

**THE SUBMISSIONS ON ENFORCEMENT MATTERS
PROCESS: CHANGES IN LAW AND THEORY**

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INTRODUCTION

In 2017, during renegotiations over the North American Free Trade Agreement (NAFTA), Professors Armand de Mestral and Markus Gehring published an opinion piece entitled *NAFTA and Environmental Protection*.¹ They argued that a process within a side agreement to NAFTA, the North American Agreement on Environmental Cooperation (NAAEC), should be preserved in any new agreement. The authors described the process, the Submissions on Enforcement Matters (SEM) process, as “one of the most accessible

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¹ Armand de Mestral & Markus Gehring, *NAFTA and Environmental Protection*, CORPORATE KNIGHTS (Sept. 7, 2017), <https://www.corporateknights.com/perspectives/guest-comment/nafta-environmental-protection/>.

international environmental processes that exist today.”² In the end, the SEM process was modified and included in the environmental chapter of the Canada-United States-Mexico Agreement (CUSMA) that entered into force on July 1, 2020.³

This Article will compare the SEM process, as it existed in the NAAEC, with the form it takes in Chapter 24 of the CUSMA. This Article will furthermore consider the SEM process and the criticisms it faces in theoretical perspective and argue that the CUSMA version of the SEM process largely responds to those criticisms.

Part I will describe the NAAEC version of the SEM process and its institutional context and will then note the significant changes to the process made by Chapter 24 of the CUSMA and describe new institutional features of the process. Part II will identify criticisms of the NAAEC and CUSMA versions of the SEM process. Part III will set out two theoretical frameworks for analyzing the SEM process in both its NAAEC and CUSMA forms. Using the frameworks provided by the interactional theory of international law⁴ and transnational network theory,⁵ this Article will then respond to the criticisms of the SEM process identified in Part II.

I. THE SEM PROCESS: THEN AND NOW

A. Political Backdrops

Before discussing the details of the SEM process, this Article lays out some of the political background to the NAAEC and the CUSMA. In order to gain support for passing NAFTA from environmental groups and Democratic members of Congress who

² *Id.*

³ *Agreement between Canada, the United States of America, and the United Mexican States*, OFF. OF THE U.S. TRADE REP. ch. 24, Nov. 30, 2018 [hereinafter CUSMA].

⁴ JUTTA BRUNNÉE & STEPHEN J. TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT 5–8 (2010).

⁵ *See, e.g.*, Kal Raustiala, *Citizen Submissions and Treaty Review in the NAAEC*, in GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 256, 260 (David L. Markell & John H. Knox eds., 2003) (explaining that under the NAAEC, parties to the treaty can file complaints against other parties for failure to enforce environmental laws under the terms of the treaty).

opposed the agreement, the Clinton Administration proposed a trilateral side-agreement that would aim to respond to the groups' concerns, including three that are particularly pertinent for our discussion: (1) the creation of *pollution havens* in Mexico, as foreign investment would be directed there and "environmental degradation and loss of natural resources there" would result;⁶ (2) the compromising of domestic environmental standards as a result of trade-related challenges;⁷ and (3) the exclusion of the public from participating in trade disputes.⁸

Environmental groups pressed for the creation of a North American Commission on the Environment that would include "a permanent Secretariat with independent power to conduct investigations and prepare reports and [that would be] advised by a nongovernmental board of citizens" and provide for "increased public participation in dispute settlement."⁹ The NAAEC reflected some of these demands, but as John Knox and David Markell argue, it should be primarily understood as an attempt to prevent pollution havens.¹⁰ The authors note that the agreement neither protected domestic environmental legislation from trade challenges under NAFTA nor did it provide for public participation in dispute resolution.¹¹ Nonetheless, the NAAEC did target domestic regulation when it obliged member Parties to effectively enforce their environmental laws and regulations and provided, through sections 14 and 15, the SEM procedure, which allows for direct citizen involvement in overseeing this obligation.¹² In this respect, the NAAEC should be seen as a political compromise that attempted to give effect to some of the aspirations of environmental groups while yielding to political exigencies.

During the NAFTA renegotiations, there was once again a

⁶ DAVID L. MARKELL & JOHN H. KNOX, *The Innovative North American Commission for Environmental Cooperation*, in GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 1, 4–5 (David L. Markell & John H. Knox eds., 2003).

⁷ *Id.* at 6.

⁸ *Id.* at 7.

⁹ *Id.* at 7–8.

¹⁰ *Id.* at 9.

¹¹ *Id.* at 6, 9.

¹² *Id.* at 9.

political contest between the executive and legislative branches of the U.S. government. In particular, Congress and President Trump disagreed over the congressional role in the renegotiation process. As M. Angeles Villarreal and Ian F. Fergusson note, under the Bipartisan Comprehensive Trade and Promotion Accountability Act of 2015 (TPA), Congress had the power to set “negotiating objectives” and to require that the President meet “various consultative, notifications, and reporting requirements before, during, and after the conclusion of negotiations.”¹³ If the President progressed towards those objectives and requirements in his negotiations, Congress was required to expedite the passage of legislation that would implement the renegotiated treaty.¹⁴ According to Villarreal and Fergusson, some members of Congress were concerned that the negotiations did not follow TPA procedures.¹⁵ Other members expressed doubts about “the extent to which the President advanced U.S. negotiating objectives in TPA.”¹⁶ For his part, President Trump threatened to withdraw from NAFTA to pressure Congress “to support timely action on implementing legislation.”¹⁷ Ultimately, the CUSMA was signed by the Party states on November 30, 2018; President Trump signed the implementing legislation on January 29, 2020; and the treaty entered into force on July 1, 2020.¹⁸

We saw in the Introduction that during the renegotiations some

¹³ M. ANGELES VILLARREAL & IAN F. FERGUSSON, CONG. RSCH. SERV., R44981, NAFTA RENEGOTIATION AND THE PROPOSED UNITED STATES-MEXICO-CANADA AGREEMENT (USMCA) 41 (2019).

¹⁴ *Id.*

¹⁵ *Id.* at Summary (explaining that the TPA’s requirements of consultation, notification, and reporting allow Congress to exercise influence before the agreement is finalized and protect Congress’s role in making trade agreements).

¹⁶ *Id.* at 41.

¹⁷ *Id.*; see also Alison Peck, *Withdrawing from NAFTA*, 107 GEO. L.J. 647, 657, 679 (2019) (explaining that § 125 of the Trade Act of 1974 does not expressly state who can withdraw from trade agreements, thus supporting an argument that President Trump did not have authority to withdraw from NAFTA).

