LOOKING AT NAFTA'S REPLACEMENT THROUGH THE LENS OF ECOLOGICAL LAW

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INTRODUCTION

The enormous and relentless momentum of anthropogenic drivers of ecological change, increasingly threatening unprecedented catastrophes for human and other life on Earth, poses a confounding challenge for law. This is not an overstatement. Socio-economic trends of increased material and energy throughput in the global economy are undeniably linked to worsening crises of climate change; global heating; loss of biodiversity and wildlife; anthropogenic additions of nitrogen and phosphorus to ecosystems; and more.[1] Clearly, the legal systems that enable these drivers and trends have utterly failed to include adequate ecological approaches to prevent harm or work towards maintaining true sustainability and a mutually enhancing human-Earth relationship.[2]

Particularly problematic elements of this ecologically inadequate legal infrastructure are regional and global trade and investment regimes, in particular the World Trade Organization (WTO) and the more than 280 regional and bilateral trade and investment agreements around the world.[3] These trade and investment regimes institutionalize rules that give paramount importance to maintaining perpetual economic growth, with strong protections of state sovereignty and private property interests, but they give only superficial attention to, and regulation of, the significant ecological impacts that international trade and investment exacerbate.[4] So far, "the international approach to the ecological consequences of trade has

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[1] *See* GEOFFREY GARVER, ECOLOGICAL LAW AND THE PLANETARY CRISIS: A LEGAL GUIDE FOR HARMONY ON EARTH 183 (2021) [hereinafter GARVER, HARMONY ON EARTH]; Xuemei Bai et al., *Plausible and Desirable Futures in the Anthropocene: A New Research Agenda*, 39 GLOB. ENV'T CHANGE 351, 355 (2016).

[2] GARVER, HARMONY ON EARTH, *supra* note 1, at 1 (examining how the failures of environmental law contributed to the ecological crises and proposing a system-based solution); CARLA SBERT, THE LENS OF ECOLOGICAL LAW: A LOOK AT MINING 48, 50 (2020); *Oslo Manifesto:* "*Oslo Manifesto*" *for Ecological Law and Governance*, ECOL. L. & GOVERNANCE ASS'N (June 21, 2016), https://elgaworld.org/oslo-manifesto [hereinafter *Oslo Manifesto*].

[3] Dana Smillie, *Regional Trade Agreements*, THE WORLD BANK (Apr. 5, 2018), https://www.worldbank.org/en/topic/regional-integration/brief/regional-trade-agreements.

[4] GARVER, HARMONY ON EARTH, *supra* note 1, at 183–84.

focused on discrete ecological impacts rather than on a comprehensive, systems-based and holistic look at aggregated and cross-scale effects."[5] A notable piece of this deficient trade and investment infrastructure is, as of July 2020, the renegotiated North American Free Trade Agreement (NAFTA).[6] In Canada, the new NAFTA is called the Canada-United States-Mexico Agreement (CUSMA);[7] in the United States, it is referred to as the United States-Mexico-Canada Agreement (USMCA);[8] and in Mexico[9] it is referred to as the *Tratado entre México, los Estados Unidos y Canadá* (T-MEC).[10] This Article refers to NAFTA's replacement as the CUSMA-USMCA, or alternatively as the Agreement.[11]

In this Article, the CUSMA-USMCA is considered from the perspective of *ecological law*. Ecological law is an emerging area of law, still largely theoretical, that responds to the failures of

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[5] *Id.* at 183.

[6] North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA].

[7] *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 (last updated Nov. 16, 2021). In French, the CUSMA is called l'Accord Canada-États-Unis-Mexique (ACEUM). *Un nouvel Accord Canada–États-Unis–Mexique*, GOUV'T DU CAN., https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/index.aspx?lang=fra (last updated Nov. 16, 2021).

[8] *United States-Mexico-Canada Agreement*, OFF. OF THE U.S. TRADE REP., https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement (last visited Dec. 13, 2021).

[9] The three countries apparently were unable to agree on a single name for the pact in English, and they gave it a title with no reference to trade or investment, falsely suggesting that it deals comprehensively with all matters of mutual concern to the signatories. It has been 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*, *in* OXFORD RSCH. ENCYC. OF POL. 1, 17 (Aug. 28, 2019), https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1662.

[10] *See* Government of Mexico, Tratado entre México, Estados Unidos y Canadá (T-MEC) (Spanish only), https://www.gob.mx/t-mec (last visited Dec. 13, 2021).

[11] *United States-Mexico-Canada Agreement*, OFF. OF THE U.S. TRADE REP., https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement [hereinafter CUSMA-USMCA] (last visited Dec. 13, 2021).

contemporary law. Ecological law therefore critiques conventional environmental law and prescribes more holistic, eco-centric, and eco-bounded regulatory approaches. As such, the lens of ecological law is a tool for analyzing the extent to which existing provisions of law are consistent with ecological law. Part I of this Article presents ecological law and the lens of ecological law in more detail. Part II provides an overview of the CUSMA-USMCA and describes the provisions that were selected for analysis using the lens of ecological law. Part III sets out the application of the lens of ecological law to those provisions, revealing that the CUSMA-USMCA falls far short of being consistent with ecological law. Part IV presents an overview of what trade and investment in North America might look like under a regime of ecological law—using the automotive sector to put elements of such a regime in context. Although the renegotiation of NAFTA is now a lost opportunity to incorporate more ecological approaches into the North American trade and investment regime, this Article concludes with an appeal to consider reforms in that direction as opportunities arise.

I. THE LENS OF ECOLOGICAL LAW

This Part begins with a description of ecological law. It then describes the analytical tool used here to analyze and critique the CUSMA-USMCA—the lens of ecological law.

A. What is Ecological Law?

Ecological law is emerging as a response to the failure of contemporary law, including environmental law, to support and maintain a mutually enhancing human-Earth relationship, in which "humans individually and collectively see themselves as members, not masters, of the entire community of life on Earth and interact with Earth and the life it supports respectfully and 'for the benefit of the larger community as well as ourselves.'"[12] According to the 2016 Oslo Manifesto for Ecological Law and Governance, which launched the international Ecological Law and Governance Association, the

[12] GARVER, HARMONY ON EARTH, *supra* note 1, at 2 (quoting THOMAS BERRY, THE GREAT WORK: OUR WAY INTO THE FUTURE 5 (1999)).

overarching problem with contemporary law, as exemplified by environmental law, is that it is:

> rooted in modern Western law with its origins in religious anthropocentrism, Cartesian dualism, philosophical individualism and ethical utilitarianism. In our ecological age, this worldview is out-dated and counterproductive, yet it continues to dominate the way environmental laws are conceived and interpreted. Most notably, nature is perceived as "the other" overlooking ecological interdependencies and human-nature interrelations.[13]

Environmental law is a flawed response to the current global ecological crisis because it is fragmented, reductionist, and subservient to private property rights, corporate rights, and other elements of law.[14] These characteristics drive a relentless pursuit of economic expansion and growth, irrespective of ecological limits and without integration of a holistic, systems-based, and scientific understanding of human-Earth relationships.[15]

According to the Oslo Manifesto:

> The ecological approach to law is based on ecocentrism, holism, and intra-/intergenerational and interspecies justice. From this perspective, or worldview, the law will recognise ecological interdependencies and no longer favour humans over nature and individual rights over collective responsibilities. Essentially, ecological law internalizes the natural living conditions of human existence and makes them the basis of all law, including constitutions, human rights, property rights, corporate rights and state sovereignty.[16]

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[13] *Oslo Manifesto*, *supra* note 2.
[14] *See id.*
[15] *See* GARVER, HARMONY ON EARTH, *supra* note 1, at 63–73.
[16] *Oslo Manifesto*, *supra* note 2.

With this overview in mind, one of the authors of this Article identified 11 features of ecological law:

> (1) Humans are part of the Earth's life systems, not separate from them, and concepts that are relevant to ecological law, like ecological integrity, must include humans within flourishing life systems;
> (2) Ecological limits, such as planetary boundaries for safe operating space for humanity, must have primacy over economic, political and other considerations;
> (3) Ecological law permeates the entire legal regime in a systemic, integrated way, and is not a specialty area of the law like environmental law;
> (4) In light of the current ecological crisis, ecological law should focus on reducing the throughput of material and energy in the human economy;
> (5) Ecological law must ensure that biomass and extracted materials are obtained and used in the economy according to real needs, with minimal consideration of utilitarian desires reflected in market prices;
> (6) Ecological law must be global but applied using principles of proportionality (sufficient but not excessive regulation) and subsidiarity (application of law at the lowest political tier at which the law's objective can be achieved);
> (7) Ecological law must ensure fair sharing of resources among present and future generations of humans and other life;
> (8) Ecological law must be binding and supranational, with supremacy over sub-global legal regimes as necessary;
> (9) A greatly expanded program of research and monitoring tied to improved understanding and continual adjustment of ecological boundaries and means for respecting them is needed to support ecological law from the global to the local level;

> (10) Ecological law requires precaution about crossing planetary boundaries, with both margins of safety to ensure that the boundaries are respected and complementary measures, such as ecological regeneration and restoration, to allow the Earth's life systems to flourish;
> (11) Ecological law must be adaptive, in recognition of the non-equilibrium nature of ecosystems and the need to get started on a comprehensive effort to constrain the economy within ecological limits despite uncertainty.[17]

The other author of this Article has framed these, and other features of ecological law, around three core principles: ecocentrism, ecological primacy, and ecological justice.[18] The following subsection explores these core principles.

