to thank the editors of the *Vermont Law Review* for giving us the opportunity to present these early assessments of the strengths and weaknesses of the USMCA-ECA and for the patience and care with which they have brought our efforts to publication.