¹⁸ VILLAREAL & FERGUSSON, *supra* note 13, at Summary; United States-Mexico-Canada Agreement Implementation Act, Pub. L. No. 116-113, §§ 1, 107, 134 Stat. 11 (2020); USMCA TO ENTER INTO FORCE JULY 1 AFTER UNITED STATES TAKES FINAL PROCEDURAL STEPS FOR IMPLEMENTATION, OFF. OF THE U.S. TRADE REP. (2020).

commentators expressed doubt about whether the SEM process would be brought into the new treaty.¹⁹ In the end, those concerns were not borne out. The next section provides an overview of the institutional structure that the NAAEC created and that the Environmental Cooperation Agreement (ECA) by and large carries into the CUSMA framework. The next section then discusses, in detail, the SEM process under the NAAEC, the changes to the process, and the institutional structure that Chapter 24 of the CUSMA introduces.

B. Institutional Structure and the SEM Processes: the NAAEC and the CUSMA Compared

The NAAEC created the Commission for Environmental Cooperation (CEC). The CEC includes the Council, comprised of cabinet-level representatives of the Parties or their representatives. The Council is the governing body of the Commission.²⁰ The CEC also includes the Secretariat, which provides “technical, administrative and operational support to the Council.”²¹ The Secretariat is headed by an Executive Director, who is chosen by the Council for one three-year term that may be renewed for an additional three years.²² Furthermore, the Secretariat is staffed by appointees of the Executive Director.²³ Finally, the NAAEC constituted the Joint Public Advisory Committee (JPAC) and provided it with 15 members, comprised of equal numbers of members from each Party country.²⁴ The NAAEC empowered the JPAC to “provide advice to the Council on any matter within the scope

¹⁹ Mestral & Gehring, *supra* note 1.

²⁰ North American Agreement on Environmental Cooperation, Can.-Mex.-U.S., Sept. 14, 1993, 32 I.L.M. 1480, art. 10(1) [hereinafter NAAEC]. The summary of the NAAEC in this and the following paragraphs draws on material previously published in Hoi L. Kong, *The Citizen Submissions Process in the NAAEC: Theory and Practice in Deliberative Democratic Institutional Design for Transnational Institutions*, in *NAFTA AND SUSTAINABLE DEVELOPMENT: HISTORY, EXPERIENCE AND PROSPECTS FOR REFORM 351* (Hoi L. Kong & L. Kinvin Wroth eds., 2015).

²¹ NAAEC, *supra* note 20, art. 11(5).

²² *Id.* art. 11(1).

²³ *Id.* art. 11(2) (explaining that the Executive Director makes selections by considering candidates proposed by the Parties and Joint Public Advisory Committee, as well as questions of national representation).

²⁴ *Id.* art. 16(1).

of this Agreement”²⁵ and “provide relevant technical, scientific or other information to the Secretariat.”²⁶

Each of these institutions has been carried forward by the ECA,²⁷ with some modifications.²⁸ Perhaps the most significant changes are to the composition of the JPAC and its functions. The JPAC is now comprised of “nine members, unless the Council decides otherwise, with an equal number of nationals appointed by each Party.”²⁹ Moreover, some specific functions of the JPAC that the NAAEC set out have not been continued into the ECA. For instance, although the ECA contains a general permissive provision, providing that the JPAC “may provide advice to the Council on matters within the scope of this Agreement,”³⁰ the ECA does not contain a provision that authorizes the JPAC to “provide relevant technical, scientific or other information to the Secretariat.”³¹ Most significantly for present purposes, unlike the NAAEC, the ECA does not specifically give “developing a factual record”³² as an example of a purpose for which the JPAC can provide advice.

This interlocking structure of a political council, an independent expert body, and a citizen advisory group creates the potential for tensions, as will become evident in the next Part’s discussion of criticisms of the SEM. In the NAAEC, the SEM was governed by articles 14 and 15. According to Article 14, “[t]he Secretariat may consider a submission from any non-governmental

²⁵ *Id.* art. 16(4).

²⁶ *Id.* art. 16(5).

²⁷ Agreement on Environmental Cooperation among the Governments of Canada, the United States of America, and the United Mexican States, Can.-Mex.-U.S., Dec. 18, 2018, art. 4 [hereinafter ECA].

²⁸ Article 3 continues in force, setting out the Council’s structures and processes, and Article 4 sets out the Council’s functions. Article 5 sets out the Secretariat’s structures and procedures and largely replicates the previously cited articles of the NAAEC, although the requirement under Article 11 of the NAAEC that the Executive Director consider “lists of candidates prepared by the Parties and by the Joint Public Advisory Committee” no longer exists. Compare ECA, *supra* note 27, with NAAEC, *supra* note 20, art. 11.

²⁹ ECA, *supra* note 27, art. 6(1).

³⁰ *Id.* art. 6(4).

³¹ NAAEC, *supra* note 20, art 16(5).

³² Compare NAAEC, *supra* note 20, art. 16(5), with ECA, *supra* note 27, art. 6(4).

organization or person asserting that a Party is failing to effectively enforce its environmental law” and sets out the conditions of admissibility for a claim.³³ Once the Secretariat has found that these conditions are met, it “shall determine whether the submission merits requesting a response from the Party;” that inquiry is guided by a set of factors.³⁴ If the Secretariat determines that a response is merited, “it shall forward to the Party a copy of the submission and any supporting information provided with the submission.”³⁵ Under the NAAEC, the Party must then, within a time limit, advise the Secretariat “whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further”³⁶ as well as “any other information that the Party wishes to submit.”³⁷

Furthermore, if the Secretariat considers that a submission is warranted, it must “inform the Council and provide its reasons.”³⁸ If the Council, “by a two-thirds vote, instructs it to do so,” the Secretariat must prepare a factual record.³⁹ According to Article 15(4), the

³³ NAAEC, *supra* note 20, art. 14 (according to article 14(1) of the NAAEC, the conditions include that the submission “(a) is in writing in a language designated by that Party in a notification to the Secretariat; (b) clearly identifies the person or organization making the submission; (c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based; (d) appears to be aimed at promoting enforcement rather than at harassing industry; (e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party’s response, if any; and (f) is filed by a person or organization residing or established in the territory of a Party”).

³⁴ *Id.* arts. 14(2)(a)–(d) (“In deciding whether to request a response, the Secretariat shall be guided by whether: (a) the submission alleges harm to the person or organization making the submission; (b) the submission, alone or in combination with other submissions, raises matters whose further study in the process would advance the goals of this Agreement; (c) private remedies available under the Party’s law have been pursued; and (d) the submission is drawn exclusively from mass media reports.”).