B. What is the Lens?

How far are existing laws from ecological law? What obstacles do current laws (including, but not limited to, environmental laws) pose for a transition to ecological law? What opportunities do they open? The lens of ecological law is an analytical tool designed to help answer these questions. It is based on foundational ecological law scholarship, including the principle of sustainability,[19] the rule of

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[17] GARVER, HARMONY ON EARTH, *supra* note 1, at 4. Earlier versions included ten features of ecological law, not eleven. *See, e.g.*, Geoffrey Garver, *The Rule of Ecological Law: The Legal Complement to Degrowth Economics*, 5 SUSTAINABILITY 316, 325–30 (2013) [hereinafter Garver, *The Rule of Ecological Law*].

[18] SBERT, *supra* note 2, at 77.

[19] *See* Klaus Bosselmann, *Ecological Justice and Law*, *in* ENVIRONMENTAL LAW FOR SUSTAINABILITY: A READER 129 (Benjamin J. Richardson & Stepan Wood eds., 2006) (proposing the principle of sustainability to achieve economic, social, and environmental goals and to make a difference to existing unsustainable patterns of human activities); KLAUS BOSSELMANN, THE PRINCIPLE OF SUSTAINABILITY: TRANSFORMING LAW AND GOVERNANCE 102–28 (2d ed. 2017) (highlighting that the principle of sustainability seeks to protect ecological processes through ecological justice). Bosselmann proposed the principle of sustainability with a notion of *strong sustainability*, which requires—first and foremost—keeping human activities within

ecological law,[20] and Earth jurisprudence,[21] among other sources.

The lens consists of three interconnected, core principles of ecological law that "reflect values that are critical to ecological law as an alternative to environmental law and aim to guide behaviour toward ecological law's objectives of constraining the economy within ecological limits, restoring ecological integrity, and enabling an ecologically just society or a mutually enhancing human-Earth relationship."[22] While the principles point to some of the key elements of an ecological law framework, the lens of ecological law was not conceived as a design tool. Instead, it is an analytical tool to contrast existing laws with ecological law, in order to better understand what a transition from one to the other might entail. The principles are:

(1) "Ecocentrism: Recognize 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";[23]
(2) "Ecological Primacy: Ensure that social and economic behavior and systems are ecologically bound, respecting planetary boundaries";[24] and

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ecological bounds. Because sustainability and sustainable development also have weaker forms that give primary importance to sustained economic growth, ecological law has emerged as a preferable term.

[20] *See* Garver, *The Rule of Ecological Law*, *supra* note 17 (explaining that this formulation in an early proposal for developing the new field of ecological law was used to highlight notions of the rule of law within ecological law, but since then it has been more common simply to refer to ecological law).

[21] *See* CORMAC CULLINAN, WILD LAW: A MANIFESTO FOR EARTH JUSTICE 77–168 (Chelsea Green Publ'g., 2d ed. 2011) (2002). Berry used the term *Earth jurisprudence* in *The Great Work* to refer to law that aligns with the quest for a mutually enhancing human-Earth relationship, with rights for non-human elements of the Earth's community of life, and Cullinan and others have developed this idea further since then. Mary Evelyn Tucker & John Grim, *Thomas Berry and the Rights of Nature: Evoking the Great Work*, KOSMOS J. FOR GLOB. TRANSFORMATION, https://www.kosmosjournal.org/kj_article/thomas-berry-and-the-rights-of-nature/ (last visited Dec. 13, 2021).

[22] SBERT, *supra* note 2, at 97.

[23] *Id.* at 78.

[24] *Id.* at 83.

(3) "Ecological Justice: Ensure 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."[25]

II. OVERVIEW AND RELEVANT PROVISIONS OF THE CUSMA-USMCA

Ecological law envisions the integration of ecological approaches into all areas of law, not just environmental law; therefore, the CUSMA-USMCA as a whole, and not just the environmental chapter and the Environmental Cooperation Agreement (ECA), is relevant to the analysis in this Article. This Part begins with an overview of the Agreement, followed by a description of the provisions that are the focus of the application of the lens of ecological law to the Agreement.

A. Overview

The CUSMA-USMCA contains provisions that are typical of modern trade and investment agreements, with chapters covering national treatment and market access for goods, agriculture, rules of origin, customs rules, sanitary and phytosanitary measures, investment, trade in services, intellectual matter, and other topics that differ little from those in other recent agreements. Unlike NAFTA, which addressed most environmental matters in a side agreement called the North American Agreement on Environmental Cooperation (NAAEC),[26] but like nearly all post-NAFTA trade and investment agreements involving at least one of the NAFTA parties, the CUSMA-USMCA also includes chapters on the environment[27] and labor.[28] Some environmental matters related to the pact are addressed in a side agreement—the ECA.[29]

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[25] *Id.* at 92.
[26] North American Agreement on Environmental Cooperation (NAAEC), Sept. 14, 1993, 32 I.L.M. 1480.
[27] CUSMA-USMCA, *supra* note 11, ch. 24.
[28] *Id.* ch. 23.
[29] Agreement on Environmental Cooperation among the Governments of Canada, the

The Agreement's Preamble sets out the broad aims of the CUSMA-USMCA, beginning with the overarching aim to replace NAFTA "with a 21st Century, high standard new agreement to support mutually beneficial trade leading to freer, fairer markets, and to robust economic growth in the region."[30] In regard to economic growth, some other provisions of the Agreement and ECA indicate a preference for the undefined concept of "green growth."[31] Another of the Parties' broad aims is to "preserve and expand regional trade and production by further incentivizing the production and sourcing of goods and materials in the region [and to] enhance and promote the competitiveness of regional exports and firms in global markets, and conditions of fair competition in the region."[32] The Parties also seek to eliminate technical barriers to trade and "to eliminate obstacles to international trade which are more trade-restrictive than necessary."[33] The Preamble also states the Parties' intentions to retain their respective rights to regulate and to "protect legitimate public welfare objectives," albeit "in accordance with the rights and obligations provided in" the CUSMA-USMCA."[34] Additionally, the Parties aim to "promote high levels of environmental protection," to "promote the protection and enforcement of labor rights," and to "promote transparency, good governance and the rule of law."[35]

United States of America, and the United Mexican States (ECA) (2019), https://www.epa.gov/sites/default/files/2018-11/documents/us-mxca_eca_-_final_english.2.pdf [hereinafter ECA]. In general, the ECA takes up matters related to cooperation among the parties on environmental matters, including the structure and function of the Commission for Environmental Cooperation and relevant areas of environmental cooperation. However, the Parties' environmental obligations in regard to levels of environmental protection, environmental enforcement, and other environmental matters are largely now within the text of the CUSMA-USMCA, in Chapter 24. *See* CUSMA-USMCA, *supra* note 11, ch. 24.

[30] CUSMA-USMCA, *supra* note 11, pmbl.

[31] *Id.* arts. 24.23(3), 24.24(1); ECA *supra* note 29, pmbl., art. 10. Neither the CUSMA-USMCA nor the ECA includes a definition of *green growth*.

[32] CUSMA-USMCA, *supra* note 11, pmbl.

[33] *Id*.

[34] *Id*.

[35] *Id*.

B. Provisions Most Relevant for Analysis with the Lens of Ecological Law

Application of the lens of ecological law to every provision of the CUSMA-USMCA is not necessary for the purposes of this Article. Instead, provisions that are most important for carrying out the key objectives set out in the Preamble have been selected for analysis, with an emphasis on those most relevant for applying the lens of ecological law.

1. Liberalized Trade in Goods and Services

The heart of the Agreement regarding trading goods rests, as with most trade agreements, in the provisions on national treatment and market access in Chapter 2. Chapter 2 aims to put goods on an equal footing regardless of their regional origin, but with exceptions and negotiated schedules for eliminating tariffs for certain categories of goods.[36] Provisions regarding agricultural goods, including those involving agricultural biotechnology such as genetic modification, are set out separately in Chapter 3 and include rules that allow countries to maintain domestic support for their agricultural sectors with certain conditions.[37] The purpose of these two chapters is to allow goods to be

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[36] *See id.* ch. 2 (specifying that national treatment generally means that a Party must treat goods from another Party the same as it treats those same goods produced domestically). The Agreement adopts the rules and interpretive notes of the General Agreement on Tariffs and Trade (GATT) by reference. *See* CUSMA-USMCA, *supra* note 11, art. 2.3. Market access for goods of another party is generally eased through the elimination or reduction of tariffs and custom duties and of import and export restrictions. *Id.* arts. 2.4–2.6, 2.8–2.11, 2.15.

[37] Although Chapter 3 includes a blanket prohibition on "export subsid[ies] on any agricultural good destined for the territory of another Party," it also allows Parties to maintain domestic support for their domestic agricultural sectors. CUSMA-USMCA, *supra* note 11, arts. 3.4(1), 3.6. One set of commentators concludes that: "like the rest of the agreement, the changes affecting agri-food are incremental and not transformative. The focus of changes with respect to agriculture emphasize co-operation and incrementally increased market access and integration between the three countries. The agri-food industry in North America is integrated and the biggest impact of the revised agreement will be reducing the uncertainty over market access for agri-food producers and consumers in North America." Eugene Beaulieu & Dylan Klemen, *You Say USMCA or T-MEC and I Say CUSMA: The New NAFTA –*

traded across borders within the region with as few restrictions as possible to enable perpetual economic growth in the region.[38] Permissible tariffs and other treatment of goods, that relate to the extent to which they originate from within the territory of a Party, must be determined according to the Rules of Origin and Origin Procedures in chapters 4 and 5.[39] Chapters 15 and 17 extend rules on national treatment, most favored nation treatment, and market access to certain services, including some financial services.[40] Chapter 10 provides trade remedies for violation of anti-dumping and countervailing duty rules, as well as emergency actions, regarding traded goods and services.[41]

2. Investment

The CUSMA-USMCA includes an investment chapter that requires the Parties to treat other Parties' investors and investments the same as their own, according to principles of national treatment and most favored nation treatment.[42] The investment chapter also prohibits

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Let's Call the Whole Thing On, 13 U. CALGARY SCH. PUB. POL'Y PUBL'NS 8 (2020). However, provisions to increase access of U.S. dairy, poultry, and egg producers to Canada's supply-managed markets for those products are notable. *See id.* at 7 (explaining NAFTA's most significant new provisions for U.S. and Canada agri-food producers).