³⁵ *Id.* art. 14(2).

³⁶ *Id.* art. 14(3)(a).

³⁷ *Id.* art. 14(3)(b) (including information, such as “i) whether the matter was previously the subject of a judicial or administrative proceeding, and ii) whether private remedies in connection with the matter are available to the person or organization making the submission and whether they have been pursued”).

³⁸ *Id.* art. 15(1).

³⁹ *Id.* art. 15(2).

Secretariat then must prepare the record, considering relevant information that “(a) is publicly available; (b) submitted by interested non-governmental organizations or persons; (c) submitted by the Joint Public Advisory Committee; or (d) developed by the Secretariat or by independent experts.”⁴⁰ Once the record is completed, the Secretariat must provide a draft copy to the Council that any Party may provide comments on.⁴¹ The Secretariat must then incorporate any comments that it finds appropriate and submit the record to the Council.⁴² Under the NAAEC, the Council may decide by a two-thirds vote to make the report public.⁴³

The NAAEC provisions governing the SEM process have in large measure been carried forward into the CUSMA and the ECA. There are, however, five significant differences.⁴⁴ First, the SEM procedure in the NAAEC was not limited in its application to the statutes or regulation of a specific level of government in any of the Party states. By contrast, the CUSMA specifically limits its application to acts or regulations made by the federal level of government in each of the Party states.⁴⁵ This change is potentially significant because provincial, state, and municipal government action will no longer be the object of factual records if federal legislation or regulations are not at issue.⁴⁶ Yet, as Professor Alexandra Harrington notes, it is often the provinces or states, not the federal government, that currently regulate

⁴⁰ *Id.* art. 15(4).

⁴¹ *Id.* art. 15(5).

⁴² *Id.* art. 15(6).

⁴³ *Id.* art. 15(7).

⁴⁴ I am grateful to Robert Moyer, who discussed some of these issues in a video-conference call with the Submissions on Enforcement Matters Unit on June 24, 2020.

⁴⁵ CUSMA, *supra* note 3, art. 24.1 (defining *environmental law* as a “statute or regulation” and specifying the meaning of these terms for each member jurisdiction: “(a) for Canada, an Act of Parliament or regulation made under an Act of the Parliament of Canada that is enforceable by action of the central level of government; (b) for Mexico, an Act of Congress or regulation promulgated pursuant to an Act of Congress that is enforceable by action of the federal level of government; and (c) for the United States, an Act of Congress or regulation promulgated pursuant to an Act of Congress that is enforceable by action of the central level of government”).

⁴⁶ *Id.*

in the area of sustainable development.⁴⁷ Therefore, as a consequence of the CUSMA's change to the SEM's scope of application, the SEM will not address significant failures to enforce sustainable development laws and regulations.⁴⁸

Second, under the NAAEC, only a non-governmental organization (NGO) or person in the territory of a Party State could make a submission,⁴⁹ whereas Article 24.27.1 of the CUSMA states that "[a]ny person of a Party" may file such a submission.⁵⁰ This change in wording suggests that a for-profit company could file; as a result, corporations might attempt to use the process in ways that have the effect of disadvantaging competitors. For example, a corporation operating in Canada could apply to have a factual record created regarding enforcement activities in the United States in order to increase enforcement activity and thus impose greater operation costs on a competitor operating within the United States.

Third, there are differences between the CUSMA and the NAAEC in relation to the timelines for reviewing a submission and recommending and preparing a factual record. Professor Tracy Hester notes that articles 24.27–24.28 of the CUSMA incorporate administrative reforms that were initiated under the NAAEC in response to significant criticisms of the process's timelines.⁵¹

Fourth, under the CUSMA, a factual record is published unless

⁴⁷ See generally Alexandra R. Harrington, *Brief on the World Trade Organization's Dispute Settlement Body and the Sustainable Development Goals*, 15 MCGILL J. SUSTAINABLE DEV. L. 23, 35 (2019) (discussing how provinces and states have "a powerful role in regulating products and practices" and often impose "more stringent environmental standards than those used at the national level.").

⁴⁸ See generally *id.* at 43 (theorizing that World Trade Organization member states will "claim compliance with" the Organization's sustainable development goals "without having dedicated themselves fully to them").

⁴⁹ NAAEC, *supra* note 20, art. 14(1)(f).

⁵⁰ CUSMA, *supra* note 3, art. 24.27.1.

⁵¹ Tracy Hester, *Still Standing: The New U.S.-Mexico-Canada Agreement and the Fate of the Commission on Environmental Cooperation*, 50 TRENDS 6, 8 (2019). For the guidelines to which Professor Hester refers, see GUIDELINES FOR SUBMISSIONS ON ENFORCEMENT MATTERS UNDER ARTICLES 14 AND 15 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION, COMM'N FOR ENV'T COOP. (2012), <http://www3.cec.org/islandora/en/item/10838-guidelines-submissions-enforcement-matters-under-articles-14-and-15-north-en.pdf> [hereinafter 2012 GUIDELINES].

two parties provide instructions that it not be published.⁵² By contrast, as we have seen above, under the NAAEC, publication required the affirmative votes of two of the three parties.⁵³ The CUSMA therefore effectively creates a default rule that a record will be published. This default can be brought to light by comparing the text of Article 24.28.6 with that of the analogous provision in the Central America-Dominican Republic Free Trade Agreement (CAFTA-DR).⁵⁴ According to the former, “[t]he CEC Secretariat shall make the final record publicly available, normally within 30 days following its submission, unless at least two members of the Council instruct it not to do so.”⁵⁵ By contrast, Article 17.8.7 of CAFTA-DR states: “The Council may, by the vote of any Party, make the final factual record publicly available, normally within 60 days following its submission.”⁵⁶

Under the CUSMA, if the Council does not vote at all, the factual record *must* be published. By comparison, under CAFTA-DR, a factual record *may only* be published if a single Party votes in favor of publication. The implication under CAFTA-DR is that if no Party votes in favor, the factual record cannot be published. This implication is strengthened by comparing Article 17.8.7 with Article 17.8.2 of CAFTA-DR. The latter states that “[t]he secretariat shall prepare a factual record if the Council, by a vote of any Party, instructs it to do so.”⁵⁷ As Giselle Davidian has noted, this wording implies that Council inaction will result in the Secretariat’s not preparing a factual record.⁵⁸

Fifth, and finally, Professor Hester notes that the ECA

⁵² CUSMA, *supra* note 3, art. 24.28.6.

⁵³ NAAEC, *supra* note 20, art. 15(2).