[38] The requirement of national treatment for other Parties' goods, and the reduction or elimination of tariff-based and non-tariff restrictions on imports and exports, promote the Parties' objectives to pursue "freer, fairer markets, and . . . robust economic growth in the region." CUSMA-USMCA, *supra* note 11, pmbl.

[39] The Rule of Origin and Origin Procedures provisions in chapters 4 and 5, respectively, pertain to determining if a good is wholly produced in or obtained (e.g., through mining or agriculture) within the territory of a Party, and if not, how to value the non-originating content of the good for purposes of excluding the preferential treatment of originating goods under the Agreement. *See, e.g.*, CUSMA-USMCA, *supra* note 11, arts. 4.2–4.12. The details of chapters 4 and 5 are beyond the scope of this Article and are therefore not discussed.

[40] *See* CUSMA-USMCA, *supra* note 11, arts. 15.3–15.4, 17.3–17.5.

[41] *Id.* ch. 10.

[42] *See id.* arts. 14.4–14.6. As with trade in goods, these provisions on national treatment and most favored nation treatment regarding investments generally mean that a Party must treat investors and investments from another Party the same as it treats its own investors and investments, and no worse than it treats investors and

a Party from expropriating an investment from another Party unless the expropriation is for a public purpose, is non-discriminatory, is in accordance with due process, and the investor is promptly compensated the fair market value of the investment.[43] However, the CUSMA-USMCA includes significant changes regarding investor-state disputes that were possible under NAFTA's Chapter 11. This chapter, like similar provisions in most post-NAFTA trade and investment agreements, waived the Parties' sovereign immunity to allow private investors to seek binding commercial arbitration, bypassing national judicial systems, for claims that a government party violated NAFTA's investment rules.[44] The CUSMA-USMCA phases out investor-dispute settlements between Canada and the United States, leaving any enforcement to Party-to-Party dispute resolution under Chapter 31, but it retains them with some modifications for Mexico and the United States.[45] Notably, the Trans-Pacific Partnership Agreement includes an investor-state dispute mechanism that applies to Canada and Mexico as signatories to that agreement.[46]

3. Intellectual Property

Chapters 19 and 20 of the CUSMA-USMCA address regional trade-related issues regarding digital trade and intellectual property, respectively. Chapter 19 prohibits customs duties and like charges for

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investments from the country whose investors and investments get the best treatment by the Party.

[43] *Id.* art. 14.8.

[44] *Compare* NAFTA, *supra* note 6, at 639–48 (allowing a claim for arbitration if: (1) party has consented; and (2) the party has waived its right to initiate or continue before an administrative tribunal of a Party), *and* CUSMA-USMCA, *supra* note 11, art. 14.D.4(1) (noting consent of Mexico and the United States to waive sovereign immunity for investor-state disputes under CUSMA-USMCA), *with* CUSMA-USMCA, *supra* note 11, art. 14.D.5 (differing from NAFTA Chapter 11 in that an investor claimant must now first seek relief before a competent administrative body or court of the State subject to the dispute claim).

[45] *See* CUSMA-USMCA, *supra* note 11, art. 14.2(4), Annex 14-D, 14-E (allowing claims for arbitration only under legacy disputes (Annex 14-C), and Mexico–United States disputes under Annex 14-D or 14-E).

[46] Kyla Tienhaara, *NAFTA 2.0: What are the Implications for Environmental Governance*, 1 EARTH SYS. GOVERNANCE 1, 2 (2019).

trade in any digital product,[47] defined as "a computer program, text, video, image, sound recording, or other product that is digitally encoded, produced for commercial sale or distribution, and that can be transmitted electronically."[48] Chapter 19 also requires non-discriminatory treatment of digital products from another Party[49] and aims to facilitate cross-border electronic transmission of information, protection of personal information, cybersecurity, and other related matters.[50] Chapter 20 addresses intellectual property more generally as it relates to copyrights, patents, and trademarks. Chapter 20 aligns the CUSMA-USMCA with WTO rules and other international agreements by requiring every Party to recognize and enforce intellectual property rights and to ensure that those rights and their enforcement do not become a barrier to legitimate trade.[51]

4. Least-Trade-Restrictive Regulations

Consistent with WTO rules,[52] and similar to NAFTA and virtually all post-NAFTA trade agreements, the CUSMA-USMCA contains provisions on sanitary and phytosanitary measures requiring government Parties to adopt the least-trade-restrictive measures to protect human, animal, or plant life or health.[53] Article 9.6(2) provides that "[e]ach 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."[54] Chapter 9's provisions include

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[47] CUSMA-USMCA, *supra* note 11, art. 19.3.
[48] *Id.* art. 19.1.
[49] *Id.* art. 19.4.
[50] *Id.* arts. 19.8, 19.11, 19.15.
[51] *Id.* arts. 20.5, 20.7.
[52] WORLD TRADE ORG., *Understanding the WTO Agreement on Sanitary and Phytosanitary Measures*, (May 1998), https://www.wto.org/english/tratop_e/sps_e/spsund_e.htm. Specifically, the WTO administers the GATT, and "Article 20 of the [GATT] allows governments to act on trade in order to protect human, animal or plant life or health, provided they do not discriminate or use this as disguised protectionism." WORLD TRADE ORG., *Standards and Safety*, https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm4_e.htm (last visited Dec. 13, 2021).
[53] CUSMA-USMCA, *supra* note 11, arts. 9.4(6), 9.6(10).
[54] *Id*. art. 9.6(2).

requirements to adopt the least trade-restrictive measures possible.[55] The Agreement clarifies that "a sanitary or phytosanitary measure is not more trade restrictive than required unless there is another option that is reasonably available, taking into account technical and economic feasibility, that achieves the Party's appropriate level of protection and is significantly less restrictive to trade."[56]

5. Good Regulatory Practice

CUSMA-USMCA Chapter 28, entitled Good Regulatory Practice, establishes significant new mandatory hurdles for the adoption of any domestic regulation of a Party that directly or indirectly affects trade and investment.[57] NAFTA had no such chapter or anything equivalent to it. Chapter 28 mandates the Parties to adopt bureaucratic procedures that are apparently designed to make the adoption or maintenance of regulations more time consuming and difficult, with a key objective being to "avoid unnecessary restrictions on competition in the marketplace."[58] For example, the Parties are required to: have processes to assess regulatory impacts;[59] publish a list of anticipated regulations a year in advance with an indication of any expected significant impact on international trade and investment;[60] develop a website dedicated to providing the information required under Chapter 28;[61] expand opportunities for comments on regulations and to evaluate all such comments in writing;[62] and have a process for retrospective reviews of regulations with a view to modify or repeal them on its own initiative or at the request of any interested person.[63] All of these requirements, and others not noted here, are

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[55] *Id.* arts. 9.6(10), 9.13(8).
[56] *Id.* art. 9.6(10).
[57] *See generally id.* ch. 28; *see* Ronald Labonté et al., *USMCA (NAFTA 2.0): Tightening the Constraints on the Right to Regulate for Public Health*, 15 GLOBALIZATION AND HEALTH, no. 35, 2019, at 1, 6.
[58] CUSMA-USMCA, *supra* note 11, art. 28.4(1)(f).
[59] *Id.* art. 28.4(1)(e).
[60] *Id.* art. 28.6.
[61] *Id.* art. 28.7.
[62] *Id.* art. 28.9.
[63] *Id.* arts. 28.13, 28.14.

enforceable through Party-to-Party dispute resolution under Chapter 31.

6. Levels of Environmental Protection and Obligations

In Article 24.3, the CUSMA-USMCA preserves NAFTA's unenforceable mandate to "strive" for high levels of environmental protection,[64] 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."[65] However, the CUSMA-USMCA does not include the Parties' objective in NAFTA Article 906 to seek upward harmonization of environmental standards in the region.[66] In regard to non-regression, or preventing backsliding with respect to environmental measures, the CUSMA-USMCA 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."[67] The remedy for environmental regression under Article 24.4(3) is full dispute resolution under CUSMA-USMCA Chapter 31 on dispute settlement, not merely consultations as under NAFTA Article 1114(2).[68] This makes the CUSMA-USMCA consistent with many of Canada's and the United States' post-NAFTA trade and investment agreements[69] that have incorporated

[64] *Id.* art. 24.3(2).
[65] *Id.* art. 24.3(1).
[66] NAFTA, *supra* note 6, art. 906.
[67] CUSMA-USMCA, *supra* note 11, art. 24.4(3).
[68] *Id.* art 24.32; *cf.* NAFTA, *supra* note 6, art. 1114(2) (noting a party should not waive or derogate environmental measures to encourage investments and may request consultation with another party that it believes has). The nature of these consultations was not specified, and none were ever undertaken, but they are clearly distinguished from other formal state-to-state or investor-state dispute processes that NAFTA established, and from the formal dispute resolution processes in CUSMA-USMCA ch. 31.
[69] *See, e.g.*, Trade Promotion Agreement art. 18.3(2), U.S.-Peru, Apr. 12, 2006, https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa; Free Trade Agreement art. 17.3(2), U.S.-Panama, June 28, 2007, https://ustr.gov/trade-agreements/free-trade-agreements/panama-tpa; Free Trade Agreement art. 20.3(2), U.S.-Korea, June 30, 2007,

environmental chapters with similar language. However, neither Canada nor 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).