⁵⁴ Compare CUSMA, *supra* note 3, art. 24.28.6, with Central America-Dominican Republic Free Trade Agreement, Cent. Am.-Dom. Rep.-U.S., Aug. 5, 2004, Hein’s No. KAV 7157, <https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text> [hereinafter CAFTA-DR].

⁵⁵ CUSMA, *supra* note 3, art. 24.28.6.

⁵⁶ CAFTA-DR, *supra* note 54, art. 17.8.7.

⁵⁷ *Id.* art. 17.8.2.

⁵⁸ Giselle Davidian, *Should Citizens Expect Procedural Justice in Nonadversarial Processes? Spotlighting the Regression of the Citizen Submissions Process from NAAEC to the CAFTA-DR*, in *NAFTA AND SUSTAINABLE DEVELOPMENT: HISTORY, EXPERIENCE AND PROSPECTS FOR REFORM* 37, 63 (Hoi L. Kong & L. Kinvin Wroth eds., 2015).

addresses a “perennial sore point under NAAEC”⁵⁹ by requiring that “[e]ach Party shall cooperate with the Secretariat to provide information relevant for the preparation of a factual record.”⁶⁰ According to Hester, the three countries under the NAAEC regime did not consistently “answer information requests needed to develop factual records.”⁶¹

In addition to the above changes to the SEM process itself, there is an institutional change that has implications for the process. The CUSMA creates (under Art. 24.26.2) an Environment Committee that is “composed of senior government representatives or their designees, of the relevant trade and environment central level of government authorities of each Party responsible for the implementation of this Chapter.”⁶² Article 24.28.7 provides that the Environment Committee “shall consider the final factual record in light of the objectives of this Chapter and the ECA and may provide recommendations to the Council on whether the matter raised in the factual record could benefit from cooperative activities.”⁶³ Further, Article 24.28.8 provides that “the Parties shall provide updates to the Council and the Environment Committee on final factual records, as appropriate.”⁶⁴

This Part has described some of the political background to the NAAEC and Article 24 of the CUSMA and shown how Article 24 and the ECA have made changes to the SEM process and its institutions. Although I have interpreted some of the CUSMA’s provisions and discussed how commentators have viewed the changes, the focus of this Part has primarily been descriptive. The next two parts will adopt a more critical and theoretical stance. Part II will identify criticisms of the SEM that authors have leveled against both the NAAEC version of the process and its renegotiated form in the CUSMA. Part III will articulate a theoretical framework for understanding the SEM process and will respond to the criticisms.

⁵⁹ Hester, *supra* note 51, at 8.

⁶⁰ ECA, *supra* note 27, art. 14.

⁶¹ Hester, *supra* note 51, at 8.

⁶² CUSMA, *supra* note 3, art. 24.26.2.

⁶³ *Id.* art. 24.28.7; *see* ECA, *supra* note 27, art. 1 (setting out the objectives of the ECA).

⁶⁴ CUSMA, *supra* note 3, art. 24.28.7.

II. CRITICISMS OF THE SEM PROCESS: THEN AND NOW

Two criticisms of the SEM process are especially relevant for the current discussion. First, authors have long argued that under the NAAEC, the Council was in a conflict of interest.⁶⁵ According to the authors, this conflict arose because the Council had the authority to determine whether a factual record would be prepared and published, but since the Council was comprised of the member state representatives, the target of any potential record would play a role in the deliberations about whether a record should go forward.⁶⁶ Second, authors argued that under the NAAEC, the SEM procedure was toothless, either because it included no possibility of enforcement or because it did not mandate monitoring after the publication of a report.⁶⁷

Geoffrey Garver has recently argued that the SEM process in the renegotiated agreement does nothing to address these criticisms. According to Garver, Council interference with the SEM process under the NAAEC “occurred most egregiously in Council votes on whether to authorize the Secretariat to prepare a factual record for a submission and in factual record instructions where one is authorized.”⁶⁸ The first form of interference continues, by design, in the CUSMA.

⁶⁵ See David J. Blair, *The CEC Citizen Submission Process: Still a Model for Reconciling Trade and the Environment?*, 12 J. ENV'T DEV. 295, 318 (2003) (providing a statement of the conflict whereby the process “intend[s] to place governments under public scrutiny in potentially embarrassing ways but that is also open to control by those same governments”).

⁶⁶ See *id.* (explaining the inherent conflict in the NAAEC SEM procedure because it is in part controlled by the parties subject to scrutiny by the procedure).

⁶⁷ See, e.g., Tseming Yang, *The Effectiveness of the NAFTA Environmental Side Agreement's Citizen Submission Process: A Case Study of Metales y Derivados*, 76 UNIV. COLO. L. REV. 443, 478 (2005) (“[S]ubmissions to the CEC cannot in themselves result in substantive remedies, whether they be penalties, environmental remedial orders, or other types of injunctive relief. A factual record is the only successful outcome.”); David Markell, *The Role of Spotlighting Procedures in Promoting Citizen Participation, Transparency, and Accountability*, 45 WAKE FOREST L. REV. 425, 451 (2010) (“[T]he process ultimately is solely a reflexive, information-gathering, and spotlighting mechanism that lacks the remedial or punitive capacity to make any party take any action.”).

⁶⁸ Geoffrey Garver, *Trade and Environment in NAFTA's Replacement: An Old Gas Guzzler Gets a Paint Job*, 13 GOLDEN GATE UNIV. ENV'T L. J. 39, 47 (2021).

Article 24.28.2 does not alter the process set out in Article 15.2 of the NAAEC: the preparation of a factual record only proceeds if two Parties instruct the Secretariat to proceed.

The second form of interference that Garver identifies arises from a controversial Council practice. In several prominent instances, the Council, in instructing the Secretariat to prepare a factual record under the NAAEC, narrowed the scope of the inquiry proposed in the submission recommended by the Secretariat.⁶⁹ This narrowing of the factual record transformed requests pertaining to a Party's systemic failure to enforce its environmental law into inquiries over a few specific instances of non-enforcement. In one instance, this narrowing of the record resulted in the submitter withdrawing a submission.⁷⁰ The NAAEC did not expressly authorize this practice, but neither did it forbid it, and as Garver implies, neither the CUSMA nor the ECA changes this state of affairs.

Commentators have leveled the second general criticism of the SEM process—that it is toothless—against both the NAAEC and the CUSMA versions of the SEM. In one sense, both are toothless in that neither SEM process requires a Party that has failed to enforce its environmental laws to rectify that failure.⁷¹ There is, however, a significant difference between the NAAEC and CUSMA with respect to a second argument about the SEM process's ineffectiveness.

According to this second argument, the SEM process in the NAAEC was toothless, in the sense that once a factual record was published, there was no follow-up monitoring.⁷² As a result, a Party

⁶⁹ See Chris Wold et al., *The Inadequacy of the Citizen Submission Process of Articles 14 & 15 of the North American Agreement on Environmental Cooperation*, 26 LOY. L.A. INT'L & COMPAR. L. REV. 415, 434 (2004).

⁷⁰ John H. Knox & David L. Markell, *Evaluating Citizen Petition Procedures: Lessons from an Analysis of the NAFTA Environmental Commission*, 47 TEX. INT'L L. J. 505, 526 (2012).

⁷¹ See Miriam Mafessanti, *Responsibility for Environmental Damage Under International Law: Can MNCs Bear the Burden? . . . And How?*, 17 BUFF. ENV'T. L. J. 87, 99 (2010) (describing that the NAAEC factual record cannot make determinations of whether a party is enforcing its obligations); Garver, *supra* note 68, at 47 (identifying the limited scope of the SEM process, which allows North Americans to seek "a detailed factual record regarding allegations of ineffective environmental enforcement by a party" prepared by the CEC Secretariat).

⁷² See generally Markell, *supra* note 67, at 452–53.

could, without any supervision, ignore the published record.⁷³ Professor David Markell, for example, argued that in the *Migratory Bird Treaty Act* case, the relevant U.S. agency did not change its actions after the publication of the factual record.⁷⁴ In order to address this problem, Professors Knox and Markell advocated for ongoing monitoring of the problems identified in the factual records.⁷⁵ Professor Chris Wold and his collaborators argued that a model for this kind of monitoring regime could be found in Article 17.8(8) of the CAFTA-DR. That article empowers an international body to issue recommendations for how a government that fails to enforce its environmental laws can monitor its enforcement activities.⁷⁶

Although Article 24.28 of the CUSMA largely incorporates the kind of oversight mechanisms provided for by CAFTA-DR, the charge of toothlessness persists. Recall that Article 24.28.7 empowers the Environment Committee to make recommendations to the Council about whether matters at issue in a published factual record “could benefit from cooperative activities.”⁷⁷ And Article 24.28.8 requires the Parties to provide updates to the CEC on final records “as appropriate.”⁷⁸ Garver has criticized the discretionary nature of this updating requirement, claiming that it renders the requirement ineffective. He writes: “Based on experience to date following revised SEM guidelines adopted in 2012 with similar language, it is likely that these updates will rarely, if ever, be provided.”⁷⁹

I conclude this Part by describing a general concern about the CUSMA and considering the implications of this sense of disquiet. Several authors argue that the scope of the CUSMA’s coverage is simply inadequate to address the scale of environmental challenges that we currently face. Professor Hester and Drs. Garver and Sbert

⁷³ *Id.* at 452.

⁷⁴ *Id.*

⁷⁵ John H. Knox, *A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission*, 28 *ECOLOGY L. Q.* 1, 122 (2001); Markell, *supra* note 67, at 458; Knox & Markell, *supra* note 70, at 537.

⁷⁶ Wold et al., *supra* note 69, at 443.

⁷⁷ CUSMA, *supra* note 3, art. 24.28.7.

⁷⁸ *Id.* art. 24.28.8.

⁷⁹ Garver, *supra* note 68, at 47 n.56.

express this concern in their contributions to this special issue when they argue, respectively, that the CUSMA neither mentions climate change nor adheres to the principles of ecological law.⁸⁰ In another publication, Garver has put the point differently. In a recent article, he describes how the planetary ecological crisis has developed between 1994 and today, and concludes: “The trade and environment policy regime of CUSMA-USMCA perpetuates an approach that remains blind to, and ineffective in confronting, the most pressing ecological challenges that global and regional trade and investment help drive.”⁸¹ One might infer from this criticism and the others identified in this Part that engagement with the SEM process is a waste of time and resources. Yet, submissions continue to be made. The next Part will provide a theoretical framework that will justify this continuing activity and respond to some of the criticisms identified in this Part.

III. THE SEM: THEORY AND JUSTIFICATION

The above criticisms challenge the efficacy and legitimacy of the SEM. In order to respond to the charge that the SEM process is ineffective, we should consider the ways in which it *has* been effective. And once we understand in what measure the process has been effective, we will be able to see how the process should be considered legitimate. One measure of the process’s efficacy can be seen in how governments have pursued discrete policy changes that responded to factual records. For example, in response to the record produced in the *Cozumel* case, the Mexican government instituted policies that limited the size of the proposed project and reduced the impacts of commercial shrimp farming in Nayarit. The policies also led to the cleanup of a lead smeltery in Tijuana and to greater efforts to reduce illegal logging in Sierra Tarahumara.⁸²

Commentators have offered two general explanations for why governments have pursued these kinds of policy changes in response

⁸⁰ Tracy D. Hester, *Saved by Silence: Climate Change, Treaty Lacunae, and the U.S.-Mexico-Canada Agreement*, 46 VT. L. REV. 240, 240 (2021); Geoffrey Garver & Carla Sbert, *Looking at NAFTA’s Replacement Through the Lens of Ecological Law*, 46 VT. L. REV. 200, 201 (2021).

⁸¹ Garver, *supra* note 68, at 41.

⁸² Knox & Markell, *supra* note 70, at 527.

to factual records. Some scholars have argued that the SEM process casts an international spotlight on a given state's failure to enforce its environmental laws.⁸³ According to these authors, when a state's actions are the target of a factual record, the resulting media attention exposes governments to domestic repercussions (e.g., the threat of electoral defeat)⁸⁴ and international repercussions (e.g., the risk that international partners will withdraw from cooperative ventures).⁸⁵ Other scholars have described the SEM process as a "fire alarm" procedure that has advantages relative to an investigative system that is under centralized control.⁸⁶ Fire alarms, in the domestic and international context, enable private actors to identify problems that governments either miss or choose not to act upon. According to this group of scholars, when private actors pull a fire alarm, by for instance, initiating the SEM process, they provide governments with incentives to act.⁸⁷

This Article's theory of the SEM will account for the process's policy successes and will respond to the legitimacy, efficacy, and relevance concerns identified by the process's critics. In the first section of this Part, I will apply Brunnée and Toope's interactional theory of international law to the SEM process to explain why it should be considered legitimate and effective. In the second section, I will apply network theory to the CUSMA's institutions and the SEM to address concerns about the relevance of the treaty and process. I will conclude that government and civil society actors can, through regulatory networks associated with the CUSMA, address the enormity of the ecological crisis that confronts us, even if the treaty itself is relatively modest in its scope.