Chapter 24 of the CUSMA-USMCA contains other Party mandates regarding the environment, using the term "shall," that are now technically subject to dispute settlement under Chapter 31.[70] For example, each Party "shall promote public awareness of its environmental laws and policies";[71] "shall provide for the receipt and consideration of written questions or comments from persons of that Party regarding its implementation of this Chapter;"[72] "shall" ensure that certain procedures are available to redress environmental harms;[73] "shall take measures to prevent the pollution of the marine

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https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text; Trans-PacificPartnership Agreement art. 20.3(6), Feb. 4, 2016, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text; Free Trade Agreement art. 1702, Can.-Colom., Nov. 21, 2008, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/fta-ale/index.aspx?lang=eng; Comprehensive Economic and Trade Agreement art. 24.5(2), Canada-EU, Oct. 30, 2016, https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/. Some U.S. agreements, such as the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR) and the US-Chile Free Trade Agreement, use the weaker "shall strive to ensure" instead of "shall." *See* Free Trade Agreement art. 17.2(2), Dom. Rep.-Cent. America, Aug. 5, 2004, https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text; Free Trade Agreement art. 19.2(2), US-Chile, June 6, 2003, https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta. *See generally Free Trade Agreements*, OFF. OF THE U.S. TRADE REP., https://ustr.gov/trade-agreements/free-trade-agreements (last visited Dec. 13, 2021); GOV'T OF CAN., *Trade and Investment Agreements*, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx (last visited Dec. 13, 2021).

[70] CUSMA-USMCA, *supra* note 11, art. 31.2(a). Chapter 31 is the generally applicable state-to-state dispute settlement mechanism applicable to "the avoidance or settlement of disputes between the Parties regarding the interpretation or application of this Agreement." *Id.* It is therefore applicable to obligations in Chapter 24, unless otherwise specified.

[71] *Id.* art. 24.5(1).

[72] *Id.* art. 24.5(2).

[73] *Id.* art. 24.6.

environment from ships";[74] "shall take measures to prevent and reduce marine litter";[75] "shall" encourage corporate social responsibility and responsible business conduct;[76] "shall promote and encourage the conservation and sustainable use of biological diversity, in accordance with its law or policy";[77] "shall seek to operate a fisheries management system that regulates marine wild capture fishing";[78] "shall" promote the conservation of marine species;[79] "shall" take action to end certain fisheries subsidies;[80] and "shall" cooperate or exchange information on a number of topics.[81] Nearly all of these "shall" mandates are either not of a nature that would likely lead to a trade dispute or contain modifying language rendering them virtually unenforceable.

7. Environmental Enforcement

The CUSMA-USCMA, like most other trade agreements involving one or more of its government parties, provides that "[n]o Party shall fail to effectively enforce its environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties, . . . after the date of entry into force of this Agreement."[82]

The Agreement also retains and slightly modifies the two primary mechanisms in the NAAEC for addressing concerns that a Party is failing to effectively enforce its environmental law. The first mechanism is the Submission on Enforcement Matters (SEM) process,

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[74] *Id.* art. 24.10(1).
[75] *Id.* art. 24.12(2).
[76] *Id.* art. 24.13.
[77] *Id.* art. 24.15(2).
[78] *Id.* art. 24.18(1).
[79] *Id.* art. 24.19.
[80] *Id.* art. 24.20.
[81] *See, e.g.*, *id.* art. 24.15(6) (requiring Parties to "cooperate to address matters of mutual interest" regarding issues of biological diversity); *id.* art. 24.21(2)(g) (requiring Parties to exchange information to prevent trade of products produced by illegal fishing); *id.* art. 24.22(2) (requiring Parties to commit to preventing illegal trade in species by promoting conservation); *id.* art. 24.23(5) (requiring Parties to exchange information on forest management practices to prevent "illegal logging and associated trade").
[82] *Id.* art. 24.4(1) (internal citations omitted).

which allows North American persons or organizations to ask the Secretariat of the Commission for Environmental Cooperation (CEC) to prepare a detailed factual record regarding allegations of ineffective environmental enforcement by a party.[83] The second mechanism is the Party-to-Party dispute resolution process in NAAEC Part V, which allows a Party to seek remedies for another Party's persistent pattern of failing to effectively enforce its environmental law.[84]

In the case of the SEM process, the CUSMA-USMCA and the ECA permit the new Environment Committee[85] and the CEC Council to consider cooperative activities that respond to information in factual records.[86] The CUSMA-USMCA also requires the Parties to "provide updates to the Council and the Environment Committee on factual records, *as appropriate*."[87] The Party-to-Party dispute resolution process is retained in that the prohibition in Article 24.4(1) of sustained or recurring courses of action or inaction amounting to ineffective environmental enforcement is subject to the dispute resolution process in Chapter 31.[88] A Party can defend against any such dispute claim by relying on Article 24.4(2), which provides:

> The Parties recognize that each Party retains the right to exercise discretion and to make decisions regarding: (a) investigatory, prosecutorial, regulatory, and compliance matters; and (b) the allocation of

[83] *See* NAAEC, *supra* note 25, arts. 14–15 (describing processes for submission on enforcement matters and creation of a factual record); CUSMA-USMCA, *supra* note 11, arts. 24.27(1), 24.28(1)–(2).
[84] NAAEC, *supra* note 25, art. 22(1); CUSMA-USMCA, *supra* note 11, art. 24.4.
[85] *See generally* CUSMA-USMCA, *supra* note 11, art. 24.26 (providing the composition and purpose of the Environment Committee).
[86] *Id.* art. 24.28(7); ECA, *supra* note 29, art. 4(1)(m).
[87] CUSMA-USMCA, *supra* note 11, art. 24.28(8) (emphasis added). This language makes the updates provision discretionary, not mandatory. Based on experience following the 2012 revisions to the SEM guidelines, which have similar language, it is questionable whether this language will encourage Parties to provide regular updates. 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." *See CEC Ministerial Statement, 2012*, COMM'N FOR ENV'T COOP. (2012), http://cec.org/Page.asp?PageID=122&ContentID=25241.
[88] *See* CUSMA-USMCA, *supra* note 11, art. 31.2(a).

> environmental enforcement resources with respect to other environmental laws determined to have higher priorities. Accordingly, the Parties understand that with respect to the enforcement of environmental laws a Party is in compliance with paragraph 1 if a course of action or inaction reflects a reasonable exercise of that discretion, or results from a *bona fide* decision regarding the allocation of those resources in accordance with priorities for enforcement of its environmental laws.[89]

No government Party under NAFTA, or any other trade agreement in the world with a similar provision regarding persistent patterns of ineffective environmental enforcement, has brought a dispute against another Party since the first such provision, Part V of the NAAEC, went into effect 27 years ago.

8. Environmental Cooperation

The ECA retains the CEC, which was established under the NAAEC, and its three main constituent bodies: the Council, the Secretariat, and the Joint Public Advisory Committee (JPAC).[90] The Council maintains authority to establish the strategic priorities and work program of the CEC, and the ECA identifies five major initial priorities for cooperation:

(1) "Strengthening environmental governance;"
(2) "Reducing pollution and supporting strong, low emissions, resilient economies;"
(3) "Conserving and protecting biodiversity and habitats;"
(4) "Promoting the sustainable management and use of natural resources;" and

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[89] CUSMA-USMCA, *supra* note 11, art. 24.4(2).
[90] *See* ECA, *supra* note 29, arts. 2(1)–(2), 6 (identifying constituent bodies and specifying that JPAC must now consist of at least nine members instead of the 15 mandated under the NAAEC).

(5) "Supporting green growth and sustainable development."[91]

9. Public Participation and Transparency

The CUSMA-USMCA contains numerous provisions related to public participation and transparency. The Preamble states the Parties' broad shared objective to "establish a clear, transparent, and predictable legal and commercial framework for business planning, that supports further expansion of trade and investment."[92] To support this objective, the Agreement includes several measures to promote or require transparency in the adoption of a broad array of regulations that may affect trade or investment.[93] In addition, Chapter 24 (Environment) and the ECA include procedures to develop and enforce environmental laws and regulations.[94] The ECA also maintains the JPAC, which serves as a liaison with the general public on matters that fall within the scope of its mandate, to provide advice to the CEC.[95]

10. Treatment of Multilateral Environmental Agreements

NAFTA and the CUSMA-USMCA both establish how they are

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[91] *Id.* art. 10(2).
[92] CUSMA-USMCA, *supra* note 11, pmbl.
[93] *See, e.g.*, *id.* art. 9.3(1)(e) (stating the objective to "enhance transparency in and understanding of the application of each Party's sanitary and phytosanitary measures"); *id.* art. 9.13 (specifying the value of sharing information about the Parties' sanitary and phytosanitary measures, and requiring notice of proposed and final sanitary or phytosanitary measures that may impact trade of another party); *id.* art. 11.7 (providing examples of transparency measures related to technical barriers to trade); *id.* art. 28.2(1) (including transparency as a component of good regulatory practice of promoting public policy objectives for health, safety, and environment); *id.* art. 28.5 (linking quality of information used in regulation to transparency of the information); *id.* art. 28.9(1) (listing requirements for transparent development of regulations).
[94] *See, e.g.*, *id.* arts. 24.5, 24.6, 24.20, 24.22 (providing examples of articles that promote transparency or may affect trade); *see also* ECA, *supra* note 29, pmbl., art. 1(d) (emphasizing an objective of public participation and cooperation).
[95] *See* ECA, *supra* note 29, art. 6(4) (stating that JPAC may advise the Council on matters within the scope of Agreement or perform other functions directed by the Council).

to be interpreted in conjunction with specified MEAs. Where NAFTA gave qualified precedence over its provisions in the event of conflict to three MEAs,[96] the CUSMA-USMCA does so with seven.[97] The CUSMA-USMCA also requires each Party to "adopt, maintain, and implement laws, regulations, and all other measures necessary to fulfill its respective obligations" under the listed MEAs.[98] 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."[99] However, the CUSMA-USMCA does not provide criteria to determine if the violation affects trade or investment or precisely how any such violations will be addressed through the agreement's dispute-settlement mechanism.[100] Notably, the Paris Climate Agreement is not included on the list of MEAs, and neither the CUSMA-USMCA nor the ECA includes significant provisions regarding mitigation of or adaptation to climate change.[101]

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[96] NAFTA, *supra* note 6, art. 104(1) (explaining obligations under 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), prevail over inconsistent provisions of NAFTA under certain circumstances).

[97] CUSMA-USMCA, *supra* note 11, art. 24.8(4) (identifying each MEA as: (1) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; (2) the Montreal Protocol on Substances that Deplete the Ozone Layer; (3) the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships; (4) the Convention on Wetlands of International Importance Especially as Waterfowl Habitat; (5) the Convention on the Conservation of Antarctic Marine Living Resources; (6) the International Convention for the Regulation of Whaling; and (7) the Convention for the Establishment of an Inter-American Tropical Tuna Commission).

[98] *Id.* art. 24.8(4).

[99] *Id.* art. 24.8, n.6.

[100] Neither Article 1.3, Article 24.8(4) nor Chapter 31 (dispute settlement) provides these criteria. Presumably, they would have to be developed in the context of a specific claim by one party against another in a Chapter 31 dispute.

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

III. THE CUSMA-USMCA THROUGH THE LENS OF ECOLOGICAL LAW

As noted earlier, in critiquing the CUSMA-USMCA from the lens of ecological law, it is important to consider the entire Agreement, rather than only its environment chapter and the ECA. The principles of ecological law that form the lens are interrelated but focus on different aspects and functions of the law, with the aim to reveal the main ways in which the law under scrutiny contrasts or resonates with ecological law, and the potential path towards the latter.

A. Ecocentrism and the CUSMA-USMCA

The principle of ecocentrism calls for the law to "[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."[102] The focus in applying this principle is conceptual and relational, probing the view of the human-Earth relationship that underlies a particular law. This principle focuses on the law's ability to support and promote a worldview where humans are part of nature and deeply connected to, appreciative of, and respectful of other living beings. Ecocentrism aims to prevent decisions that disregard their ecological consequences and have a bias towards short-term human interests.

The understanding of the human-Earth relationship underlying the CUSMA-USMCA is profoundly anthropocentric. This is not surprising, given that the agreement is structured around contemporary economics, which is inherently anthropocentric and utilitarian because of its deep roots in Enlightenment notions of human separation from and superiority over nature.[103]

The CUSMA-USMCA fails to recognize that humans are part of nature and are interconnected with other beings. The ECA's

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[102] SBERT, *supra* note 4, at 78 (defining ecocentrism).

[103] *See* ROBERT L. NADEAU, THE WEALTH OF NATURE: HOW MAINSTREAM ECONOMICS HAS FAILED THE ENVIRONMENT x–xi (2003); FRITJOF CAPRA & UGO MATTEI, THE ECOLOGY OF LAW: TOWARD A LEGAL SYSTEM IN TUNE WITH NATURE AND COMMUNITY 3 (2015).

Preamble narrowly "[r]ecogniz[es] the unique environmental, economic and social links among" the governments of the United States, Mexico, and Canada.[104] And the CUSMA-USMCA's Preamble only refers to "the longstanding friendship between them and their peoples, and the strong economic cooperation that has developed through trade and investment."[105] These are inherently anthropocentric framings of the context and purpose of the agreement, placing the entire emphasis on the people of the three countries and the governments themselves.

The Environment Chapter acknowledges that the environment is important for humans, but not that humans are part of nature. It states that "[t]he Parties recognize that a healthy environment is an integral element of sustainable development . . . ."[106] From the perspective of ecological law, the concept of sustainable development is problematic because it is commonly premised on balancing environmental, economic, and societal considerations (understood as equally important "pillars"[107]) instead of on the recognition that "[t]here is only ecological sustainable development or no sustainable development at all."[108] Ecological law is rooted in the understanding that the economy is but a subsystem of society, which is in turn a subsystem of the biosphere, upon which they are both dependent.[109] In addition, the agreement states that "[t]he Parties recognize that the environment plays an important role in the economic, social, and cultural well-being of indigenous peoples and local communities, and acknowledge the importance of engaging with these groups in the long-term

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[104] *See* ECA, *supra* note 29, pmbl.
[105] CUSMA-USMCA, *supra* note 11, pmbl.
[106] *Id.* art. 24.2(1).
[107] Even this notion of equality among the pillars is suspect, given that sustained economic growth, which is entirely human-centered, is now treated as an essential element of sustainable development in the United Nations' Sustainable Development Goals and other internationally agreed to descriptions of sustainable development. *See, e.g.*, G.A. Res. 66/288, The future we want, ¶¶ 11, 56, 94 (July 27, 2012) (insisting on sustained economic growth, without making as clear a commitment with respect to ecological limits or to social equality).
[108] BOSSELMANN, *supra* note 18, at 21; Jim MacNeill, *Brundtland Revisited*, OPEN CAN. (Feb. 4, 2013), https://opencanada.org/brundtland-revisited.
[109] Garver, *The Rule of Ecological Law*, *supra* note 17, at 317.

conservation of the environment."[110] For ecological law, the environment plays an important role for the well-being of all, while the understanding shared by many Indigenous peoples of the interconnected relationship between the Earth and all its beings, including humans, is a critical starting point for long-term ecological viability and flourishing.[111]

In the CUSMA-USMCA, relationships between humans and the rest of nature are seen through a market-oriented perspective and the inherent value of nonhumans is not recognized or respected, but commodified. Throughout the Agreement, nonhumans and other parts of nature are "natural resources" to be taken, managed, and conserved by humans. For example, the Preamble highlights the Parties' "inherent right to . . . protect legitimate public welfare objectives, such as health, safety, environmental protection, conservation of living or non-living exhaustible natural resources . . . ."[112] Likewise, Article 24.22 on Conservation and Trade states:

> The Parties affirm the importance of combatting the illegal take of, and illegal trade in, wild fauna and flora, and acknowledge that this trade undermines efforts to conserve and sustainably manage those natural resources, has social consequences, distorts legal trade in wild fauna and flora, and reduces the economic and environmental value of these natural resources.[113]

While the CUSMA-USMCA promotes predominantly human interests, there are measures that aim to benefit other beings. For example, the Preamble's stated aim is to protect "human, animal, or plant life or health in the territories of the Parties and advance science-based decision making while facilitating trade between them"; sanitary and phytosanitary measures; and MEAs recognized by the CUSMA-USMCA, such as the Convention on International Trade in Species of

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[110] CUSMA-USMCA, *supra* note 11, art. 24.2(4).
[111] SBERT, *supra* note 2, at 53–62.
[112] CUSMA-USMCA, *supra* note 11, pmbl.
[113] *Id.* art. 24.22(1).

Wild Fauna and Flora (CITES).[114] However, these measures are primarily designed to protect those beings as resources for human use and consumption and are dampened by the "least trade-restrictive" and "good regulatory practice" requirements described in Sections II.B.3 and II.B.4.[115] Another measure that shows some consideration for non-humans is the provision that states "[n]o Party shall require that a cosmetic product be tested on animals to determine the safety of that cosmetic product, unless there is no validated alternative method available to assess safety," even though this "does not preclude a Party from considering the results of animal testing to evaluate the safety of a cosmetic product."[116] In contrast, ecological law would, first, call into question the true need for cosmetics and other products that require animal testing and, second, eliminate or severely restrict animal testing altogether.

The CUSMA-USMCA is founded on strong notions of protection of private property. From an ecological law perspective, this is problematic in numerous ways,[117] but primarily because private property relationships often exacerbate disconnection of people from the ecosystems that sustain them.[118] One example is the

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[114] *Id.* art. 24.8; *see supra* note 97 and accompanying text.
[115] *Supra* Parts II.B.3–II.B.4.
[116] *Supra* Part II.B.5.
[117] *See* PETER D. BURDON, EARTH JURISPRUDENCE: PRIVATE PROPERTY AND THE ENVIRONMENT 45 (2015) (arguing that private property is anthropocentric and should be reconceived as a relationship between members of the Earth community, rather than a right of humans over other beings); PROPERTY RIGHTS AND SUSTAINABILITY: THE EVOLUTION OF PROPERTY RIGHTS TO MEET ECOLOGICAL CHALLENGES 5–9 (David Grinlinton & Prue Taylor eds., 2011) (comprising an introductory chapter by its editors—arguing for transforming property from a driver of ecological harm to a tool for promoting ecologically sustainable development—and 14 chapters from different contributors who discuss, in three sections: theoretical perspectives on property rights and sustainability, differing cultural approaches to property rights in natural resources, and changing conceptions of property and the challenge of accommodating principles of sustainability in the ownership and use of natural resources).
[118] *See, e.g.*, BURDON, *supra* note 116, at 130–33 (pointing to agrarian farming in particular, the Natural Systems Agriculture Program run by Wes Jackson and the Land Institute, which promotes ownership as a relationship with a land as well as between the owner and others, using the land in ways that change the ecosystem it is embedded in as little as possible—in contrast to dominant Western agricultural

anthropocentrism of intellectual property rights, particularly the notion that companies and individuals profit from patenting other members of the Earth. Making exceptions to this patentability is what requires sanctioning. In this regard, under the CUSMA-USMCA's article on Patentable Subject Matter, a Party may exclude patentability for "animals other than microorganisms, and essentially biological processes for the production of plants or animals, other than non-biological and microbiological processes."[119] The Article permits a Party to exclude "plants other than microorganisms" from being patented, while "confirm[ing] that patents are available at least for inventions that are derived from plants."[120]

In sum, the CUSMA-USMCA is profoundly anthropocentric. However, an eco-centric vision of the human-Earth relationship is not an absolute requirement for law to embrace the principles of ecological primacy and justice that follow in the next parts. While these two other components of the lens involve constraints on behavior and prioritization of interests that flow more naturally from ecocentrism, they could also be adopted based on anthropocentric concern for survival in the face of ecological collapse.