⁸³ See Raustiala, *supra* note 5, at 260 (explaining that the citizen submission procedure of the NAAEC offers a focus on enforcement of domestic environmental law by permitting any individual or NGO to file a submission with the Secretariat of the CEC).

⁸⁴ Raymond MacCallum, *Evaluating the Citizen Submission Procedure Under the North American Agreement on Environmental Cooperation*, 8 COLO. J. INT'L ENV'T L. & POL'Y 395, 422 (1997).

⁸⁵ David G. Schiller, *Great Expectations: The North American Commission on Environmental Cooperation Review of the Cozumel Pier Submission*, 28 UNIV. MIA. INTER-AMERICAN L. REV. 437, 474 (1997).

⁸⁶ Raustiala, *supra* note 5, at 257.

⁸⁷ *Id.* at 264.

A. The Interactional Theory of International Law and the SEM

Brunnée and Toope find inspiration for their theory in Professor Lon Fuller's work. According to Fuller, laws that conform to the rule of law address themselves to citizens in ways that create a relationship of reciprocity between lawgiver and citizen.⁸⁸ This relationship of reciprocity is the basis of a given legal order's legitimacy.⁸⁹ If a lawgiver undermines this relationship, through for instance, acting like a tyrant, the resulting governance order is no longer one of law and the citizen has no obligations of fidelity towards it.⁹⁰ Building on these insights, Brunnée and Toope write:

[W]ithin *all* systems of legal normativity, even state systems of law, social norms are constructed through rhetorical activity and social practice, producing increasingly influential mutual expectations or shared understandings of actors. In turn, if these shared understandings are reinforced through action based upon Fuller's criteria of legality, it becomes possible to generate obligation, or fidelity to law.⁹¹

Brunnée and Toope extend these ideas of legality and reciprocity to the international sphere when they stress that "law is only possible within specific times and places where actors have developed certain basic understandings about what they hope to achieve together."⁹² When these basic understandings are present and when specific legal forms exist through which parties can reason together and reinforce their

⁸⁸ See Roderick A. Macdonald, *The Fridge Door Statute*, 47 MCGILL L. J. 36, 36–37 (2001) (noting that according to a Fullerian framework, laws offer hypotheses of interaction that citizens can construct and interpret).

⁸⁹ See JEREMY WALDRON, DIGNITY, RANK, AND RIGHTS 53 (2012) (calling this aspect of Fuller's conception of the rule of law "self-application").

⁹⁰ See KRISTEN RUNDLE, FORMS LIBERATE: RECLAIMING THE JURISPRUDENCE OF LON L FULLER 3 (2012) ("If a lawgiver fails to observe the requirements of the internal morality of law, the legal subject can justifiably withdraw her fidelity because, as an agent and bearer of dignity, she cannot be expected to comply with the lawgiver's demands in the face of such disrespect for her status.").

⁹¹ BRUNNÉE & TOOPE, *supra* note 4, at 34.

⁹² *Id.* at 42.

mutual obligations, legal relations in the international sphere come to exist.⁹³

The authors stress that the participants in this law-making exercise are diverse and include actors other than states. The relevant non-state actors include “[i]nternational organizations, NGOs, corporations, informal intergovernmental expert networks, and a variety of other groups [that] are actively engaged in the creation of shared understandings and the promotion of learning amongst states and other international actors.”⁹⁴ Moreover, Brunnée and Toope justify considering “soft law” (i.e., “non-binding political instruments such as declarations, resolutions, and programs of action”⁹⁵) as law, even if a particular soft law instrument is not incorporated into the binding decisions of formal adjudicative bodies.⁹⁶ According to Brunnée and Toope, the norms of soft law can be considered to be law because when they “are rooted in shared understandings and adhere to the conditions of legality, they generate fidelity.”⁹⁷

Brunnée and Toope further draw from Fuller the conditions or requirements of legality. Two are particularly relevant for present purposes. According to the first, “legal norms . . . must be general, providing for rules, rather than *ad hoc* decisions, that prohibit, require, or permit certain conduct.”⁹⁸ A second requirement of legality states that “[l]aw should avoid contradiction, not requiring or permitting and prohibiting at the same time.”⁹⁹ When a legal regime satisfies these, and other requirements of legality, those who are subject to the regime develop “an internalized sense of obligation.”¹⁰⁰ Moreover,

⁹³ *Id.*

⁹⁴ *Id.* at 45.

⁹⁵ Dinah Shelton, *Soft Law in* ROUTLEDGE HANDBOOK INT’L L. 68, 68 (David Armstrong ed., 2008) (noting that states do not consider soft law to be law but further arguing that the contrast between soft law and law may not be “as significant as expected.”).

⁹⁶ BRUNNÉE & TOOPE, *supra* note 4, at 51.

⁹⁷ *Id.*

⁹⁸ Jutta Brunnée & Stephen J. Toope, *Norm Robustness and Contestation in International Law: Self-Defense against Nonstate Actors*, J. OF GLOB. SEC. STUD. 73, 75 (2019).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 75. BRUNNÉE & TOOPE, *supra* note 4, at 6 (providing the full list of Fuller’s criteria of legality: generality, promulgation, non-retroactivity, clarity, non-

communities of practice develop around the relevant sets of rules. Members of these communities engage in practices of legality, which involve “continually testing social norms against the requirement of legality” and allow for the production, maintenance, and alteration of legal norms.¹⁰¹

Brunnée and Toope’s interactional conception of international law allows us to frame and respond to criticisms of the SEM process. Recall that according to Garver, the process is flawed because it involves a conflict of interest, as the Parties are subject to the process and, through their representatives on the Council, can shape it. This kind of conflict of interest can yield the first failure of legality identified above: although the SEM process’s rules governing the production and publication of factual records appear to be *general norms*, they can yield *ad hoc decision-making* when the parties do not view themselves to be meaningfully constrained by the rules. The narrowing of factual records, discussed above, provides perhaps the clearest example of this kind of failure. The conflict of interest that Garver identifies can also violate the second requirement of legality identified above, namely the injunction against contradiction. One might argue that a contradiction arises because although the SEM process purports to empower citizens and NGOs to investigate the parties, the parties determine whether a factual record goes forward, and thus, the process can in some cases be disempowering.

To respond to these challenges, I first note that according to Brunnée and Toope (and Fuller), “the criteria of legality do not operate like an on-off switch.”¹⁰² The authors argue, for example, that “a given norm may be more or less clear.”¹⁰³ In general, the degree to which a given norm fails to satisfy a legality requirement depends on what Brunnée and Toope call the “continuing practice of legality.”¹⁰⁴ This kind of practice involves “a constant contestation over the appropriate application of a posited legal norm. If the norm becomes unable to meet the criteria of legality for any reason . . . or if it is simply ignored

contradiction, not asking the impossible, constancy, and congruence between rules and official action).

¹⁰¹ Brunnée & Toope, *supra* note 98, at 75.

¹⁰² *Id.* at 76.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

in practice, the norm may be effectively contested and displaced or replaced by another norm.”¹⁰⁵ As a result, whether a given legal norm is illegitimate, in the sense that it manifestly contradicts the requirements of legality, depends on how the community of practice interprets and applies the norm.

When applied to the rules governing the production of factual records, the foregoing analysis suggests that the SEM process should only be considered to be illegitimate when it fails in significant measure to satisfy the criteria of legality. For the process to be considered illegitimate, in this sense, it is not sufficient that the Parties’ power over the process *can be* exercised in ways that reduce the apparently general rules to forms of *ad hoc* decision-making. Nor is it sufficient that rules that appear to empower citizens to hold the Parties to account, may in some situations disempower them. Instead, as we have just seen, Brunnée and Toope’s framework would require one to examine the relevant community’s interpretive practices, to determine whether these norms are illegitimate. In this context, the practices in question are those of the SEM’s communities. It is their practices that will determine whether there has been a significant failure of legality that renders the process and its norms illegitimate.

The relevant practices include review processes undertaken by CEC institutions, and the activities of the Parties and civil society. Under the NAAEC, the Council’s practice of narrowing records was subject to pointed criticism by the JPAC, including by means of an “advice letter,” and in response to the attention drawn to the practice, the Council refrained from engaging in it.¹⁰⁶ Moreover, as a result of a consultation process, interpretive guidelines were developed that expressly rejected a proposal to codify the practice of narrowing factual records.¹⁰⁷ These actions by institutions within the CEC limited the extent to which the process could undermine the above-identified requirements of legality. Of course, if the Parties were to systematically act in ways that put the process’s legitimacy in doubt, civil society actors would likely cease to have recourse to the SEM

¹⁰⁵ *Id.*

¹⁰⁶ John H. Knox, *Fixing the CEC Submissions Procedure: Are the 2012 Revisions Up to the Task?*, 7 GOLDEN GATE UNIV. ENV’T L. J. 81, 88 (2014).

¹⁰⁷ *Id.* at 102–03.

because it would be perceived to be illegitimate. The practices of the CEC's institutions, the Parties, and civil society will, therefore, determine whether the SEM process continues to be considered legitimate.

I conclude this section by answering the criticism that the SEM process is toothless. Recall that according to Brunnée and Toope's framework, the fact that an international regime does not provide for enforcement through an adjudicative body does not mean that the rules under that regime fail to be legal in nature. Nor does non-enforcement through these bodies mean that a rule is ineffective. The history of the SEM process supports their analysis. We have seen above that in some circumstances the SEM process has been effective at changing state behavior, and that its successes have depended on the practices of state and non-state actors, rather than formal enforcement mechanisms. Moreover, although a Party has discretion as to whether it will update a given factual record, pursuant to Article 24.28.8 of the CUSMA, this does not render the requirement to update ineffective. Instead, its effectiveness will be determined by the internal practices of the CEC (including periodic reviews) and by the practices of non-state actors (including the JPAC, NGOs, and academics) that monitor the CEC's activities. None of these actors can *compel* a Party to provide an update, but they can criticize a Party for failing to do so. They can thus encourage a recalcitrant Party to update a factual record, by shining a spotlight on its inaction.

Finally, Article 24.29 creates a mechanism for addressing concerns about the SEM process and its operations. Article 24.29.1 provides that "Parties shall at all times endeavor to agree on the interpretation and application of this Chapter, and shall make every effort through dialogue, consultation, exchange of information, and if appropriate, cooperation to address any matter that might affect the operation of this Chapter."¹⁰⁸ Article 24.29.2 further provides that "[a] Party (the requesting Party) may request consultations with any other Party (the responding Party) regarding any matter arising under this Chapter"¹⁰⁹ A persistent failure to issue updates or a consistent practice of narrowing factual records would fall within the express

¹⁰⁸ CUSMA, *supra* note 3, art. 24.29.1.

¹⁰⁹ *Id.* art. 24.29.2.

language of these articles, as each would be a “matter” that involves the “operation of this Chapter.”¹¹⁰ Any other action that undermined the effective operation of the SEM process would similarly be covered by these articles. The CUSMA provides, therefore, a setting for Brunnée and Toope’s “practices of legality.” And in the context of the SEM, these practices can determine whether the relevant interpretive community will consider the process under the CUSMA to be legitimate and effective.

B. Network Theory and the SEM

The previous section answered specific challenges to the SEM process by placing the criticisms and the responses to them in the context of a general theory of international law. In this section, I will invoke a second theory in order to respond to the general concern, identified above, that the processes and goals of the CUSMA and SEM are insufficient to address the full magnitude of the climate crisis. The ambitions of this section are modest. I aim only to show that the CUSMA facilitates the creation of networks within which state and non-state actors can interact, and that these interactions may spur action on a scale broader than what the CUSMA itself envisages. To make this claim, I draw upon transnational network theory.

Transnational network theorists argue that relationships among states are increasingly shaped by interactions among actors from various states who work within the legislative, adjudicative, and administrative branches of their respective states.¹¹¹ According to Professor Anne-Marie Slaughter, a network conception of international relations sees:

a world of governments, with all the different institutions that perform the basic functions of government—legislation, adjudication, implementation—interacting both with each other domestically and also with their

¹¹⁰ *Id.* arts. 24.29.1–24.29.2.

¹¹¹ Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT’L L. 1, 3–4 (2002–2003).

foreign and supranational counterparts.¹¹²

Network theorists further argue that international law is often made effective through the shared understandings and interactions of actors in the legislative, administrative, and judicial branches of multiple states, who draw on these interactions to influence their respective states.¹¹³

The structure of the CEC provides spaces for networks to form, and actors within these networks can effect changes to environmental policy beyond what the CUSMA itself specifically envisages. For example, the CEC facilitates interactions among the member states' environmental ministries, particularly in the Council.¹¹⁴ The breadth of the Council's activity within the CEC flows in part from the ambitions of the institution. As Knox and Markell note, the CEC was designed to be the first organization that could address any environmental issue arising anywhere on the continent.¹¹⁵ The mandate of the Council under the NAAEC was commensurately broad, as under article 10, it could make recommendations on an open-ended list of topics.¹¹⁶ The Council's mandate under the ECA is similarly

¹¹² ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 5 (2004).