B. Ecological Primacy and the CUSMA-USMCA

Under the principle of ecological primacy, the law shall "[e]nsure that social and economic behavior and systems are ecologically bound, respecting planetary boundaries."[121] This principle has a material focus, asking whether the law in question prioritizes ecological imperatives by constraining economic activities based on ecological limits at relevant scales. It focuses on providing clarity about priorities to ensure human development is pursued without

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practices where ownership is a relationship only among people); Geoffrey Garver, *Confronting Remote Ownership Problems with Ecological Law*, 43 VT. L. REV. 425, 425–37 (2019) (describing how private property rules in the international sphere allow investors to profit from land and resource grabbing that takes place far away, with little regard for the people and ecosystems that are often significantly affected and harmed).

[119] CUSMA-USMCA, *supra* note 11, art. 20.36.

[120] *Id.*

[121] SBERT, *supra* note 2, at 83 (emphasis omitted).

irreversibly impairing ecological integrity or crossing planetary boundaries, including using precaution with respect to these boundaries.

Economic growth and green growth are overarching goals of both the CUSMA-USMCA and the ECA. While it does not include provisions spelling out its overall objectives,[122] the CUSMA-USMCA Preamble states its aim to "replace the 1994 North American Free Trade Agreement with a 21st Century, high standard new agreement to support mutually beneficial trade leading to freer, fairer markets, and to robust economic growth in the region."[123] For its part, the ECA Preamble "emphasiz[es] the importance of green growth, including its economic, health and environmental benefits, in achieving a competitive and sustainable North American economy."[124]

The CUSMA-USMCA "recognize[s] the sovereign right of each Party 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."[125] It relies on fragmented mitigation of environmental impacts rather than regulations based on broad indicators of ecological limits, such as planetary boundaries or ecological footprint, despite the huge per capita ecological footprint of North Americans[126] and the fact that some ecological limits have already been surpassed (specifically, those regarding climate, nitrogen and phosphorus flows, land degradation, and extinction).[127]A reactive and fragmented approach is characteristic of environmental law[128] and can be observed not only in the specific

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[122] Some individual chapters do contain statements of purpose or objectives. *See, e.g.*, CUSMA-USMCA, *supra* note 11, arts. 9.3, 20.2, 24.2 (outlining objectives regarding sanitary and phytosanitary measures, intellectual property rights, and the environment, respectively).

[123] *Id.* at pmbl.

[124] ECA, *supra* note 29, pmbl.

[125] CUSMA-USMCA, *supra* note 11, art. 24.3(1).

[126] *Living Planet Report 2020: Bending the Curve of Biodiversity Loss*, WORLD WILDLIFE FUND 54 (Rosamunde Almond et al. eds., 2020).

[127] Will Steffen et al., *Planetary Boundaries: Guiding Human Development on a Changing Planet,* 347 SCI. 1259855-1, 1259855-6, 1259855-7 (2015) (showing all of these planetary boundaries have already been crossed or are in zones of uncertainty of whether they have been crossed).

[128] *See Oslo Manifesto*, *supra* note 2 (noting that environmental law is flawed because

environmental laws of each of the Parties,[129] but also in Articles 24.9 through 24.23, which recognize the need for science-based action on an array of urgent issues, but largely fail to compel it or to ensure that any such action aligns with key ecological limits.[130] The environmental enforcement mechanisms in the CUSMA-USMCA, described in Part II.B.6, even if effectively implemented, offer no avenues for strengthening environmental laws in terms of ecological primacy.

A step in the direction of ecological primacy is perhaps the inclusion of provisions that ease obstacles for recycling and repurposing by treating *recovered materials* and *remanufactured goods*[131] as "originating" within a Party's territory.[132] A shift to an ecological economy will likely include the production of goods primarily from existing stocks and a major reduction in extracting and producing new materials. For this reason, measures that facilitate the transition away from production processes that rely on virgin material is a step in the right direction.[133] At the same time, it is critical to ensure that recycling and repurposing capacity does not add unnecessary

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of "its anthropocentric, fragmented and reductionist characteristics," fails to address "ecological interdependencies," and is "politically weak" compared to property and corporate rights protected by the law, which has led to an imbalanced legal system "unable to secure the physical and biological conditions, upon which all human and other life depends").

[129] *See* GARVER, HARMONY ON EARTH, *supra* note 1, at 73–90 (describing the failures of environmental law in the United States and Europe with reference to "Total Maximum Daily Loads [TMDLs] under the United States' *Clean Water Act*"; the "regulation of greenhouse gases under the *Clean Air Act*"; the critical loads and levels approach for implementation of the Convention on Long-Range Transport of Air Pollutants in the European Union; and the "[c]ap-and-trade program for sulfur dioxide under the United States' *Clean Air Act*") (emphasis in original).

[130] CUSMA-USMCA, *supra* note 11, arts. 24.9–24.23. *But see id*., arts. 24.18(2), 24.19(2), 24.20, 24.21 (identifying cases in which there is science-based action that align with key ecological limits, such as the use of explosives and poisons in fishing, and shark finning, commercial whaling, fisheries and subsidies, and Illegal, Unreported, and Unregulated (IUU) Fishing).

[131] *Id*. art. 1.5 (defining recovered material and remanufactured goods).

[132] *Id*. art. 4.4 (clarifying when a recovered material is designated as *originating* within a Party's territory).

[133] *See* SBERT, *supra* note 2, at 215–17 (arguing for a shift away from mineral extraction towards substantially reduced use of primarily recycled minerals based on the satisfaction of basic needs).

production of goods. A reduction in total consumption is necessary to slash existing ecological footprints to levels that avoid overshooting the Earth's biocapacity while facilitating ecosystem recovery.[134] In this sense, a *circular economy*[135] is inconsistent with ecological primacy if it supports green growth.

The absence of any mention of the climate emergency, let alone actions to cut greenhouse gas emissions in accordance with the Paris Agreement, is the most egregious way in which the CUSMA-USMCA is ecologically unbound. Notably, the Paris Agreement aims to set limits on economic activity based on the climate systems' limits, which is consistent with ecological primacy.[136] It is a lost opportunity that the CUSMA-USMCA fails to leverage North American trade to drastically reduce and eliminate regional greenhouse gas (GHG) emissions. For example, exceptions to intellectual property rights like those in Article 20.6 for "certain public health measures"[137] could have been incorporated into measures needed to address the climate emergency, the species abundance and extinction crisis,[138] and threats of local or

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[134] *See* Stefan Giljum et al., *Global Patterns of Material Flows and Their Socio-Economic and Environmental Implications: A MFA Study on All Countries World-Wide from 1980 to 2009*, 3 RES. 319, 329, 335 (2014) (presenting a material flows accounting (MFA) study showing an increase of more than 90% in global material extraction over the 30 years prior to 2014 and arguing for absolute reductions of resource use, especially in industrialized economies, to address global environmental problems and social inequities); *see generally* WORLD WILDLIFE FUND, *supra* note 125.

[135] *See, e.g.*, Vanessa Prieto-Sandoval et al., *Towards a Consensus on the Circular Economy*, 179 J. OF CLEANER PROD. 605 (2017).

[136] Paris Agreement to the United Nations Framework Convention on Climate Change art. 2(a), Dec. 12, 2015, T.I.A.S. No. 16-1104 (setting target limits of 2˚ C and 1.5˚ C above pre-industrial levels).

[137] *See* CUSMA-USMCA, *supra* note 11, art. 20.6. "The obligations of this Chapter do not and should not prevent a Party from taking measures to protect public health . . . [and] the Parties affirm that this Chapter can and should be interpreted and implemented in a manner supportive of each Party's right to protect public health and, in particular, to promote access to medicines for all."

[138] *Facts About the Climate Emergency*, UN ENV'T PROGRAM, https://www.unep.org/explore-topics/climate-change/facts-about-climate-emergency (last visited Dec. 1, 2021); WORLD WILDLIFE FUND, *supra* note 125, at 13; *see* Elizabeth Kolbert, THE SIXTH EXTINCTION: AN UNNATURAL HISTORY 104, 108, 120 (2014); Steffen et al., *supra* note 124, at 1259855-5, 1259855-6.

regional ecosystem collapse. Likewise, subsidy elimination measures like those foreseen for fisheries,[139] but with immediate enforceable deadlines, could have been adopted for fossil fuels. While far from perfect, recent proposals in the European Union (E.U.) and the United States for a border carbon tax, or *carbon border tariff*,[140] would promote ecological law but are likely problematic under WTO rules or the CUSMA-USMCA.[141]

As noted earlier, one important element from the NAFTA framework lacking under the CUSMA-USMCA is the goal of upward harmonization of environmental standards that might contribute to prioritization of ecological imperatives.[142] The Parties have only committed to "strive to ensure that its environmental laws and policies provide for, and encourage, high levels of environmental protection, and shall strive to continue to improve its respective levels of environmental protection."[143] Moreover, neither the Agreement nor the ECA recognizes the need for a precautionary approach in setting environmental protection levels.[144] A trade agreement consistent with ecological primacy would instead require its parties to take a precautionary approach in adopting, and systematically strengthening, laws and policies aimed at ensuring all economic activities within its territory, and all trade among them, respect ecological limits at the local, regional, and planetary levels.

In sum, the CUSMA-USMCA is growth-insistent and, with minor exceptions, ecologically unbound. Thus, it is almost entirely inconsistent with the principle of ecological primacy.

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[139] CUSMA-USMCA, *supra* note 11, art. 24.20 (detailing that fishery subsidies will eventually be eliminated when they contribute to overfishing and overcapacity).

[140] *EU Unveils Sweeping Climate Change Plan*, BBC NEWS (July 14, 2021), https://www.bbc.com/news/world-europe-57833807; Lisa Friedman, *Democrats Call for a Tax on Imports from Polluting Countries*, N.Y. TIMES (July 14, 2021), https://www.nytimes.com/2021/07/14/climate/border-carbon-tax-united-states.html?action=click&module=Top%20Stories&pgtype=Homepage.

[141] *See infra* Part IV.

[142] *See supra* Section II.B.6.

[143] CUSMA-USMCA, *supra* note 11, art. 24.3(2).

[144] SBERT, *supra* note 2, at 86 (recognizing the importance of understanding human-Earth relationship when enacting a law or entering an international agreement); GARVER, HARMONY ON EARTH, *supra* note 1, at 112, 142–46.

C. Ecological Justice and the CUSMA-USMCA

The principle of ecological justice requires the law to "[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."[145] The focus of this principle is relational, with emphasis on whether respect for all members of the Earth community translates practically and materially as equitable access to sustenance and ability to flourish. This principle serves as ethical grounding for decisions about equitable use of the planet's sustaining capacity and the fair distribution of, and restraint on, wealth.

Liberalized trade in goods and services and investor protections to sustain economic growth are fundamentally inconsistent with ecological justice. They promote wealth accumulation rather than sufficiency, sacrifice local well-being to regional competitiveness, and prioritize wealth creation for enterprising humans over the flourishing of all humans and nonhumans. In particular, the CUSMA-USMCA aims to "preserve and expand regional trade and production by further incentivizing the production and sourcing of goods and materials in the region"[146] without any consideration of what those goods and materials are for, that is, whether they are meant to satisfy needs or wants. From the perspective of ecological justice, this is a crucial question[147]—as the Earth's sustaining capacity may be great but is not infinite, and it should be available for current and future generations not only of humans but of all other life as well.[148]

The CUSMA-USMCA is founded on meeting unmitigated and

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[145] SBERT, *supra* note 2, at 92 (emphasis omitted).

[146] CUSMA-USMCA, *supra* note 11, pmbl.

[147] SBERT, *supra* note 2, at 92 (explaining that ecological justice seeks to ensure fair sharing of human resources); Carla Sbert, *Needs-Based Constraints in an Ecological Law Transition*, *in* FROM ENVIRONMENTAL TO ECOLOGICAL LAW 135–46 (Kirsten Anker et al. eds., 2021).

[148] It is estimated that "the human enterprise currently demands 1.56 times more than the amount that Earth can regenerate" and that Canada and the U.S. were among the countries with the highest rates of Ecological Footprint of consumption per person in 2016 (>5 global hectares per person), and Mexico among those with the third highest rate (2–3.5 gha per person). WORLD WILDLIFE FUND, *supra* note 125, at 56, 58 (footnote omitted).

ever-increasing utilitarian human desires. It treats the needs of non-human beings as irrelevant unless they are a species at risk of extinction or a "natural resource" that should be "sustainably managed" or "used."[149] In contrast, trade rules under ecological law would support regional production and exchange of goods and materials to satisfy regional needs. Those trade rules for satisfying wants could be allowed only if their production, trade, and use does not prevent other beings from accessing sustenance or otherwise cause harm to human and non-human beings.

Another fundamental flaw of the CUSMA-USMCA from the perspective of ecological justice (also noted under the principle of ecological primacy) is that it ignores the climate crisis. For example, the agreement omits the Paris Agreement from the MEAs recognized in articles 1.3 and 24.8.

Recognizing and acting with urgency to address the climate emergency are pressing ecological justice priorities, given the existential threat that climate change represents for present and future generations of all life on Earth and considering that those not responsible for the carbon emissions driving the climate crisis are most at risk from and increasingly experiencing its worst impacts.[150] Climate justice is integral to ecological justice.

The CUSMA-USMCA assumes that North American markets adequately align with fairness and justice with minimal corrections (namely labor rights, public health and phytosanitary measures, and environmental protection measures). Thus, the Agreement, especially in chapters 9 and 28,[151] adopts a kind of trade-protective precaution—protecting trade from health, safety, environment, and other regulations that are too strong—that is the reverse of the precaution against crossing ecological limits that inheres in ecological law.[152] The

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[149] CUSMA-USMCA, *supra* note 11, arts. 24.15(1), 24.22(1) (outlining the importance of conservation and sustainable use and management of natural resources).

[150] *E.g.*, Glenn Althor, et al., *Global Mismatch Between Greenhouse Gas Emissions and the Burden of Climate Change*, SCI. REPS. 1, 3 (Feb. 5, 2016), https://www.nature.com/articles/srep20281.

[151] *See supra* Part II.B.3–II.B.4.

[152] *See* Geoffrey Garver, *Trade and Environment in NAFTA's Replacement: An Old Gas Guzzler Gets a Paint Job*, 13 GOLDEN GATE U. ENV'T L.J. 39, 45 (2021)

Agreement, however, is devoid of provisions addressing massive wealth and income inequality within and among North American countries. This is despite evidence that such inequality rose in North America after NAFTA took effect, especially in Canada and the United States, and that NAFTA was partly responsible.[153]

In terms of equity among humans, (1) provisions for public participation and transparency; (2) scaling back investor privileges in investor-state disputes; (3) and recognizing the need for free, prior, and informed consent (FPIC) of indigenous peoples in the context of genetic resources,[154] are minimal features that could support ecological justice. However, recognizing FPIC requirements with respect only to genetic resources is very narrow compared to the scope of the concept as enshrined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),[155] and treating biodiversity as a commodified "resource" for human benefit is problematic for ecological justice and from the perspective of ecocentrism. Further, the provisions on transparency and public participation[156] are largely oriented toward protecting the interests of private corporations and business sectors by giving them new ways to challenge regulations that would protect the common good.[157] This favoritism for private sector enterprises involved in cross-border trade and investment extends to remedies and enforceability under the CUSMA-USMCA. By and

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[hereinafter Garver, *Trade and Environment*].

[153] *See* James K. Galbraith, *Inequality After NAFTA*, 43 INT'L J. POL. ECON. 61 (2015).

[154] Article 24.15(4) of the CUSMA-USMCA states: "The Parties recognize the importance of facilitating access to genetic resources within their respective national jurisdictions, consistent with each Party's international obligations. The Parties further recognize that some Parties may require, through national measures, prior informed consent to access such genetic resources in accordance with national measures and, if access is granted, the establishment of mutually agreed terms, including with respect to sharing of benefits from the use of such genetic resources, between users and providers." CUSMA-USMCA, *supra* note 11, art. 24.15(4).

[155] G.A. Res 61/295, United Nations Declaration on the Rights of Indigenous Peoples, at 9 (Sept. 13, 2007) (outlining broader rights recognized for indigenous peoples as compared to those set out in the CUSMA-USMCA).

[156] *Supra* Part II.B.9.

[157] Chapter 28 gives an advantage to private interests seeking to thwart regulation in that it "places significant burdens on regulatory agencies that are, in many cases, already under-resourced." Tienhaara, *supra* note 45, at 2.

large, the provisions that are clearly enforceable with meaningful remedies are those that allow investors to either force Parties into binding arbitration with monetary penalties for unfair treatment of their investments (reduced, but still present in the CUSMA-USMCA) or that allow the Parties to act on behalf of their business sectors in disputes with another Party.[158] As noted in Part II, the Parties have mostly ensured that "shall" language related to environmental provisions is qualified to make the relevant provisions unenforceable.[159]

In sum, the CUSMA-USMCA is ecologically unjust because it aims to promote trade to increase economic growth rather than as a mechanism for ensuring that the needs of people in North America are met today and into the future without depriving other members of the Earth community of the means to meet their current and future needs.

IV. NORTH AMERICAN TRADE AND INVESTMENT UNDER ECOLOGICAL LAW

At the time of this writing, Democrats in the United States Congress were proposing a tax on imports from countries with weak climate change laws and regulations. The E.U. was considering a similar proposal to impose a carbon border tax.[160] Even though the United States is historically the greatest emitter of greenhouse gases—second only to China in current emissions, with the E. U. third[161]—the goal of these proposals is to pressure China and other export-dependent countries to adopt more aggressive measures to address climate change and other environmental problems.[162] Broadly, measures of this nature would align, to some extent, with the goal in ecological law of giving

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[158] *See supra* Parts II.B.2, II.B.5.
[159] *See* Garver, *Trade and Environment*, *supra* note 152, at 42–47.
[160] Friedman, *supra* note 138.
[161] Carni Klirs, *Greenhouse Gas Emissions Over 165 Years*, WORLD RES. INST. (Mar. 22, 2019), https://www.wri.org/data/greenhouse-gas-emissions-over-165-years; Johannes Friedrich et al., *This Interactive Chart Shows Changes in the World's Top 10 Emitters*, WORLD RES. INST. (Dec. 10, 2020), https://www.wri.org/insights/interactive-chart-shows-changes-worlds-top-10-emitters.
[162] *See* Friedrich et al., *supra* note 158 (emphasizing the importance of action from the top 10 greenhouse gas emitting countries).

ecological limits primacy in legal systems. These particular measures would likely be only a small, incremental step in that direction. Nonetheless, they would almost certainly face a high hurdle if challenged under WTO rules requiring such measures to be the least restrictive of trade possible—challenges that have a strong record of success at the WTO.[163] Conceivably, both Canada and Mexico could be targeted with the United States' proposal. In Canada, the political and economic power of oil and gas interests continues to impede ambitious climate change measures, and Mexico also has a significant fossil fuel industry that has undermined its past progress toward addressing climate change.[164] The least-restrictive regulations provisions of both the WTO and the CUSMA-USMCA could impede domestic regulations that move in the direction of ecological law.