¹¹³ *See, e.g., id.* (showing that many courts around the world follow United States, European Union, South African, and Canadian constitutional court precedent on issues of environmental policy, corporate governance, etc.); Harold Hongju Koh, *Transnational Legal Process*, 75 *NEB. L. REV.* 181, 200 (1996) (noting that states' long-term self-interests are better served by cooperation with the international community).

¹¹⁴ *See, e.g.,* Mark S. Winfield, *North American Pollutant Release and Transfer Registries: A Case Study for Environmental Policy Convergence*, in *GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION* 38, 50 (David L. Markell & John H. Knox eds., 2003) (explaining how the CEC played a large role in the facilitation of Mexico-Canada-U.S. environmental policies like Pollutant Release and Transfer Registers (PRTRs)).

¹¹⁵ *See id.* at 46 (showing how the CEC has the power to collect and analyze data and develop recommendations on environmental issues).

¹¹⁶ *Id.* at 50. The Council has issued an annual report on North American pollutant releases and transfers that analyzes data from the jurisdictions in the U.S. and Canada and compares the performance of facilities. These reports provoked media attention, have incentivized actors to respond, and have enabled NGO monitoring of facilities. Moreover, the Council put public pressure on the Mexican government to implement a mandatory PRTR system and provided technical and financial support. *Id.*

open-ended. Article 4.1(j) provides that the Council may “consider and develop recommendations regarding transboundary and border environmental issues.”¹¹⁷ Article 4.1(k) provides that the Council may “consider and develop recommendations on any other environmental topic as the Council may decide.”¹¹⁸ As a consequence, the composition of the Council and its mandate provide opportunities for representatives of the member states to exchange open-ended ideas about environmental regulation. Network theorists would predict that what the state representatives learn from these forums will shape their states’ actions in other contexts of international environmental regulation, particularly where these contexts involve dense and overlapping regulatory regimes.¹¹⁹

Authors have extended network analysis to include non-state actors, including the kinds of civil society actors who would participate in the SEM process. Slaughter, for example, has recently written that “individuals, businesses, charities, civic organizations, criminal syndicates, universities, and all other actors we recognize in our national space . . . are all, like government officials and agencies equally capable of creating networks and operating as nodes within those networks.”¹²⁰ The SEM process facilitates this kind of network activity. Commentators have shown that environmental activists from member countries have filed submissions together and collaborated on initiatives related to the procedure, including letter-writing

¹¹⁷ ECA, *supra* note 27, art. 4.1(j).

¹¹⁸ *Id.* art. 4.1(k). The Secretariat’s reporting powers have been narrowed. The Secretariat was authorized under Article 13 of the NAAEC to prepare a report on any matter within the scope of the annual program, without council authorization, and on any other environmental matter related to the cooperative functions of the NAAEC, unless the council objected by a 2/3 vote. NAAEC, *supra* note 20, art. 13.1. By contrast, Article 4.3 of the CUSMA provides that the Council “may instruct the Secretariat to prepare a report on the state of the environment in North America.” CUSMA, *supra* note 3, art. 4.3. And Article 5, which sets out the Secretariat’s powers, does not mention any independent authority to prepare reports on environmental matters. *Id.* art. 5.

¹¹⁹ See Karen J. Alte & Kal Raustiala, *The Rise of International Regime Complexity*, 14 ANN. REV. L. & SOC. SCI. 329, 331 (2018) (discussing the concept of a *regime complex* that has these features).

¹²⁰ ANN-MARIE SLAUGHTER, *THE CHESSBOARD AND THE WEB: STRATEGIES OF CONNECTION IN A NETWORKED WORLD* 23 (2017).

campaigns.¹²¹ These coalitions of environmental groups have created networks, and used the SEM process to “mobilize support for their cause, force the attention of government on normative matters, and increase pressure on government to change its policies in ways it had previously resisted.”¹²²

According to Professor Raul Pacheco-Vega, these kinds of activities strengthen networks. He writes that the NGOs who participate in the SEM “share information and transfer knowledge, thereby building stronger, more robust advocacy coalitions.”¹²³ I understand Pacheco-Vega to be arguing that these strengthened coalitions can engage effectively in advocacy beyond the SEM process. As a consequence, they, like their governmental counterparts in the Commission, can use their experiences in the relatively circumscribed institutional context of the CUSMA to address pressing environmental issues in other regulatory contexts.

CONCLUSION

This article has described how CUSMA has changed the SEM process, identified criticisms of the process, provided a theoretical account of the SEM, and responded to the criticisms of it. In conclusion, I note that the CUSMA could have introduced more sweeping changes to the SEM. It could, for instance, have reduced the potential for conflicts of interest by drawing on the example of CAFTA-DR and providing that only one of the Party representatives on the Council could authorize the creation of a factual record. Ultimately, however, the CUSMA and ECA evidence the Parties’

¹²¹ Knox & Markell, *supra* note 70, at 528. See also JONATHAN GRAUBART, *LEGALIZING TRANSNATIONAL ACTIVISM: THE STRUGGLE TO GAIN SOCIAL CHANGE FROM NAFTA’S CITIZEN’S PETITIONS* 1, 3–4 (Penn State Univ. Press, 1st ed. 2008) (noting how coalitions of activist groups have made use of the citizen submissions process).

¹²² Jonathan Graubart, ‘Legalizing’ Politics, ‘Politicizing’ Law: *Transnational Activism and International Law*, 41 INT’L POL. 319, 336 (2004).

¹²³ Raul Pacheco-Vega, *Transnational Environmental Activism in North America: Wielding Soft Power through Knowledge Sharing?*, 32 REV. POL’Y RSCH. (SPECIAL ISSUE: TRANSBOUNDARY NATURAL RESOURCE GOVERNANCE IN NORTH AMERICA), 146, 150 (2015).

decision to retain a significant degree of control over the SEM. This choice, and indeed, the structure of the CEC, and the scope of the CUSMA, are the outcomes of political choices. Seen in this light, the criticisms of the SEM process can be understood to claim that these choices have fundamentally undermined the SEM process. In this article, I have adopted a different view. Drawing on interactional and network theories of international law, I have argued that it is the interactive practices of the CEC's institutions, governmental representatives, and civil society that determine whether the SEM should be considered to be legitimate, effective, or relevant. This article has aimed to provide a normative framework for this ongoing assessment.