The potential fate of these carbon taxes on imports, if challenged under trade rules—which could have been rewritten in the CUSMA-USMCA to allow them—is only one illustration of how far the CUSMA-USCMA is from ecological law. What, then, would a trade regime consistent with ecological law look like in North America? This Part considers key elements of such a regime, using the automotive sector as an illustration.

For the sake of maintaining the Earth's capacity to support thriving communities of people and diverse and abundant non-human life now and into the future, ecological law would rule out, one way or another, many more things than contemporary law does that are possible but no longer ethically responsible. Making domestic and regional legal regimes consistent with ecological law, including those relating to regional trade and investment, is an enormous challenge. It

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[163] *See, e.g.*, Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 1, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998) (providing an example of successful WTO challenge on a U.S. prohibition, commonly known as *Shrimp/Turtle I*); Report of the Panel, *United States–Restrictions on Imports of Tuna*, ¶ 2.3, DS21/R-39S/155 (Sept. 3, 1991), 30 I.L.M. 1594 (1991) (*Tuna/Dolphin I*); Report of the Panel, *United States–Restrictions on Imports of Tuna*, 56–58, DS29/R (June 16, 1994), 33 I.L.M. 839, 896–99 (1994) (*Tuna/Dolphin II*); Appellate Body Report, *Brazil–Measures Affecting Imports of Retreaded Tyres*, WTO Doc. WT/DS332/AB/R (decided Dec. 3, 2007).

[164] Josh Gabbatiss, *The Carbon Brief Profile: Mexico*, CARBON BRIEF (June 4, 2021), https://www.carbonbrief.org/the-carbon-brief-profile-mexico.

will take decades to achieve, if it is possible at all.[165] This long-term vision is of human societies organized, to the greatest extent possible, around self-sufficient communities where societal provisioning and social metabolism are contained locally. The resulting ecological impacts would be minimal and geographically constrained, so as not to affect people and places with little connection to the people causing those ecological impacts. It is a vision of living and flourishing within one's means, with the remote provisioning that is commonplace and often favored in today's globally interconnected economy, a last resort. This likely implies less—but more mindful—trade, consistent with meeting basic needs and providing for fulfilling lives without consuming more than is necessary.

At its most fundamental level, ecological law gives legal form to worldviews that are much different from those that dominate the global legal order, in particular, the human-nature dualism of the Enlightenment that helped give rise to the current global ecological crisis.[166] In the best version of the long-term vision of ecological law, people are not miserable because they can no longer do things that require overconsumption and needless ecological degradation; but rather, they rejoice in the knowledge that they are living in a truly sustainable way and walking lightly on the Earth, with a greater connection to the ecosystems that sustain them. The exact nature of the societies and their legal institutions that fulfill this vision is difficult or impossible to predict, and in fact the vision likely implies a diverse array of societies, less organized around nation states than today's societies.[167] Further, on the road to ecological law, climate change and other ecological change, from the local to global levels, will advance considerably given the great momentum of current drivers of such change. Even if that momentum can be slowed to an ecologically sound pace, damage is being and will continue to be done along the way. Thus, if and when ecological law becomes dominant, it will apply to a world that has undergone transformative change.

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[165] *See* GARVER, HARMONY ON EARTH, *supra* note 1, at 183–224.

[166] *See* CAPRA & MATTEI, *supra* note 103; GARVER, HARMONY ON EARTH, *supra* note 1, at 24–25, 44–47.

[167] *See* GARVER, HARMONY ON EARTH, *supra* note 1, at 227–33 (noting compatibility of many degrowth principles with ecological law).

On the long path to achieving its ultimate vision, ecological law serves as a kind of beacon on the horizon, against which transitional measures can be tested using tools like the lens of ecological law. Already, some concrete steps in the direction of ecological law are becoming evident. This is most notable in the emergence of rights of nature in various parts of the world.[168] In many cases—as with the assertion of rights for the Klamath River by the Yurok tribes in California, for the Magpie River by the Innu Council of Ekuanitshit in Quebec, and for the Whanganui River through a settlement between the Whanganui iwi and the New Zealand government—rights of nature are putting Indigenous legal principles and notions of human kinship relationships with non-human nature at the forefront of future policy and decision making.[169] Many of these Indigenous principles resonate with ecological law.[170]

The contrast between the vision of the CUSMA-USMCA and an alternative future under ecological law is contextualized using cars and the automotive sector, which was highly influential during the negotiation of both NAFTA and the CUSMA-USMCA.[171] A key

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[168] *See* DAVID BOYD, THE RIGHTS OF NATURE: A LEGAL REVOLUTION THAT COULD SAVE THE WORLD 168–72 (2017) (explaining and defending rights of nature generally and providing examples of the assertion of rights of nature in the United States, New Zealand, Ecuador, Bolivia, and elsewhere).

[169] *See* The Yurok Tribal Council, Resolution Establishing the Rights of the Klamath River, Resolution 19–40 (May 9, 2019) (recalling the Yurok Tribe's strong relationship and interdependence with the Klamath River since time immemorial); Chloe Rose Stuart-Ulin, *Quebec's Magpie River Becomes First in Canada to be Granted Legal Personhood*, CANADA'S NAT'L OBSERVER (Feb. 24, 2021), https://www.nationalobserver.com/2021/02/24/news/quebecs-magpie-river-first-in-canada-granted-legal-personhood (noting the declaration of rights of the Magpie River in accordance with Innu customs and practices); Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, § 15 (2017) (requiring persons who exercise or perform a function, power or duty under various New Zealand laws that relate to or affect the Whanganui River, to recognize and provide for the legal personhood of the river and for the intrinsic values of the river (known as Tupua te Kawa) that are grounded in the worldview and traditions of the Whanganui iwi (i.e. the Indigenous peoples with a kinship relationship with the river)).

[170] *See* Geoffrey Garver, *Are Rights of Nature Radical Enough for Ecological Law?*, *in* FROM ENVIRONMENTAL TO ECOLOGICAL LAW 90–104 (Kirsten Anker et al. eds., 2021).

[171] *See* GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, NAFTA REVISITED:

outcome in the CUSMA-USMCA for the automotive manufacturing sector was the amount of each vehicle that must originate within North America under the Rules of Origin; the amount increased from 62.5% under NAFTA to 75% under the CUSMA-USMCA.[172] This outcome is a success from an economic perspective where economic growth, jobs, profits, consumerism, competitiveness, etc., are of paramount concern—especially given the economic weight and manufacturing prowess of China on the global stage.[173] Yet, in the context of the CUSMA-USMCA, these concerns are largely disconnected from the ecological principles and concerns at the heart of ecological law.

With an ecological law perspective, the starting point is not, as it is with the CUSMA-USMCA, to find ways to make sure that the North American automotive sector continues to operate, provide jobs, and grow, even if to produce solely electric vehicles. Rather, it is a rethinking and critical analysis of what the deep underlying purpose of the automotive sector is. From this perspective, it would not be taken for granted that every family should have one or more cars, that the automotive sector should remain perpetually a strong source of good-paying jobs, or that North America should and will remain as car-dependent as it is today. A core question would be: what are the transportation and mobility needs of a society that is living within its means and causing minimal harm to the ecosystems that sustain it?

At some point in answering this question, a demand for a certain number of cars might emerge based less on utilitarian desires of consumerist individuals bombarded with car advertisements and more on overall needs. Determining the appropriate number of cars would account for ways that superfluous transportation can be avoided

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ACHIEVEMENTS AND CHALLENGES 365–93 (2005); Owen Stuart, *How Will the Shift from NAFTA to USMCA Affect the Auto Industry?*, INDUS. WEEK (Oct. 12, 2018), https://www.industryweek.com/the-economy/article/22026500/how-will-the-shift-from-nafta-to-usmca-affect-the-auto-industry; Janyce McGregor, *Auto industry Relieved by NAFTA 2.0, but Results may be Mixed*, CBC NEWS (Oct. 4, 2018), https://www.cbc.ca/news/politics/auto-impact-usmca-wednesday-1.4848589.

[172] Andrew Chatzky et al., *NAFTA and the USMCA: Weighing the Impact of North American Trade*, https://www.cfr.org/backgrounder/naftas-economic-impact (last updated July 1, 2020).

[173] *Id.* Trade agreements, such as NAFTA, are often lauded for shifting production to places with lower labor and environmental costs, such that consumer prices drop and overall consumption increases.

and alternative forms of transportation where it cannot be avoided, along with options for sharing motor vehicles within those alternative forms of transportation. The question then becomes: what are the least ecologically harmful transportation systems and motor vehicles in those circumstances? Only when these needs-based, ecological determinations are made might it be relevant to consider what kind of market and trading regime makes sense for the law to enable and support.

CONCLUSION

The CUSMA-USMCA was born of and perpetuates a growth-insistent economic system that has caused, and is ill-equipped to reverse, alarming trends toward ecological overshoot and collapse of the ecosystems on which human societies and non-human lives depend. A key purpose of applying the lens of ecological law to a legal instrument like the CUSMA-USMCA is to open the imagination to different and better ways for human communities to provide for themselves and support good lives for their human and non-human members, now and into the future. The analysis in this Article reveals that the CUSMA-USMCA is anthropocentric, growth-insistent and ecologically unbound, and ecologically unjust, with paths to ecological trade rules yet to be discovered. The current ecological crisis makes it urgent to seize every opportunity to discover them.